

# Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities

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## Introduction

Years of consistently severe underfunding, increased caseloads and inadequate resources have created a serious crisis in this nation's public defender system. These factors have gravely eroded the criminal defendant's right to adequate representation which is guaranteed by the Sixth Amendment and was affirmed by the Supreme Court in *Gideon v. Wainwright*.<sup>1</sup> Moreover, criminal defendants' right to equal protection under the Fourteenth Amendment is also being denied because the ineffective assistance of counsel provided by public defenders has a disproportionate impact upon racial minorities.

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\* Member, Third Year Class; B.A. Stanford University, 1992. The author would like to thank Professor David Faigman, David Avila and Kate Dyer. Special thanks to my family for their support throughout all my endeavors. This note is dedicated to the many committed public defenders working under difficult conditions to ensure legal representation for all criminal defendants and to all those working to end racism in the criminal justice system and throughout the country.

1. 372 U.S. 335 (1963).

In the United States, racial minorities are disproportionately poor<sup>2</sup> and, as a result, disproportionately require public defenders when charged with crimes. Therefore, the ineffective assistance that public defenders often provide due to inadequate resources particularly disadvantages people of color. This is a clear denial of Fourteenth Amendment equal protection to racial minorities. As a suspect class, any breach of their fundamental right to counsel must be examined under a strict scrutiny analysis.<sup>3</sup>

This Note will demonstrate that the underfunding of public defender offices results in representation which violates indigent racial minorities' Sixth Amendment right to counsel and their Fourteenth Amendment right to equal protection of the laws. Section I explores the establishment of the fundamental right to counsel under the Sixth and Fourteenth Amendments and its expansion in *Gideon v. Wainwright*.<sup>4</sup> Section II describes the chronic underfunding in public defenders' offices and explores how this lack of resources often results in ineffective assistance of counsel to indigent clients. Section III statistically establishes that people of color are disproportionately poor in the United States, and, consequently, are disproportionately represented by public defenders. Section IV addresses the historic discrimination racial minorities have faced under the American criminal justice system. Section V explores the equal protection ramifications of underfunded public defender offices, including discussions of the intentional discrimination and disparate impact doctrines. Section VI suggests that this equal protection violation should be considered under a strict scrutiny standard because racial minorities are being discriminated against in their fundamental right to counsel. Section VII considers the possible legislative responses to this discrimination. Section VIII offers several proposals to end the discrimination against racial minorities with regard to their constitutional right to adequate representation.

## I. *Gideon v. Wainwright* and the Right to Counsel

Thirty years ago, prisoner Clarence Earl Gideon submitted a handwritten habeas corpus petition to the United States Supreme Court claiming that the State of Florida had violated his constitutional

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2. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 473 (1993) (Table No. 744).

3. For a discussion of "suspect class" under equal protection analysis, see *Korematsu v. United States*, 323 U.S. 214 (1944).

4. 372 U.S. 335 (1963).

rights to counsel and due process. Gideon had been convicted in a Florida court without any assistance of counsel for the felony offense of breaking and entering a poolroom. At trial, Gideon informed the court that he could not afford counsel and was unable to conduct his own defense. The trial court denied Gideon's request for counsel because Florida law only provided lawyers to indigent persons charged with capital offenses.

The Supreme Court, in a majority decision written by Justice Hugo Black, held that those charged with a felony in a state court who could not afford a lawyer must have one appointed for them at no charge.<sup>5</sup> The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel [sic] for his defence."<sup>6</sup> The Court in *Gideon* extended this federal right to counsel to state courts as well.<sup>7</sup> The Court found that "those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment."<sup>8</sup>

The Court specifically overruled *Betts v. Brady*,<sup>9</sup> a case with facts similar to *Gideon*, which had held that the right to counsel was not a fundamental right. The Court stated:

We accept *Betts v. Brady*'s assumption . . . that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.<sup>10</sup>

In *Strickland v. Washington*,<sup>11</sup> the Supreme Court reaffirmed the right to counsel as a fundamental right and gave meaning to the promise of *Gideon*. The Court held that the Sixth Amendment not only required counsel for indigent criminal defendants, but also that the appointed counsel must provide effective assistance to their clients.<sup>12</sup>

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5. *Id.* at 344.

6. U.S. CONST. amend. VI.

7. *Gideon*, 372 U.S. at 341.

8. *Id.*

9. 316 U.S. 455 (1942).

10. *Gideon*, 372 U.S. at 342.

11. 466 U.S. 668 (1984).

12. *Id.* at 686. The *Strickland* court established the test for determining when counsel has rendered ineffective assistance. This test requires a convicted defendant to show: (1) that counsel's performance was deficient, i.e., that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) that the deficient performance by his counsel prejudiced the defense,

The *Gideon* decision ended 172 years of the denial of the Sixth Amendment right to counsel to indigent criminal defendants in state proceedings.<sup>13</sup> After *Gideon*, poor people could not be tried for felonies in any court—federal or state—without representation by counsel.<sup>14</sup>

Implementation of *Gideon*, however, presented some serious logistical problems. A great number of felony cases would now require appointed counsel. As a result, organized systems to provide lawyers for indigent criminal defendants developed around the country. Prior to 1963, few cities had public defender offices or any means by which to provide counsel to indigents in felony cases.<sup>15</sup> Today, public funds pay for the cost of lawyers in eighty percent of this nation's felony cases.<sup>16</sup> Most U.S. counties have adopted an organized indigent defense system, and all counties provide lawyers to represent defendants accused of felonies in state courts who cannot afford representation.<sup>17</sup>

## II. The Underfunding of Public Defender's Offices

Yet, only thirty years after *Gideon* established the right to counsel in state courts, that right is in jeopardy due to dire underfunding of the indigent defense systems throughout this nation.<sup>18</sup> The American Bar Association's Special Committee on Funding the Justice System recently reported that nearly eighty percent of the legal needs of poor people are not met each year.<sup>19</sup> As a result, the "justice system and the concept of justice itself in the United States is sorely threatened by a lack of resources."<sup>20</sup> One lawyer at the Cook County Public Defender's Office in Chicago stated what many public defenders feel throughout the country: "There are simply too many cases for the number of public defenders we have."<sup>21</sup>

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i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

13. Nancy A. Goldberg & Marshall J. Hartman, *After 3 Decades, Gideon's Plea for Fairness Still Echoes in State Courts*, CHI. DAILY L. BULL., May 3, 1993, at 6.

14. Later cases such as *Argersinger v. Hamlin*, 407 U.S. 25 (1972), extended this right to counsel to misdemeanors when a defendant faces a potential sentence of up to six months in prison.

15. See Goldberg & Hartman, *supra* note 13.

16. *Id.*

17. *Id.*

18. Although the underfunding problem affects court-appointed attorneys and appellate-level public defenders offices as well, this Note will focus primarily on the underfunding of trial-level public defender offices in state and federal court.

19. Goldberg & Hartman, *supra* note 13, at 7.

20. *Id.*

21. *Id.* at 10 (quoting Rita Frye, Public Defender of Cook County).

This combination of increasingly meager resources and soaring caseloads has prompted persistent questioning as to whether the promise of effective representation for indigent criminal defendants is being fulfilled. Many court observers have begun to sound the alarm bell.<sup>22</sup> As one observer has noted, "America has never fully lived up to the Supreme Court's promise. Indigent-defense systems nationally . . . either are experiencing a crisis or are on the verge of one. The promise of effective representation is in jeopardy."<sup>23</sup> Others have stated that "the spirit of *Gideon v. Wainwright* is undermined . . . as legislators scour the state budget for ways to make cuts. Public defenders carry twice the caseload they should under national standards."<sup>24</sup> Defense lawyers simply cannot adequately represent all of their clients due to the severe burdens of inadequate funding.<sup>25</sup> There seems to be a general feeling that public defenders are underpaid and overwhelmed.<sup>26</sup> As is typically the case, the reality is even worse than the perception.

Today, one chief reason for the crisis in indigent defense systems is the "War on Drugs." During the 1980s more resources were provided to police and prosecutors which led to increased arrests, prosecutions and trials. This created more work for public defenders, but without a proportional increase in financial support. A director of the Defender Division of the National Legal Aid and Defender Association observed,

The war on drugs is funneling tens of millions of federal dollars into state and local police and prosecution budgets, resulting in a massive increase in the number of arrests and prosecutions. But defense programs are not getting anywhere near comparable funding to help them deal with the flood of new cases.<sup>27</sup>

According to a draft report of the ABA Criminal Justice Section's Ad Hoc Committee on the Indigent Defense Crisis, "one result of the

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22. See, e.g., Jill Smolowe, *The Trials of the Public Defender: Overworked and Underpaid Lawyers Serve Up a Brand of Justice That is Not Always in Their Clients' Best Interests*, TIME, Mar. 29, 1993, at 48; Christopher Johns, 'Slaughterhouse Justice': *Crushing Workloads, Underfunded Public Defenders Shortchange Indigent Clients*, ARIZ. REPUBLIC, May 23, 1993; Steve Berry, *30 Years Ago, Gideon Won Freedom, Justice for the Poor*, ORLANDO SENTINEL, July 18, 1993.

23. Johns, *supra* note 22, at C1.

24. Berry, *supra* note 22, at A1.

25. Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 363 (1993).

26. Smolowe, *supra* note 22, at 49.

27. Johns, *supra* note 22, at C1 (quoting Mary Broderick of the National Legal Aid and Defender Association).

War on Drugs is that attorneys for indigent defendants are overworked and underpaid.”<sup>28</sup>

Providing money to defend indigent suspects was apparently a low priority during the War on Drugs.<sup>29</sup> During the Bush administration, various agencies at all levels of the government spent about \$100 billion to fight drugs.<sup>30</sup> In 1990, according to the Bureau of Justice Statistics, almost one-third of court commitments were drug related, an increase of 11.5% since 1977.<sup>31</sup> A “blue ribbon” panel appointed by Chief Justice Rehnquist concluded that the federal court’s most serious problem is the unprecedented number of federal narcotics prosecutions.<sup>32</sup> This War on Drugs also adversely affects state courts. By 1990, seventy-five percent of all criminal prosecutions in Los Angeles were drug-related.<sup>33</sup> Yet nationally, only a little more than one billion dollars—just one-hundredth of the amount spent on the War on Drugs—is spent on all indigent criminal legal services.<sup>34</sup> It is clear that providing support for indigent defense programs is not a high priority in American spending. In fact, while there were explosive increases in the spending to fight drugs and crime, the budgets of some indigent defense programs were actually cut.<sup>35</sup>

The new “War on Crime” in the 1990’s reflects increased public demands for tougher sentencing, increased prosecutions, more jails and a general “get tough on crime” attitude.<sup>36</sup> An example of this attitude is the federal and state “Three Strikes You’re Out” laws. Voters in the state of Washington passed a Three Strikes initiative by a seventy-five percent margin during the 1993 election which guarantees life imprisonment without the possibility of parole for any person con-

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28. A.B.A. Annual Meeting, *Indigent Defendants’ Counsel Overworked*, N.Y. L.J., Aug. 9, 1993, at 9.

29. Smolowe, *supra* note 22, at 48.

30. Johns, *supra* note 22, at C1.

31. *Id.*

32. Richard Klein & Robert Spangenberg, *The Indigent Defense Crisis*, 1983 A.B.A., SEC. CRIM. JUST. 4 (Ad Hoc Committee on the Indigent Defense Crisis).

33. *Id.*

34. Johns, *supra* note 22.

35. *See* Klein, *supra* note 25.

36. During the November, 1993 election, the people of Washington state, by referendum, passed a “Three Strikes You’re Out” law. The same day, California voted to make permanent an existing tax to provide \$1.5 billion for public safety which ensures more police and firemen, and Texas endorsed a one billion dollar bond to build more prisons and mental health facilities. The day after the elections, the House of Representatives passed another crime bill which will subsidize the hiring of 50,000 more police officers. *See* George F. Will, *Are We a Nation of Cowards?*, NEWSWEEK, Nov. 15, 1993, at 94.

victed of a violent felony for the third time.<sup>37</sup> California's "Three Strikes" measure<sup>38</sup> was signed into law on March 7, 1994 and is being hailed as the nation's toughest anti-crime law.<sup>39</sup> It has been predicted that the California measure will incarcerate 275,621 more inmates over the next three decades, and require that twenty more prisons be built over the next six years. This is in addition to the twenty-eight currently in operation and the twelve others now on the drawing board.<sup>40</sup>

Some California judges refuse to apply the "Three Strikes" law.<sup>41</sup> Sonoma County Superior Court Judge Lawrence Antolini declared the three-strikes law unconstitutional because it handed down "cruel and unusual" jail terms for nonviolent criminals.<sup>42</sup> The California measure does not distinguish between "violent" and "serious" felonies.<sup>43</sup> For a person who has one felony conviction, even a very minor felony may count as the third strike.<sup>44</sup> Already, crimes such as mugging a homeless person for fifty cents and shoplifting a bottle of beer have counted as third strikes which may send people to prison for life.<sup>45</sup> Just in Los Angeles County, prosecutors filed more than 750 third-strike cases in the first six months after the law was enacted.<sup>46</sup> With a felony conviction potentially having such severe consequences under the California "Three Strikes" law, criminal defendants are opting for trial rather than plea-bargaining to felonies.<sup>47</sup> This increase in trials creates even more work for already overworked public defend-

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37. Grover G. Norquist, *GOP Hat Trick*, AM. SPECTATOR, Jan. 1994 at 53.

38. Assembly Bill 971, Chapter 12, 1994 Ca. Sess. Law. California's "Three Strikes You're Out" measure sets a minimum of 25 years in prison for third-time felony offenders already convicted of two violent felonies, doubles sentences for second felonies and limits time off for good behavior on second and third convictions. According to an estimate by the state legislature, the measure could cost the state several billion dollars a year. Previous harsh sentencing measures in California have quadrupled the state's prison population in the last 10 years without any decrease in the crime rate. Elizabeth Gleick, *Slamming the Prison Door: A Daughter's Murder Triggers an Angry Father's Crusade Against Repeat Offenders*, PEOPLE, Feb. 7, 1994, at 52.

39. Vlae Kershner & Greg Lucas, *'Three Strikes' Signed into California Law*, S.F. CHRON., Mar. 8, 1994, at A1.

40. Vlae Kershner, *'3 Strikes' Initiative—A Vast, Expansive Plan*, S.F. CHRON., Mar., 1, 1994, at A1.

41. Marc Peyser & Donna Foote, *Strike Three, You're Not Out*, NEWSWEEK, Aug. 29, 1994, at 53.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

ers. Judges and prosecutors are trying to short-circuit the law by charging crimes as misdemeanors instead of felonies or dismissing prior felonies to avoid a third strike, but this policy has been criticized as “thwarting the will of the people.”<sup>48</sup> The “Three Strikes” idea is so popular in California that a “Three Strikes” ballot initiative was overwhelmingly passed by the voters in the past election.<sup>49</sup> The “Three Strikes” initiative, basically identical to the current statute, requires a vote by a two-third majority of the legislature in order to ever repeal or amend the law.<sup>50</sup>

California is clearly not the only state clamoring for a renewed “toughness” on crime. Sixteen states currently have a “Three Strikes” measure and others appear likely to follow.<sup>51</sup> The federal government has also included its own “Three Strikes” bill as part of the 1994 Omnibus Crime Bill.<sup>52</sup> Under the federal law, a violent felon could be sent to prison without the possibility of parole after being convicted of a third federal crime following two previous convictions.<sup>53</sup> The federal crime bill also appropriated approximately thirteen billion dollars for police grants and approximately ten billion for prisons.<sup>54</sup>

The “get tough on crime” attitude crosses party lines and is seemingly a political necessity in this day and age when crime is one of the biggest concerns of the American public. Delaware Senator Joe Biden noted, while he was the Senate Judiciary Committee Chair, “Three strikes is the wacko product of other Senators eager to outdo their colleagues on the toughness scale.”<sup>55</sup> Senator Bob Dole has said simply, “[t]he American people want decisive action on crime in America.”<sup>56</sup> Yet, there has been great criticism levied at various “Three Strikes” proposals. At a National Press Club luncheon, Jesse Jackson stated:

Fear about crime is on the rise. People want to feel safe when they walk down their streets. We need a serious program on crime . . . . Three strikes and you’re out, or in prison for the rest of your life, is the current rage. It sounds American[.] It fits on the bumper. The posture is tough. Support in the polls is off the

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48. *Id.*

49. *California Election Returns*, L.A. TIMES, Nov. 9, 1994, at A20.

50. Peysner & Foote, *supra* note 41.

51. *Id.*

52. The Congressional Crime Bill, 103d Cong., 2d Sess. (1994).

53. Peysner & Foote, *supra* note 41.

54. The Congressional Crime Bill, 103d Cong., 2d Sess. (1994).

55. Michael Kramer, *Tough. But Smart?*, TIME, Feb. 7, 1994, at 29.

56. Catherine Crier & Bernard Shaw, *Clinton Preparing for State of Union Address*, on INSIDE POLITICS, (CNN television broadcast, Jan. 25, 1994).



chart. Every anxious knee-jerk politician has rushed to support it . . . Yet, . . . the proposal makes no sense. It will waste scarce resources, imprisoning geriatrics barely able to remember the crimes of their youth, at \$20,000 a head for a year minimum. . . . And, as we know, these laws will discriminate against African-Americans and Latinos.<sup>57</sup>

The problem with this “get tough on crime” attitude in America is that, “indigent defense just doesn’t have a high priority. . . . The fact is, everything is ‘law and order, let’s lock everybody up,’ and it’s law enforcement that’s getting the money.”<sup>58</sup> Therefore, more money spent arresting, jailing and prosecuting these three time felons does not necessarily translate into equal resources for defense services. With the threat of increasing punishments for criminal defendants, there also must be an increase in the constitutional protections provided. Yet, in a 1989 Gallup poll, seventy-nine percent of those surveyed said that they were “more worried about criminals being let off too easily than they were about infringing the constitutional rights of defendants.”<sup>59</sup> Underfunded public defenders face a hard struggle to guarantee that indigent criminal defendants receive the same constitutional protections afforded wealthy criminal defendants.<sup>60</sup>

It is the most disenfranchised people who do not have the resources to protect themselves, whose constitutional rights must be protected most

The battle for equal justice is being lost in the trenches of the criminal courts where the promise of *Gideon* and *Argersinger* goes unfulfilled. . . . Casualties are defendants accused of street crimes, virtually all of whom are poor, uneducated, and unemployed. They are the persons being represented all too often by ‘walking violations of the [S]ixth [A]mendment.’<sup>61</sup>

Clarence Darrow, in a speech given eighty-five years ago to inmates in the Cook County Jail, wondered, “If the courts were organized to promote justice, the people would elect somebody to defend all criminals, somebody as smart as the prosecutor—and give him as many detec-

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57. Jesse Jackson, *National Press Club Luncheon Address by Jesse Jackson*, FEDERAL NEWS SERVICE, Feb. 17, 1994.

58. Peter Applebome, *Study Faults Atlanta’s System of Defending Poor*, N.Y. TIMES, Nov. 30, 1990, at B5 (quoting Vernon S. Pitts, director of the Fulton County Public Defender’s Office).

59. Andy Court, *Is There A Crisis?*, AM. LAWYER, Jan./Feb. 1993, at 47.

60. Thomas E. Daniels, *Gideon’s Hollow Promise—How Appointed Counsel Are Prevented from Fulfilling Their Role in the Criminal Justice System*, 71 MICH. B. J. 136, 138 (Feb. 1992).

61. Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 656 (1986) (citing Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973)).

tives and as many assistants to help, and pay as much money to defend you as to prosecute you."<sup>62</sup> Darrow recognized the way that our criminal justice system should function, but the unfortunate reality is that far fewer funds are spent to defend people than to prosecute them.

The total expenditures for the criminal justice system in both the state and federal systems display an inequity in the distribution of resources. The federal government spends approximately \$10 billion dollars per year on the criminal justice system: \$4 billion is for police protection; \$1.5 billion is prosecution and legal services; \$1.5 billion is for corrections; and, only \$406 million is for public defense.<sup>63</sup> State and local governments combined spend approximately \$64 billion dollars on the criminal justice system: \$28 billion is for police; \$4 billion is for prosecution and legal services; \$23 billion is for corrections; and, only \$1 billion is for public defense.<sup>64</sup>

The financial support given to public defenders' offices is simply insufficient to provide the truly effective assistance of counsel as mandated by the Constitution.<sup>65</sup> Across the nation, the bulk of criminal justice funds go to the police, prosecutors and jails. Only 2.3% of the seventy-four billion dollars spent on the justice system in 1990 went to pay for attorneys for indigent defendants while 7.4% went to the prosecution.<sup>66</sup> However, the number of defendants unable to afford an attorney has risen dramatically, from forty-eight percent in 1982 to eighty percent today.<sup>67</sup> Public defenders handle over 11 million of the 13 million criminal cases which are tried annually.<sup>68</sup> Yet, as of 1990, the United States Department of Justice found that nationally, public defenders are receiving less than one-third of the resources provided

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62. Abbe Smith, *The Public Defender: The Practice of Law in the Shadows of Repute* by Lisa J. MacIntyre, 62 TEMP. L. REV. 651, 661 (1989) (reviewing A. WEINBERG, ATTORNEY FOR THE DAMNED (1957)).

63. BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE U.S., 202 (1993).

64. *Id.*

65. This same argument can be made for appellate level public defenders. The National Legal Aid and Defender Association concluded that "many indigent capital defendants are not receiving the assistance of a lawyer sufficiently skilled in practice to render quality assistance." Klein, *supra* note 25, at 367.

66. Klein & Spangenberg, *supra* note 32, at 1.

67. Klein & Spangenberg, *supra* note 32, at 4; A.B.A. Annual Meeting, *supra* note 28. Indigency rates among prisoners on death row requiring expensive legal appeals is even higher. In California alone, every one of the 384 men and four women on death row as of July 1, 1994, was poor enough to qualify for a lawyer at state expense. Bob Egelko, *Search for Wealthy Inhabitants of Death Row Comes Up Empty*, S.F. EXAMINER, Aug. 14, 1994, at 9A.

68. Gary Boulard, *Budget Cuts by States Hit Public Defenders*, CHRISTIAN SCI. MONITOR, June 1, 1994, at 7.

to the prosecution.<sup>69</sup> Prosecutors' offices received \$5.5 billion dollars from federal,<sup>70</sup> state, local, county and municipal governments<sup>71</sup> as opposed to the \$1.7 billion provided for public defense by the same government sources.<sup>72</sup> Moreover, defense lawyers are further overwhelmed by additional resources provided to prosecutors including a great deal of investigatory work by law enforcement which are officially classified as "police expenditures."<sup>73</sup>

A 1990 National Institute of Justice report found that 80% of the public defenders surveyed believed that more attorneys were needed to represent the indigent, in order to fill the gap between the number of defenders and increasing caseloads.<sup>74</sup> Approximately 95% of respondents believed that the public defender's budget was less than the corresponding prosecutor's budget covering indigent defense cases.<sup>75</sup> As the ABA's Ad Hoc Committee on the Indigent Defense Crisis concluded: "While all components of the criminal justice system are suffering from the lack of adequate resources, the current level of funding for a majority of the indigent defense programs around the country has reached the crisis level and threatens the effective implementation of the Sixth Amendment right to counsel."<sup>76</sup> This kind of resource disparity is just one of the reasons why many believe indigent

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69. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT ON JUSTICE EXPENDITURE & EMPLOYMENT IN 1990, at 3, (1992).

70. From the federal government, the prosecution receives \$1,518,098,000 and public defense receives \$405,771,000. *Id.*

71. The prosecution receives 3,982,041,000 dollars from all state and local sources and the defense only receives 1,336,266,000 dollars. *Id.*

72. *Id.* Prosecutors must satisfy a higher burden of proof in a criminal case by proving the defendant guilty beyond a reasonable doubt when the defense, in theory, has no burden because the defendant is supposed to be presumed innocent until proven guilty. Yet, the conviction rates for prosecutors in this country are quite high. In fact, in a survey of felony defendants in the seventy-five largest counties in the United States, only thirty-one percent are not convicted, and only one percent of those are actually acquitted at trial rather than dismissed. *See* BUREAU OF JUSTICE STATISTICS, DEPT. OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 13 (1990). It is also true that prosecution funding must be used to prosecute defendants in civil cases when only a limited number of civil defendants are entitled to defense counsel, even if they are indigent. Additionally, prosecutors must represent the state in the twenty percent of criminal matters where the defendant can afford private criminal defense attorneys. Yet, the justice system total expenditures still clearly disadvantage public defenders when one considers that prosecution is receiving over 300% more money than all public defense systems. This includes not only public defenders but all government programs that pay the fees of court-appointed counsel. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JUSTICE EXPENDITURE & EMPLOYMENT, 1990, at 2 (1992).

73. Klein, *supra* note 61, at 675.

74. Klein, *supra* note 25, at 391.

75. *Id.*

76. Klein & Spangenberg, *supra* note 32, at 1.

criminal defendants are not competing on a fair playing field, and why their lawyers are often unable to provide them an adequate defense.<sup>77</sup>

Mary Broderick of the National Legal Aid and Defender Association said, "We aren't being given the same weapons. It's like trying to deal with smart bombs when all you've got is a couple of cap pistols."<sup>78</sup>

She further stated that, "if you pin them [prosecutors] down about their budgets and staffing, you'll find that the resources available to the prosecutors are much greater than [those] available to the defense for handling the same cases . . . Prosecutors have access to 'free' services from police, crime labs, the FBI, etc., while indigent-defense programs have to pay for investigations, lab work, expert witnesses, etc., from their own budgets."<sup>79</sup> Broderick expresses what many believe, that "[t]he only way to have an effective and efficient criminal-justice system is to adequately fund all its components—courts, prosecution and defense."<sup>80</sup>

To mount an effective defense, lawyers must have time for each case they are assigned: time to meet with the client, time to interview witnesses, and time to properly investigate, research and arrange for any necessary expert witnesses for trial. In addition, the lawyer should have available adequate support services, expert witnesses, social workers and investigators.<sup>81</sup> These basic resources necessary to provide clients with adequate counsel are often unavailable to lawyers in public defenders' offices.<sup>82</sup>

Many public defenders themselves admit frustration. Some even say they feel they are violating their clients' constitutional rights because they are unable to spend the time or resources that they believe their client's cases merit. Richard Teisser, a New Orleans public defender, regularly represented ninety people charged with serious felo-

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77. It is true that prosecutors must litigate all criminal matters including those handled by private criminal defense attorneys, but since approximately eighty percent of criminal defendants are indigent and require a publicly funded attorney, this allocation of funds seems unequal, especially considering that the police resources are much more likely to be spent on assisting the prosecutor than defense counsel. See A.B.A. Annual Meeting, *supra* note 28, at 9.

78. Smolowe, *supra* note 22, at 48-49.

79. Johns, *supra* note 22, at C1.

80. *Id.*

81. Daniels, *supra* note 60, at 139.

82. In capital cases, which are often the most difficult and labor intensive of criminal cases, the lack of resources for indigent defense has a profound impact upon which defendant's occupy the death rows of this country. As Kica Matos, capital punishment research director for the NAACP Legal Defense Fund said, "If you have money and you can afford adequate counsel, you don't end up on death row." See Egelko, *supra* note 67, at 9A.

nies, and his office had no money to hire experts, find witnesses or even buy new law books for their library.<sup>83</sup> Although he handled about 450 felony cases a year—three times the ABA's recommended yearly caseload—his salary was just \$18,500.<sup>84</sup> Teisser eventually decided he could not fairly represent all his clients, so he filed suit against himself demanding that the judge declare his work inadequate and order the state to provide money to hire more lawyers.<sup>85</sup> The judge agreed and found the state's indigent defense system unconstitutional.<sup>86</sup> The judge said, "Not even a lawyer with an 'S' on his chest could do the job Mr. Teisser has been asked to do."<sup>87</sup> Teisser stated, "This is a test of whether there is justice in the United States . . . If you're only going to pay it lip service then get rid of *Gideon*."<sup>88</sup> Teisser believes that given "[t]he circumstances that public defenders work under, they're all ineffective, and the trial courts should have to rule on that each and every time."<sup>89</sup> Other suits have been filed in at least five states which also challenge the funding and staffing of indigent defense programs.<sup>90</sup>

New Orleans is not the only public defender office whose representation has been found unconstitutional due to lack of resources. Robert Spangenberg,<sup>91</sup> who conducted a yearlong study on indigent defense systems for the ABA, said that "[t]he public defenders in Tennessee are so overworked and so underfunded that the state criminal justice system is in a real crisis."<sup>92</sup> Although indigent cases in Tennessee have tripled since 1986 and three out of every four defendants cannot afford a lawyer, funding for Tennessee public defenders has barely increased.<sup>93</sup> "The problem is so bad," says Knoxville lawyer Ann Short, president of the Tennessee Association of Criminal Defense Lawyers, "that I believe there is a clear and present danger that innocent people are going to jail because public defenders are so over-

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83. Smolowe, *supra* note 22, at 48.

84. Andy Court & Kevin Bell, *Public Defenders: To The Barricades!*, AM. LAW., May 1992, at 99.

85. Smolowe, *supra* note 22, at 48.

86. *Id.*

87. James H. Andrews, *Poor Defendants and Foggy Mirrors*, CHRISTIAN SCI. MONITOR, Mar. 29, 1993, at 13.

88. Smolowe, *supra* note 22, at 48.

89. Court & Bell, *supra* note 56.

90. *Id.*

91. Robert Spangenberg's Massachusetts Institute studied defense systems for the indigent in more than 40 states for the American Bar Association.

92. Mark Curriden, *Tenn. Defense for Poor Called Inadequate*, ATLANTA J. CONST., July 9, 1993, at C2.

93. *Id.*

worked and have so few resources that their cases cannot be thoroughly investigated and defended.”<sup>94</sup>

In Atlanta, the local bar association and an independent consultant described their public defender system in this way: “Suspects are held in jail as long as three or four months, often without seeing a lawyer, before they are arraigned . . . they are represented by lawyers carrying caseloads as much as four times the maximum recommended by national guidelines, and . . . they often fail to get even the most cursory review of their cases by their lawyers.”<sup>95</sup> In Indianapolis, it was reported that “[t]he system, as practiced in Marion County, makes a mockery of the notion of equal justice because only poor people are deprived of adequate representation. This means, of course that the indigents accused have a slim chance at receiving adequate legal representation and counsel.”<sup>96</sup> At the Maricopa County Public Defender’s Office in Phoenix, Arizona, the annual public defender felony-trial caseload is 82% above that recommended by the National Advisory Commission on Criminal Justice Standards.<sup>97</sup> As one Maricopa County public defender put it, “public defender[s] who have too large a caseload cannot realistically give a client effective assistance of counsel with any regularity.”<sup>98</sup> In New York, the situation was described by the president of the Association of Legal Aid Attorneys: “[H]orror stories abound. Defendants do not see their lawyers for months because the lawyers are not physically able to get to all the courtrooms in which they have cases in a given morning.”<sup>99</sup>

Although some public defender offices are better funded than others, lack of resources is a problem that seems to affect indigent defense systems throughout the nation. Robert Spangenberg said, “Public defenders’ offices face severe financing problems almost every place in the country.”<sup>100</sup> One recent survey found that “[v]irtually no assigned counsel program in the country is adequately funded. In fact,

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94. *Id.*

95. Applebome, *supra* note 58, at B5.

96. Charles Blair, *Cracks in the Legal System Leave Defendants Guilty by Reason of Poverty*, INDIANAPOLIS RECORDER, Jan. 30, 1993, at A4.

97. Johns, *supra* note 22, at C1. Trial lawyers are not the only ones overworked in Maricopa County: the caseloads for appellate defenders exceed the recommended amount by 161%; juvenile attorneys caseloads are 31% over; and attorney’s handling mental-health-commitment cases are over by 290%. *Id.*

98. *Id.*

99. Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 TEMP. L. REV. 1171, 1183 (1988) (quoting Schneider, *You Can’t Afford a Lawyer if You Don’t Have a Dime*, BLIND JUSTICE, Feb. 1987 at 1, Col. 4).

100. Applebome, *supra* note 58, at B5.

the funding situation nationally is frequently and accurately characterized as a crisis."<sup>101</sup> An August, 1992 study by the ABA's Special Committee on Funding the Justice System found that the "American justice system is under siege, and its very existence is threatened as never before."<sup>102</sup> There is also a widespread concern that public defenders may be overusing plea bargaining as a way to handle their impossible caseloads. "Public defenders often use plea bargaining not because it is in their client's best interests, but because it has become 'a necessary technique to deal with an overwhelming caseload.'"<sup>103</sup> Thus, the constitutional implications of this underfunding of public defender systems are serious, and this nation's budgetary priorities must be re-examined.

The problems plaguing underfunded and deteriorating indigent defense systems continue to worsen. In recent years, the caseloads in public defender offices have increased exponentially. The ABA Standing Committee on Legal Aid and Indigent Defendants found that, as of 1990, "there was an unmistakable trend showing that 'caseloads of most public defenders [had] grown at an alarming rate.'"<sup>104</sup> The project coordinator of the ABA's Bar Information Program reported, "With few exceptions, the whole country is inadequately funded. Some are desperate, some are only beginning to feel the effects of it."<sup>105</sup>

An ABA study on the quality of indigent criminal representation found that problems in the system are reaching crisis proportions. Additional funding is desperately needed to combat excessive caseloads so that attorneys can protect the constitutional rights of their clients.<sup>106</sup> Due to inadequate funding, there simply are not enough lawyers in public defenders' offices to provide effective representation.<sup>107</sup> As these few lawyers get more and more cases, the amount of time they must spend in court increases and the time re-

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101. Klein, *supra* note 25, at 364 (quoting Nancy Gist, *Assigned Counsel: Is the Representation Effective?*, CRIM. JUST., Summer 1989, at 16, 18).

102. Johns, *supra* note 22, at C1.

103. Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531, 550 (1988).

104. Klein, *supra* note 25, at 393 (quoting *Recent Trends in Indigent Defense Services*, INDIGENT DEF. INFO. (A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANT'S BAR. INFO. PROGRAM), Spring 1990, at 1).

105. *Id.* (quoting Stacey Colin, *When Justice Goes Begging: The Crisis in Indigent Defense*, STUDENT LAW, Oct. 1988, at 14).

106. Klein, *supra* note 61, at 1172.

107. Klein, *supra* note 25, at 532.

maintaining for investigation and case preparation decreases.<sup>108</sup> In *McQueen v. Swenson*,<sup>109</sup> the Eighth Circuit Court of Appeals noted that even the most competent lawyer cannot provide effective assistance if he or she cannot prepare adequately enough to discover facts necessary to mount a legitimate defense.<sup>110</sup>

If *Gideon's* promise is to be realized, there must be a re-evaluation of this country's criminal justice priorities and its definition of constitutionally acceptable counsel for criminal defendants. Preserving the rights of poor people reflects on the integrity of both our criminal justice system and our society in general. The Spangenberg Group made an important statement after studying the conditions of the nation's indigent defense systems:

It is in everyone's interest to fund an indigent defense system adequately—the public's, the counties', the criminal justice system's and the bar's. All components of the criminal justice system throughout the country are suffering from a lack of adequate funding, but public defenders . . . appear to be suffering the most. Public defenders are critical not only to their clients, but to every aspect of the criminal justice system.<sup>111</sup>

As the ABA's Ad Hoc Committee on the Indigent Defense Crisis concluded, "[u]nless the adversary system effectively protects all citizens, regardless of wealth or power, the Sixth Amendment guarantee of effective assistance of counsel is no more than a false promise."<sup>112</sup>

### III. Race Statistics on Poverty and Public Defenders

People of color are disproportionately poor in the United States. African-Americans comprised only about 12% of the entire U.S. population in 1991,<sup>113</sup> but they comprised 30.4% of the families living below the poverty line.<sup>114</sup> While Hispanics composed approximately 9% of the U.S. population,<sup>115</sup> they accounted for 26.5% of the families

108. *Id.*

109. 498 F.2d 207 (8th Cir. 1974).

110. *Id.* at 217 (quoting *Goodwin v. Swenson*, 287 F. Supp. 166, 182-83 (W.D. Mo. 1968)).

111. Robert L. Spangenberg, *We are Still Not Defending the Poor Properly*, CRIM. JUSTICE, 12 (Fall 1984).

112. Klein & Spangenberg, *supra* note 32 at 25.

113. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, PRESS RELEASE, Mar. 11, 1991, at 2.

114. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, National Data Book, 473 (1993).

115. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, PRESS RELEASE, Mar. 11, 1991, at 2.



living below the poverty line.<sup>116</sup> Asians and Pacific Islanders made up 3% of those living in the United States,<sup>117</sup> yet they accounted for 13.8% of those living below the poverty line.<sup>118</sup> These statistics are in stark contrast with the fact that whites comprise about 80% of the U.S. population,<sup>119</sup> but account for only 8.8% of the families living below the poverty line.<sup>120</sup> These statistics suggest that racial minorities experience poverty in much greater numbers than corresponds with their percentage of the population.

A comparison between whites and other racial groups in this country demonstrates a "severe and amazingly persistent pattern of income inequality."<sup>121</sup> Over the past two decades, the median household income of blacks has remained at about 59% of the income earned by whites which is a difference of over twelve thousand. Hispanics' median household income is 72% of that earned by whites totalling a difference of over eight thousand dollars. During the past two decades, both of these gaps have grown.<sup>122</sup> African-Americans face an especially disproportionate level of poverty in this country. While approximately 20% of all American children grow up in poverty, nearly half of black children grow up in poverty in the United States.<sup>123</sup> The problem of huge numbers of African-Americans living in poverty does not seem to be improving. As William Julius Wilson explained, "[t]hroughout much of the 20th century, blacks were able to experience social mobility through good-paying, blue collar jobs. Now, as industry has moved to suburban and exurban areas, the traditional avenue out of poverty has been closed off."<sup>124</sup> Racial minorities often find themselves in cycles of poverty that are difficult to escape.

Unfortunately, there is no indication that this disproportionate pattern of poverty will correct itself in the United States. People living below the poverty line cannot afford lawyers when charged with

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116. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, NATIONAL DATA BOOK, 473 (1993).

117. BUREAU OF THE CENSUS, DEPT OF COMMERCE, PRESS RELEASE, Mar. 11, 1991, at 2.

118. BUREAU OF CENSUS, DEP'T OF COMMERCE, POVERTY IN THE UNITED STATES, 1992, at xi (1993).

119. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, PRESS RELEASE, March 11, 1991, at 2.

120. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, NATIONAL DATA BOOK, 473 (1993)(Families Below Poverty Level).

121. George C. Galster, *Polarization, Place and Race*, 71 N.C. L. REV. 1421, 1424-25 (1993).

122. *Id.* at 1425.

123. Cornel West, *The '80s. Market Culture Run Amok*, NEWSWEEK, Jan. 3, 1994, at 49.

124. William Julius Wilson, *Hope for Our Cities*, PEOPLE, Jan. 17, 1994, at 81.

criminal offenses. As a result, they usually receive an appointed lawyer. Therefore, since people of color are disproportionately poor in this country, they also disproportionately require public defenders.

Given these vast disparities in income and the history of racial discrimination in our criminal justice system, it is not surprising that people of color also are found in great numbers in this country's prisons. Prisoners in both state and federal jurisdictions are disproportionately racial minorities. The total federal prison population in 1993 was 64.1% white, 33.3% African-American, less than 1% Hispanic, less than 1% American Indian or Alaskan Native and less than 1% Asian/Pacific Islanders.<sup>125</sup> As of 1991, fully 65% of state prison inmates were racial or ethnic minorities, up from 60% in 1986.<sup>126</sup> African-Americans comprised 46% of the state prison inmates, Hispanics comprised 17% and other racial minorities comprised 2%.<sup>127</sup> In stark contrast, whites made up only 35% of the state prison population.<sup>128</sup> Statistics from January, 1993, show that, on average, African-Americans compose 37.3%, Hispanics 8.1%, Asians 0.5%, Native Americans 3.0% and whites 49.3% of the state and federal inmate populations.<sup>129</sup> Even though whites comprise a much greater percentage of the population, there are nearly equal numbers of white and non-white prisoners on death row in this country. As of April, 1993, 50.6% (1,381) of the prisoners on death row were white, 39.3% (1,072) were African-American, 7.1% (193) were Hispanic, 1.8% (48) were Native American and .73% (20) were Asian.<sup>130</sup>

The overrepresentation of African-American men as defendants in the American justice system is especially severe. Proportionately, the criminal justice system puts far more blacks in jail than it does whites.<sup>131</sup> "One of the distressing aspects of the United States's [sic] prison populations is the very high degree of disproportionality in the incarceration rates for blacks compared to whites, with a ratio of about seven to one."<sup>132</sup>

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125. George M. Camp & Camille G. Camp, *The Corrections Yearbook*, Criminal Justice Institute, 4-5 (1993).

126. BUREAU OF JUSTICE, U.S. DEP'T OF JUSTICE, SURVEY OF STATE PRISON INMATES 1991, 3 (1993).

127. *Id.*

128. *Id.*

129. Camp & Camp, *supra* note 125, at 4-5.

130. *Id.* at 32.

131. Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in Bostik v. Florida*, 67 TUL. L. REV. 1979, 2032 (1993).

132. Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743 (1993).

In fact, there are a greater percentage of black males incarcerated in the United States than in South Africa. There are 14,625,000 black men in the United States, of which 454,724 are incarcerated.<sup>133</sup> South Africa has 15,050,642 black men and only 109,739 of them are incarcerated.<sup>134</sup> "Nearly one in every four black men in the United States between 20-29 years of age is under the control of the criminal justice system—whether in prison or jail, on probation, or on parole."<sup>135</sup> This over-representation of minority groups is not only a black-white issue—it affects all racial minorities in the United States.

#### IV. Racism in the American Criminal Justice System

Racial discrimination in the United States has permeated all aspects of our society. Unfortunately, the legal system is no exception. Not only are people of color disproportionately poor, but also they are disproportionately both victims of crime and criminal defendants.

The phenomenon is well known to anyone who spends time in an American courtroom. At arraignment, a highly disproportionate number of the persons waiting to be formally charged are minorities, particularly Black and Hispanic males. A similar disproportionate number comprise the jail and prison population, and, if there is a death row<sup>136</sup> in a state, there as well.<sup>137</sup>

Racial minorities are simply over-represented as defendants and victims in the criminal justice system and historic discrimination seems to be a factor contributing to this imbalance.

The Sentencing Project published a report in 1990 which revealed that almost one in every four black men between the ages of 20-29 were either in custody, on probation, or on parole.<sup>138</sup> These kinds of

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133. Marc Mauer, *Americans Behind Bars*, CRIMINAL JUSTICE, Winter 1992, at 15.

134. *Id.*

135. *Id.* at 12 (quoting Marc Mauer, *Young Black Men and the Criminal Justice System: Growing National Problem*, THE SENTENCING PROJECT, (Feb. 1990)).

136. When convicted of similar charges, people of color are sentenced to death and executed in significantly higher proportions than whites. 54.6% of all persons executed since 1930 have been black. See, Rose Matsui Ochi, *Race Discrimination in Criminal Sentencing*, JUDGES JOURNAL, Winter 1985, at 9. As of April of 1993, there were 2,729 prisoners on death row: 50.6% were white; 39.3% were black; 7.1% were hispanic; 1.8% were native american; .73% were asian; and .55 were unknown. GEORGE M. & CAMILLE GRAHAM CAMP, THE CORRECTIONS YEARBOOK 32 (1993).

137. National Conference on Sentencing Advocacy, *Race, Sentencing and Criminal Justice*, 159 PLI CRIM. 31 (1991).

138. The Sentencing Project's Findings were published in an article entitled, *Young Black Men and the Criminal Justice System: A Growing National Problem*, THE SENTENCING PROJECT (Feb. 1990). The report found that there were "more black men in their 20's under court control than there were black men of all ages in higher education." *Id.* In comparison, "[only] about 6% of white men in their 20's are being held or supervised by

figures are certainly disturbing, but more importantly, they demonstrate serious racial inequalities in the way our criminal justice system operates. Julius Chambers, former executive director of the NAACP Legal Defense Fund, said that discrimination in the criminal justice system is at least partly to blame for over-representation of racial minorities in custody. He noted, "I don't think there's any doubt about that. It is still a white system: white judges, white prosecutors and white juries."<sup>139</sup> As Professor Michael Torry states, "some bias does occur simply because whites predominate as justice-system officials and as jurors."<sup>140</sup> In "Black Issues in Higher Education," the three reasons identified for the disproportionate number of blacks incarcerated were: lack of jobs, lack of strong adult male role models and "inequity in our justice system."<sup>141</sup>

This discrimination discredits the entire criminal justice system. As published by the ABA in *The Judges Journal* in 1985,

The accepted symbol of justice in America—as completely impartial and unswayed by color of skin and economic status—and the reality of justice is very different. . . . Justice in America should not depend upon whether a person is a member of a minority group and poor or a member of the majority group and affluent. The inequalities in our criminal justice system implicate the courts in racial discrimination and bring disrespect on an esteemed institution. This no doubt will come as a shock to those responsible for administering justice who have closed their eyes and continue to operate under the delusion that justice is color blind.<sup>142</sup>

Compound discrimination faces many people of color in our criminal justice system because discrimination may be based on both race and class status. "Wealth discrimination [results] from poor defendants' inability to obtain a private attorney or pre-trial release. As the effect of wealth discrimination on minority defendants is likely to be greater than on white defendants, [and since] minorities are more likely to be poor, it amounts to indirect racial discrimination."<sup>143</sup> The

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the criminal courts, and more than four times as many white men are in college as under court control." *Id.* The Sentencing Project is a Washington nonprofit group that lobbies for alternatives to incarceration. National Conference on Sentencing Advocacy, *supra* note 137.

139. National Conference on Sentencing Advocacy, *supra* note 137.

140. Ted Guest, *Crime's Bias Problem*, U.S. NEWS & WORLD REPORTS, July 25, 1994, at 32.

141. National Conference on Sentencing Advocacy, *supra* note 137.

142. Ochi, *supra* note 136, at 7.

143. *Id.* at 8 (quoting Cassia Spohn, et. al., *The Effect of Race on Sentencing: A Reevaluation of an Unsettled Question*, 16 L. & SOC. REV. 71 (1981-82)).

fact that prosecutors have been shown to pursue cases more aggressively where the victim is white than when the victim is a racial minority only increases the perception that minorities have less worth in the criminal justice system.<sup>144</sup> The same can be said for the fact that criminal defendants are much more likely to be given the death penalty if the victim is white than black.<sup>145</sup> This obvious injustice may result in a justifiable loss of faith in the judicial system by members of minority groups.<sup>146</sup>

In an article published by the ABA, Rose Matsui Ochi observed that "the lives of minority group members have been less valued in the American justice system than the lives of white majority group members."<sup>147</sup> The situation will only worsen if our indigent defense programs continue to deteriorate and racial minorities are disproportionately discriminated against even with respect to the most basic right provided by our legal system: the right to effective assistance of counsel.

## V. Equal Protection Doctrine Implications

The Equal Protection Clause of the Fourteenth Amendment states that "No state shall make or enforce any law which . . . shall

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144. Joseph F. Sheley, *Structural Influences on the Problem of Race, Crime and Criminal Justice Discrimination*, 67 TUL. L. REV. 2273, 2277 (1993).

145. *McCleskey v. Kemp*, 481 U.S. 279, 286-87 (1987) (citing Baldus study. *See infra* note 181).

146. One example of this loss of faith in the criminal justice system among racial minorities has recently been documented during the proceedings leading up to the O.J. Simpson murder trial. "The disparity between the races on the Simpson case is stark. In a Time/CNN poll, 63% of whites said they believe Simpson will get a fair trial; only 31% of blacks felt the same way. . . . Indeed, such poll results probably indicate less about how blacks view the evidence against Simpson than about how they regard the way blacks are treated generally by the criminal-justice system." Jill Smolowe, *Race and the O.J. Case: The Issue Bubbles to the Surface, Highlighting Black Distrust of the Criminal-Justice System*, TIME, Aug. 1, 1994, at 24-25. Reverend Cecil Murray, the pastor at Los Angeles' oldest black congregation said, "I don't know how we can be surprised about a poll that shows African Americans are suspicious of our system of jurisprudence." *Id.* The perception of many black people that the criminal-justice system discriminates against them is pervasive and deep. Factors such as the disproportionate number of black people on death row and the appearance that justice is more likely to be done when the victim is white support this perception. Since 1977, 63 blacks have been executed for murdering white people while only one white person has been executed for murdering a black person. *Id.* O.J. Simpson is a black celebrity who can afford to retain private criminal defense counsel, but blacks and other minority group members are disproportionately represented by public defenders when accused of a crime. The perception, which is already so pervasive among racial minorities, that the criminal justice system discriminates against them, will only be exacerbated by the continued underfunding of our public defender systems.

147. Ochi, *supra* note 136, at 9.

deny to any person within its jurisdiction the equal protection of the laws.”<sup>148</sup> This notion of equal protection for all citizens of the United States was not adopted until 1868, when the Fourteenth Amendment was ratified as one of the three “Civil War Amendments,” designed to bring equality to the recently emancipated black slaves<sup>149</sup>. Equality was not a prominent concept in 1787 when the Constitution was drafted or even in 1791 when the Bill of Rights was added. Thomas Jefferson wrote about equality in the Declaration of Independence with the now famous words, “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>150</sup> However, these words were not included in the Constitution. It was not until President Lincoln’s *Gettysburg Address* that Jefferson’s concept of equality was re-introduced into the national debate.<sup>151</sup> The Civil War Amendments officially made the idea that “all men are created equal” a part of the United States Constitution.<sup>152</sup> The country is still striving to uphold the meaning of those words.

Inscribed above the United States Supreme Court entrance is a statement upon which our criminal justice system is supposed to be based: “Equal Justice Under the Law.” Yet the courts of this country have not always upheld this basic notion of equality. The Supreme Court severely limited the equal protection doctrine’s effectiveness as a tool against racial discrimination in the 1976 case *Washington v. Davis*,<sup>153</sup> which required a plaintiff to demonstrate a racially discriminatory purpose behind a law before it would be declared unconstitutional. In *Washington v. Davis*, the Court found that a

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148. U.S. CONST. amend. XIV. The Due Process Clause of the Fifth Amendment has been interpreted as containing an equal protection component applicable against the federal government and the states. *Washington v. Davis*, 426 U.S. 229, 239 (1976)(citing *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

149. The Thirteenth, Fourteenth, and Fifteenth Amendments were the three Civil War Amendments. The Thirteenth Amendment was ratified in 1865 and ended slavery in the United States. The Fifteenth Amendment was ratified in 1870 and guaranteed that the right of United States citizens to vote could not be denied based upon race, color or previous condition of servitude.

150. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

151. See GARRY WILLS, LINCOLN AT GETTYSBURG 101-08 (1992).

152. Not only were racial minorities not protected by the original Constitution, but women and many other groups were also not protected. In fact, women were not even given the right to vote until the Nineteenth Amendment was ratified in 1920. Under the Fourteenth amendment, gender is only given heightened, rather than strict review. *Craig v. Boren*, 429 U.S. 190, 197-98 (1976)(citing *Reed v. Reed*, 401 U.S. 71 (1971)).

153. 426 U.S. 229, 239 (1976).

Washington D.C. police department personnel test which excluded a disproportionately high number of black applicants<sup>154</sup> was constitutional, and held that a law is not unconstitutional solely because it has a racially disproportionate impact.<sup>155</sup> Yet, many legal scholars reject the strict "intent standard" of *Washington v. Davis* and argue that proof of disparate impact alone should be enough to find a law unconstitutional.<sup>156</sup>

Before the *Washington v. Davis* intent standard, the courts used a discriminatory effect test which measured the actual harm that a law caused to racial minorities rather than searching for the purpose behind the law. In the 1971 decision, *Palmer v. Thompson*,<sup>157</sup> the Supreme Court for the first time directly considered a lawmaker's motivation in equal protection analysis and explicitly rejected it as a relevant factor.<sup>158</sup> In *Palmer*, a group of black residents brought suit to reopen the pools when the city of Jackson, Mississippi chose to close all public pools in the city rather than allow them to be integrated.<sup>159</sup> The Supreme Court rejected the plaintiff's central argument that the city's reason for refusing to integrate the pools made the closings unconstitutional.<sup>160</sup> The Court stated, "[n]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."<sup>161</sup> The Court realized the difficulty and uselessness of making equal protection decisions based upon the purpose behind the law. The Court reasoned that,

It is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators, furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be

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154. Proportionately, four times as many blacks failed the exam as did whites. *Id.* at 237.

155. *Id.* at 239.

156. See, e.g., *The Limits of Racial Equality: The Fourteenth Amendment and the Criminal Justice System*, 101 HARV. L. REV. 1472, 1491, 1493-94 (1988); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

157. 403 U.S. 217 (1971).

158. Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1108 (1989).

159. 403 U.S. at 218-19.

160. *Id.* at 223-25.

161. *Id.* at 224.

valid as soon as the legislature or relevant governing body re-passed it for different reasons.<sup>162</sup>

The Supreme Court's hostility toward motivation-based inquiry led many lower courts and commentators to believe that "discriminatory purpose was basically irrelevant to equal protection analysis."<sup>163</sup> After *Washington v. Davis*, this understanding that the proper question to consider under equal protection analysis was the actual effect of the law rather than the motive behind the law was lost.

There has been a great deal of criticism of the *Washington v. Davis* equal protection discriminatory intent standard. "The 'discriminatory purpose' doctrine has come under heavy criticism from leading constitutional scholars since its birth."<sup>164</sup> Professor Charles Lawrence has written that the discriminatory purpose standard is an impossible one, in light of the realities of racism in the United States.<sup>165</sup> He writes that, "[m]inorities and civil rights advocates have been virtually unanimous in condemning *Davis* and its progeny. They have been joined by a significant number of constitutional scholars who have been equally disapproving, if more restrained, in assessing its damage to the cause of equal opportunity."<sup>166</sup>

Lawrence sets forth two principal arguments against the purposeful discrimination standard. First, a motive-centered standard for racial discrimination puts a heavy, if not impossible, burden of persuasion on plaintiffs, permitting defendants to conceal improper motives and argue that their actions were prompted by racially neutral considerations.<sup>167</sup> Second, Lawrence points out that the damage wrought by racial discrimination is the same regardless of decisionmakers' motives. Racial inequality is the real problem, and it must be addressed by applying heightened judicial scrutiny without regard to motive when racially disproportionate harm exists.<sup>168</sup>

Lawrence attributes much of the racism in the United States to unconscious motives. Therefore a purposeful discrimination standard does not truly address the problem. He argues that,

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Be-

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162. *Id.* at 225.

163. *Id.*

164. Veronica Patton, *Rethinking Equal Protection Doctrine in the Wake of McCleskey v. Kemp*, 11 NAT'L BLACK L.J. 348, 348 (1990).

165. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987).

166. *Id.* at 319.

167. *Id.*

168. *Id.* at 319-20.



cause of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about non-whites. . . . We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.<sup>169</sup>

Lawrence uses cognitive psychology to describe why the purposeful discrimination test does not accord with how the human brain actually functions. He argues that requiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent "ignores much of what we understand about how the human mind works" and furthermore "disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious."<sup>170</sup> He contends that racism in America is very complex. It is not the "conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots."<sup>171</sup>

Lawrence insists that the Equal Protection Clause requires that governmental actions which take race into account without a compelling reason for those actions are unconstitutional, and that equal protection analysis must incorporate a determination of unconscious racism.<sup>172</sup> He rejects Justice White's argument in *Davis* that, for judicial economy's sake, the Equal Protection Clause must be limited to purposeful discrimination only. Lawrence says,

One answer might be that the neutral principle of judicial economy distinguishes the value choice disfavoring intentional racial discrimination from that disfavoring all racially stigmatizing government conduct; requiring extraordinary justification for all racially stigmatizing practices would simply involve the courts in too many cases. . . . To give judicial economy priority over the recognition of constitutional injury seems wrong. It is to make a value choice that is no different from the decision to deny that injury recognition altogether.<sup>173</sup>

Requiring a plaintiff to demonstrate a discriminatory purpose for every action that has a racially disproportionate impact essentially renders the Equal Protection Clause toothless and illustrates the lack of importance our society places on ending racial inequality.

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169. *Id.* (citations omitted).

170. *Id.* at 323.

171. *Id.* at 330.

172. *Id.* at 323.

173. *Id.* at 383-84.

Professors Lively and Plass are similarly concerned about the intent standard and suggest that such a motive-centered constitutional model is a setback in equal protection jurisprudence.<sup>174</sup> They state that since intent based inquiry “effectively avoids rather than confronts unsettling racial questions, it reveals itself as the sophisticated grandchild of the separate but equal doctrine. . . . motive-referenced criteria afford an ideal methodology for restoring equal protection analysis to the deferential model endorsed by [*Plessy v. Ferguson*]”<sup>175</sup>

Motive-based inquiry facilitates the jurisprudence of denial and evasion by detaching the process of review from the persistent realities and consequences of racism. . . . Absent proof of discriminatory intent, the Court defers to the status quo as it did under *Plessy*. Like the analysis of a century ago, the Court has created a doctrine that effectively precludes confrontation of racial realities and constitutionally-driven societal change.<sup>176</sup>

Unconscious racism in the criminal justice system is especially dangerous because it can influence decisions made about the life and liberty of criminal defendants. As Professor Sheri Lynn Johnson believes,

Unconscious racism is ignored in the reasoning of race and criminal procedure decisions for three reasons, all linked to the nature and phenomenon itself: ignorance, fear, and denial. . . . A burgeoning literature documents the rise of the ‘aversive’ racist, a person whose ambivalent racial attitudes leads him or her to deny his or her prejudice and express it indirectly, covertly, and often unconsciously.

Even if one makes the distinction between conscious, unconscionable racism, and unconscious racism, it is hardly ego-enhancing to think of oneself as the passive recipient of a culturally pervasive illness. . . . This seems like a rather drastic reaction when incarceration and death are at stake, but then, that is the whole point of denial.<sup>177</sup>

This denial of racism in the criminal justice system has particularly devastating consequences, but can be justified by simply blaming the criminal defendant. “[A]s the studies of modern racism would predict, one then justifies one’s opposition to racial change—both to oneself and to the world—by citing nonracial reasons. In the context of criminal procedure decisions, finding a nonracial reason is particu-

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174. Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1313-14 (1991).

175. *Id.* at 1323 (referring to 163 U.S. 537, 554 (1896)).

176. Lively & Plass, *supra* note 174, at 1334-35.

177. Sheri L. Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1027-30 (1988).

larly easy to do: one cites the guilt of the suspect.”<sup>178</sup> For instance, because all clients of public defenders are poor and many are racial minorities, the guilt of the indigent criminal defendant may be assumed without considering that underfunding of public defenders offices may have denied them competent legal assistance at trial which could have shown their innocence.

The discriminatory purpose standard was taken to its most egregious extreme in *McCleskey v. Kemp*.<sup>179</sup> There, a black defendant who was sentenced to death for the murder of a white police officer challenged his death sentence on the ground that black defendants in Georgia were disproportionately more likely to receive the death penalty for killing a white person than white defendants were for killing a black person.<sup>180</sup> Even though the defense offered a comprehensive statistical analysis, the Baldus study,<sup>181</sup> to document this pattern of discrimination, the Supreme Court held that statistics alone cannot establish sufficient racial discrimination to find an equal protection violation. Rather, a discriminatory purpose must be shown.<sup>182</sup>

In *McCleskey*, the Court essentially found that the criminal justice system was doing the best it could, and warned that acknowledging *McCleskey*'s challenge of racism in capital sentencing could put the credibility of the entire criminal justice system into question. As Justice Powell wrote for the majority, “[a]ny mode of determining guilt or punishment has its weaknesses and the potential for misuse. . . . [Petitioner’s] claim, taken to its logical conclusion, throws into serious question the principles that underlie the entire criminal justice system.”<sup>183</sup> The Court claimed that legislatures are better qualified to address statistical analyses such as the Baldus study.<sup>184</sup>

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178. *Id.* at 1030-31.

179. 481 U.S. 279 (1987).

180. *Id.* at 283-86.

181. The Baldus study examined over 2,000 murder cases that occurred in Georgia during the 1970's. The raw data showed substantial disparities in the imposition of the death penalty depending upon the victim's race and smaller disparities which were associated with the defendant's race. Baldus subjected his data to extensive analysis, considering 230 variables that could have explained the disparities on nonracial grounds. One of his models controlled for the effects of all 230 variables and another for thirty-nine nonracial variables. When Baldus controlled for these thirty-nine nonracial variables, he found that Georgia defendants charged with killing white victims were 4.3 times more likely to be condemned to death than defendants charged with killing black victims, and that black defendants were 1.1 times more likely to receive the death penalty than white defendants. Johnson, *supra* note 177, at 1017-18 (citing *McCleskey*, 481 U.S. at 287).

182. *McCleskey*, 481 U.S. at 297.

183. *Id.* at 314.

184. *Id.* at 319.

*McCleskey* may be one of the most criticized decisions in constitutional history. In fact, four Justices criticized the decision: Justices Brennan, Marshall, Blackmun<sup>185</sup> and Stevens all dissented vigorously. In his dissent, Brennan cited Charles Lawrence's "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism"<sup>186</sup> and noted, "[p]erhaps today the discrimination takes a form more subtle than before. But it is not less real or pernicious."<sup>187</sup> Brennan also acknowledged that the willingness to impose the death penalty when the defendants are black but not when the victims are black evidences a devaluation of the lives of black people in our society.<sup>188</sup>

Most importantly, Brennan chastised the Court for being swayed by a fear of paralyzing the entire criminal justice system. "The prospect that there may be more widespread abuse than *McCleskey* documents may be dismaying," he wrote, "but it does not justify complete abdication of our judicial role. The Constitution was framed fundamentally as a bulwark against governmental power, and preventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by the rule of law."<sup>189</sup>

Justice Blackmun, in his equally compelling *McCleskey* dissent, noted that, racial discrimination is "fundamentally at odds" with the Fourteenth Amendment's equal protection guarantee.<sup>190</sup> He cited a prior Supreme Court case, *Rose v. Mitchell*,<sup>191</sup> which held that, "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. . . . Disparate enforcement of criminal sanctions 'destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process.'"<sup>192</sup> Blackmun identified why the majority's decision was so entirely unpersuasive: "The Court today holds that even though the Fourteenth Amendment *was* aimed specifically at eradicating discrimination in the enforcement of criminal sanctions, allegations of such discrimina-

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185. In fact, in a 1994 case before the Supreme Court, Justice Blackmun renounced capital punishment altogether. Blackmun said that "Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die." *Callins v. Texas*, 114 S.Ct. 1127, 1135 (1994) (Blackmun, J., dissenting from denial of certiorari).

186. Lawrence, *supra* note 156.

187. *McCleskey*, 481 U.S. at 333 (Brennan, J., dissenting)(quoting *Rose v. Mitchell*, 443 U.S. 545, 558-59 (1979)).

188. *Id.* at 336 (Brennan, J., dissenting).

189. *Id.* at 339 (Brennan, J., dissenting).

190. *Id.* at 346 (Blackmun, J., dissenting).

191. 433 U.S. 545 (1979).

192. *McCleskey*, 481 U.S. at 346 (Blackmun, J., dissenting)(quoting *Rose*, 433 U.S. at 545, 555-56).

tion supported by substantial evidence are *not* constitutionally cognizable.”<sup>193</sup>

Blackmun, like Brennan, also criticized the Court’s rationale for denying McCleskey’s motion due to the implications for the larger judicial system.

Granting relief to McCleskey in this case, it is said, could lead to further constitutional challenges. That, of course, is no reason to deny McCleskey his rights under the Equal Protection Clause. If a grant of relief to him were to lead to a closer examination of the effects of racial considerations throughout the criminal justice system, the system, and hence society, might benefit.<sup>194</sup>

This strong criticism in both Brennan’s and Blackmun’s dissenting opinions identified many of the fundamental flaws with the majority decision.

Others have reiterated these criticisms of *McCleskey* and offered still other reasons about why the holding was a blatant miscarriage of justice. In the words of Professor Randall Kennedy, “[t]he Court’s decision in *McCleskey v. Kemp* was immediately beset by sharp criticism and, in some instances, outright denunciation.”<sup>195</sup> Professor Norval Morris also commented that, “[t]he *McCleskey* case is simply a miscarriage of justice, irreconcilable with the rest of the jurisprudence of racial discrimination. It’s a scandal and will be seen as such, I’m convinced.”<sup>196</sup> Professor Sheri Lynn Johnson stated of the *McCleskey* opinion, “The opinion is defensive and unpersuasive, and the outcome threatens our communal sense of justice.”<sup>197</sup> Many others are similarly convinced.

McCleskey demonstrates the parade of horrible consequences that flow from the discriminatory purpose doctrine. Those consequences can only be rectified if the judiciary first recognizes that a motive-centered standard for review is dysfunctional and second, develops an equal protection doctrine which reflects an understanding of the complexity of race discrimination. . . . In essence, the *McCleskey* decision is institutional racism’s last stand in the same way as *Plessy v. Ferguson* was segregation’s last stand.<sup>198</sup>

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193. *McCleskey*, 481 U.S. at 347 n.2.

194. *Id.* at 365 (Blackmun, J., dissenting).

195. Kennedy, *supra* note 156 at 1388.

196. Norval Morris, *Race and Crime: What Evidence is There That Race Influences Results in the Criminal Justice System?*, 72 JUDICATURE 111, 112 (1988-89).

197. Johnson, *supra* note 177, at 1017.

198. Patton, *supra* note 164, at 348, 358.

Professor Kennedy specifically criticized the way the doctrine of purposeful discrimination “insulates entirely many of the unconscious ways in which prejudiced social values give rise to differential treatment on the basis of race.”<sup>199</sup> Kennedy believes that the doctrine of purposeful discrimination conveys a basic misunderstanding of modern racism and was “born out of a fear of too much justice.”<sup>200</sup>

The great failing of [purposeful discrimination] is its hopeless inadequacy as a tool for responding to racial oppression in its subtle modern guises. By conditioning the availability of a remedy under the fourteenth amendment on proof that a decisionmaker purposefully set out to harm a person or group because of race, Justice Powell and his colleagues display minds trapped by visions of old conquests—the battles against de jure segregation and overt, intentional discrimination in the administration of statutes making no mention of race. They articulate a conception of discrimination that ignores the chameleonlike ability of prejudice to adapt unobtrusively to new surroundings and, further, to hide itself even from those firmly within its grip. They manifest views attuned only to the most blatant deprivations of the equal protection of the laws.<sup>201</sup>

One of the Court’s greatest concerns in *McCleskey* was whether courts would be forced to grant equal protection relief in many other areas of our society if *McCleskey*’s claims were acknowledged.<sup>202</sup> Professor Kennedy convincingly argues that race-based discrimination is unique and that claims for disparate impact based on other classifications would simply not have the same constitutional weight. He notes, “Experience teaches that in the United States racial prejudice—particularly that which is anti-black—displays an intensity and persistence that is distinguishable from all other biases. Moreover, there exists textual warrant in the Constitution for distinguishing racial and, to a lesser extent, gender bias from other sorts of prejudice.”<sup>203</sup>

*McCleskey v. Kemp* has dire consequences for the entire criminal justice system. As Professor Kennedy recognized, “[t]he opinion fails even to address the obvious counter argument that it is precisely because the challenged conduct arises in a criminal justice setting that the Court should be *more*, not less, sensitive to any hint of racial inequality.”<sup>204</sup> Kennedy and others have asked that the Court at least

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199. Kennedy, *supra* note 156, at 1405.

200. *Id.* at 1414.

201. *Id.* at 1419.

202. See *McCleskey*, 481 U.S. at 317.

203. Kennedy, *supra* note 156, at 1410.

204. *Id.* at 1409.

recognize the violation of equal protection. Kennedy said, "the constitutional requirement of racial justice embedded in the Reconstruction amendments demands judicial intervention—even if it begins with no more than a candid announcement that existing conditions violate the norms of the equal protection clause."<sup>205</sup> This idea was reiterated in the *Harvard Law Review* special issue on "Developments in the Law—Race and the Criminal Process"<sup>206</sup> as follows: "The Court should recognize that the claimant has a right to equal protection of the laws while acknowledging that it does not have the resources, power, or institutional legitimacy to rectify the injury."<sup>207</sup> Whereas the Court might not have believed it could do anything to correct racial inequality in the justice system, it could have at least admitted that the discrimination exists and acknowledge that something should be done to rectify the situation.

The Supreme Court has relaxed the equal protection intent requirement in order to address racial discrimination within the criminal justice system. In the jury selection process, a shifting of burdens scheme was adopted in order to address racial discrimination. In *Castaneda v. Partida*,<sup>208</sup> a Hispanic defendant was convicted after indictment by a grand jury in which Hispanics were underrepresented. The Supreme Court held that a criminal defendant could establish a prima facie case of discriminatory purpose in the jury composition process by showing a substantial underrepresentation of his or her racial group in the grand jury pool.<sup>209</sup> Once the defendant shows substantial underrepresentation of his/her group, the burden shifts to the State to rebut the inference of discrimination by showing that permissible racially neutral selection criteria and procedures produced the monochromatic result.<sup>210</sup>

The Supreme Court developed a similar equal protection standard for the discriminatory use of peremptory strikes in the selection of jury panels in *Batson v. Kentucky*.<sup>211</sup> The requirements for the plaintiff to establish a prima facie case in *Batson* are similar to those set forth in *Castaneda*. First, it must be established that the plaintiff belongs to a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of

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205. *Id.* at 1443.

206. *See supra* note 156.

207. Kennedy, *supra* note 156, at 1494.

208. 430 U.S. 482 (1977).

209. *Id.* at 494-95.

210. *Id.* at 497-98.

211. 476 U.S. 79 (1986).

the defendant's race.<sup>212</sup> Second, the defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice "that permits 'those to discriminate who are of a mind to discriminate.'"<sup>213</sup> Third, the defendant must show that "these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude jurors on account of their race."<sup>214</sup> Once the defendant makes a prima facie showing, the burden then shifts to the government to provide a race-neutral explanation for challenging the jurors in question.<sup>215</sup> Therefore, a criminal defendant challenging the selection of his or her jury need only show that the selection procedures have had a "racially disparate impact on his [or her] minority group and that the selection procedures were susceptible to abuse."<sup>216</sup>

In *Batson*, the Court recognized that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."<sup>217</sup> Therefore, the Court developed an equal protection scheme which placed a lighter burden on the individual and a heavier burden on the state. This same type of burden scheme which allows the plaintiff to make a showing of racially disparate impact without having to demonstrate intent should be employed when a criminal defendant challenges the underfunding of public defenders and its discriminatory effect upon racial minorities.

The fairness of our system of justice is just as clearly at stake as a result of the underfunding of public defenders as it is when a peremptory challenge is exercised in a racially-biased manner. Although an impartial jury which reflects a cross-section of the community is a critical element of a fair trial, the right to competent counsel is just as critical. To fulfill the Sixth and Fourteenth Amendment's constitutional guarantees of adequate counsel for one's defense and equal protection under the law, a relaxed intent standard must also be employed to address the ineffective assistance of counsel being disproportionately provided to racial minorities.

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212. *Id.* at 95.

213. *Id.* at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

214. *Id.*

215. *Id.* at 97.

216. *See Ortiz*, *supra* note 158, at 1122-23.

217. 476 U.S. at 87.



## VI. Race Discrimination and the Strict Scrutiny Standard

The levels of scrutiny with which courts review actions under the Fourteenth Amendment's Equal Protection Clause are not always clear. Courts consider most claims under the rational basis test and a few groups, such as women, are afforded a heightened or intermediate level of scrutiny.<sup>218</sup> However, it is well established that claims of racial discrimination under the law are reviewed under the highest level—strict scrutiny—because racial minorities are classified as a “suspect class.”<sup>219</sup> “Racial discrimination was the major target of the 14th Amendment and thus racial classifications are ordinarily ‘suspect’: this theme is among the few continuously voiced ones in equal protection doctrine.”<sup>220</sup> Under a fourteenth amendment analysis, laws that classify persons on the basis of their “status as a member of a racial minority or on the basis of their national origin” are suspect and subject to the strict scrutiny standard of review.<sup>221</sup>

In *Korematsu v. United States*,<sup>222</sup> the United States Supreme Court solidified this notion that laws which appear to discriminate against a racial group are afforded strict scrutiny review.

All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.<sup>223</sup>

Courts employ a strict standard of review under the equal protection doctrine in two major categories of cases: first, when fundamental constitutional rights are implicated,<sup>224</sup> and second, “when the govern-

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218. *Craig v. Boren*, 429 U.S. 190 (1976).

219. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

220. GERALD GUNTHER, *CONSTITUTIONAL LAW* 636 (12th ed. 1993).

221. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.3 at 576 (4th ed. 1991).

222. 323 U.S. 214 (1944).

223. *Id.* at 216.

224. The Court applied strict scrutiny under the fundamental constitutional right theory for the right to interstate travel in *Shapiro v. Thompson*, 394 U.S. 618, 643-44 (1969), where it stated, “[a]ny other purposes offered in support of a law that so clearly impinges upon the constitutional right of interstate travel must be shown to reflect a *compelling* government interest.” The fundamental right to vote was implicated in *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966). The Court stated: “where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. [citations omitted.] Those principles apply here. For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.” Certainly, the constitutionally guaranteed right to counsel is at

ment classification distinguishes between persons on a 'suspect' basis."<sup>225</sup>

The disproportionate effect of underfunding public defender offices upon racial minorities implicates the fundamental right to counsel and distinguishes between persons on a "suspect" basis. This is not to suggest that the Court should reexamine wealth as a suspect classification, but rather that race provides a suspect classification under which public defender underfunding should be examined when a fundamental right is at stake. The underfunding of public defenders is a clear example of a case where both prongs of the strict scrutiny analysis are implicated because there exists a disproportionate impact upon a suspect class involving a fundamental right.<sup>226</sup>

Clearly, the government policy of underfunding public defender offices does discriminate on the basis of race. Racial minorities are being disparately disadvantaged by ineffective counsel because they are disproportionately the clients of public defenders. This disproportionate impact upon a "suspect class" in regard to their fundamental right to counsel triggers both prongs of the strict scrutiny standard of review.<sup>227</sup>

Therefore, this infringement on racial minorities' fundamental right to counsel must be examined by the courts under a strict scrutiny standard. Combined with a relaxed intent standard, once a plaintiff

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least as fundamental as the right to move freely and to vote, neither of which is specifically mentioned in the Constitution.

225. NOWAK & ROTUNDA, *supra* note 221, at 575.

226. The author believes that the disparate impact standard is the correct standard of review in this context. See the discussion and criticism of the purposeful discrimination standard in section V, *supra*. This standard is used under Title VII for employment discrimination and it should similarly be used in the fundamental right to counsel context.

227. Even if the discrimination is seen as discrimination against a class of poor people who are the clients of public defenders rather than as a class of people who are racial minorities, strict scrutiny should still apply because a fundamental right protected by the Constitution is implicated. *Kramer v. Union Free Sch. Dist.* 395 U.S. 621 (1969); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). If a rational basis standard is applied based upon economic class then it should be a rational basis test like the one applied by the Court in *City of Cleborne v. Cleborne Living Center* 473 U.S. 432 (1985). In *Cleborne*, the Court invalidated a zoning ordinance requiring a special use permit for a proposed group home for the mentally retarded. The Court held that the city's reasons for this requirement, which included negative attitudes of the majority of property owners located within 200 feet of the facility, concern that the facility was across the street from a junior high school, the home's location on a five hundred year flood plain, and concern regarding the size of the home and the number of people that would occupy it, were not "rationally related to a legitimate governmental purpose." *Id.* at 440. Instead, the Court found that the reasons "were irrational prejudice against the mentally retarded." *Id.* at 450. Even under a rational basis test, true scrutiny should be imposed in order to determine if the reasons given for the government's action were actually a pretext for prejudice.

clearly demonstrates that racial minorities are disparately disadvantaged in their fundamental right to counsel by the underfunding of public defenders, then the burden shifts to the government to prove that there is a "compelling" reason for its actions and that the means chosen were "narrowly tailored" to promote that compelling interest.<sup>228</sup> This strict standard of review requires lawmakers and regulators to wrestle with their reasons for legislating and the effects of their laws upon racial minorities.<sup>229</sup>

## VII. Legislative Responses to Racial Discrimination

The legislature also has the power to end the discrimination in our criminal justice system. "The Congress has the power under the Fourteenth Amendment to take remedial measures that eliminate not only overt race discrimination but also practices that entail a significant risk that persons of different races are being treated differently."<sup>230</sup> The Congress has enacted statutory provisions to protect against discrimination in many areas of American life. For instance, there are civil rights statutes which prevent discrimination in public accommodations,<sup>231</sup> in employment<sup>232</sup> and in housing.<sup>233</sup> Certainly, equity in the legal system deserves as much attention from the legislature as these other areas.

The disparate impact standard set forth in these existing civil rights statutes is an appropriate model for a statute to protect against discrimination in the criminal justice system. Title VII, the federal employment discrimination statute, would probably be the best model upon which to model a criminal justice system statute. The Title VII cases provide good examples of instances in which a disproportionate impact on racial minorities has been sufficient to prove legislation illegal. In *Griggs v. Duke Power Company*,<sup>234</sup> the Court prohibited an

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228. NOWAK & ROTUNDA, *supra* note 221, at 575.

229. Although this equal protection scheme could have incredibly wide-spread implications upon many institutions in this country (e.g., AFDC, subsidized medical care and any government service used predominately by the poor), there is no fundamental constitutional right to these government programs as there is for adequate counsel for indigent defendants under the Sixth Amendment. Therefore, although the author believes that action should be taken to reform all government programs that disparately impact upon racial minorities, this equal protection scheme would only apply to fundamental rights guaranteed under the Constitution.

230. H.R. REP. NO. 458, 103d Cong., 2d Sess. 6 (1994).

231. The Civil Rights Act of 1964, 42 U.S.C. § 2000a.

232. *Id.*

233. 1968 Open Housing Act, 42 U.S.C. §§ 3601 et seq.

234. 401 U.S. 424 (1971).

employer from requiring a high school education or a passing mark on a standardized intelligence test as a condition for employment. Neither requirement was found to be significantly related to successful job performance and effectively disqualified blacks at a substantially greater rate than whites.<sup>235</sup> Chief Justice Burger wrote in *Griggs* that, "What is required by Congress [in Title VII cases] is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."<sup>236</sup> The Court clearly held that Title VII applies "to the *consequences* of employment practices, [and] not just the motivation" behind them.<sup>237</sup> The *Griggs* Court applied the "disparate impact theory," a results-oriented theory, under which race can be taken into account to remedy discrimination.<sup>238</sup> "Under this theory, employment practices that do not intentionally discriminate but still have an adverse effect on minorities, violate Title VII."<sup>239</sup>

In another Title VII case, *Watson v. Fort Worth Bank and Trust*,<sup>240</sup> the Supreme Court applied its disparate impact analysis to a subjective or discretionary promotion system. In *Watson*, Justice O'Connor wrote "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."<sup>241</sup> Moreover, the Court acknowledged that "a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices."<sup>242</sup> In yet another Title VII case, *Hazlewood School District v. United States*,<sup>243</sup> the Court noted that statistics alone may be enough to show this disparate impact. "[W]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination."<sup>244</sup>

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235. *Id.* at 426.

236. *Id.* at 431.

237. *Id.* at 432 (emphasis added).

238. Robert Belton, *The Dismantling of the Griggs Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223 (1990).

239. *Id.* at 224.

240. 487 U.S. 977 (1988).

241. *Id.* at 987.

242. *Id.* at 990.

243. 433 U.S. 299, 307-08 (1977).

244. *Id.* at 307-08 (citing *Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

The Title VII disparate impact standard also has been applied in Title VIII housing discrimination cases. There clearly is no fundamental right to housing in the United States yet there is a fundamental right to adequate counsel.

Title VIII is designed to prohibit 'all forms of discrimination, sophisticated as well as simple-minded.' Just as Congress requires . . . 'the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification,' such barriers must also give way in the field of housing.<sup>245</sup>

In Title VIII cases, to establish a prima facie showing of racial discrimination a plaintiff "need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has discriminatory effect."<sup>246</sup> The plaintiff need not make any showing that the action which resulted in racial discrimination in housing was racially motivated.<sup>247</sup> "Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because . . . [w]hatever our law was once, . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."<sup>248</sup> Under this Title VIII scheme, once the plaintiff establishes a prima facie case of discriminatory effect, the burden shifts to the government to demonstrate that its conduct was necessary to promote a compelling governmental interest.<sup>249</sup>

If hard evidence of disparate impact or even statistics demonstrating disparate impact against people of color is enough to rule a practice illegal in the employment and housing contexts, it surely should be sufficient in the right to counsel context. While the rights to employment and housing are important, the Constitution does not explicitly guarantee either of them. However, the Sixth Amendment explicitly guarantees the right to counsel for criminal defendants. This fundamental right should be analyzed under the same disparate im-

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245. *United States v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974) (quoting *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971)).

246. See *United Farmworkers v. City of Delray Beach*, 493 F.2d 799, 808 (5th Cir. 1974). Other circuits have also held that discriminatory impact is a sufficient showing under Title VIII. See, e.g., *Betsey v. Turtle Creek Assoc.*, 736 F.2d 983, 987 (4th Cir. 1984).

247. *City of Black Jack*, 508 F.2d at 1185; *United Farmworkers*, 493 F.2d at 808.

248. *City of Black Jack*, 508 F.2d at 1185 (quoting *Hobson v. Hanson*, 269 F. Supp. 401, 497 (D.D.C. 1967)).

249. *City of Black Jack*, 508 F.2d at 1185; *United Farmworkers*, 493 F.2d at 809.

pact standard that is applied in employment and housing discrimination brought under the civil rights acts.

As in the employment and housing contexts, extensive discrimination against racial minorities pervades the criminal justice system and cries out to be addressed and rectified. To adhere to the status quo of race discrimination in the justice system by enforcing a purpose rather than a disparate impact standard is unconscionable. "Sustained discrimination depends upon institutions and circumstances that disadvantage certain groups without resort to repeated acts of intentional discrimination. The central discrimination issue in the years ahead will be to end the perpetuation of past discrimination that often occurs unknowingly."<sup>250</sup> Intentional discrimination is "notoriously difficult to prove"<sup>251</sup> and puts an immense burden on plaintiffs attempting to prove that discrimination was purposeful. A party's actions often can be disguised through some plausible relation to a legitimate concern. As a result, evidence of discriminatory intent is very difficult to obtain, "whether the responsible individuals are conscious of their bias, and therefore likely to try to hide it, or whether they are expressing unconscious bias through some discretionary decision making process."<sup>252</sup> Therefore, action must be taken either through the courts or the legislature to ensure that disparate impact—not strict intent—is the standard for equal protection claims based upon the underfunding of public defenders.

If legislative action is taken to rectify this injustice against racial minorities in the criminal defense context, the government's actions could be examined under a Title VII shifting of burdens scheme. The appropriate burden of proof allocation, if these cases of government underfunding of public defenders are reviewed under a statutory disparate impact standard,<sup>253</sup> should be a three-step process.<sup>254</sup> First, the

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250. D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 734, 776 (1987).

251. D. Marvin Jones, *The Death of the Employer: Image, Text, and Title VII*, 45 VAND. L. REV. 349, 353 (1992).

252. Welch, *supra* note 250, at 773 (quoting Bartholet, *Proof of Discriminatory Intent Under Title VII: United States Postal Service Bd. of Governors v. Aikens*, 70 CAL. L. REV. 1201, 1202-03 (1982)).

253. If the intent standard of *Washington v. Davis*, 426 U.S. 229 (1976), is employed rather than the more appropriate disparate impact standard, then an allocation of burdens standard that places a substantial burden on the defendant is even more essential. The intent rule allows discriminatory policies to continue because it places the burden of demonstrating motive on the plaintiffs alleging disparate impact. Because it is so difficult to determine a motive the burden should be shifted to the defendant. This need to find the "secret agenda" upon which a decision is based unfairly puts the burden on plaintiffs to "read the minds of decision makers." The discriminatory intent standard allows plaintiffs

plaintiff would be required to establish a prima facie case of discrimination by showing that the challenged practice has a significantly disproportionate impact on minorities.<sup>255</sup> The burden would shift and the defendant would have the burden of “proving”<sup>256</sup> by clear and convincing evidence<sup>257</sup> a compelling, nondiscriminatory reason that explains the conduct.<sup>258</sup> Third, the plaintiff would be given the opportunity to show that other tests or devices would serve the purposes of the defendant without an adverse impact on minorities.<sup>259</sup> Although many different allocation of burden schemes have been advanced, this proposal would best be used for cases involving the underfunding of public defenders offices. It requires that the plaintiff make a clear showing of disproportionate racial impact while simultaneously requiring that the government prove a compelling justification for that discrimination as required under a strict scrutiny standard. In addi-

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to prevail only if they can prove that the decisionmakers made policies based upon factors which they deny. The decisionmaker is in the “better position to produce evidence regarding discriminatory purpose.” Leslie Ann Coleman, Comment, *It's the Thought that Counts: The Intent Requirement in Environmental Racism Claims*, 25 ST. MARY'S L.J. 447, 452 (1993).

254. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975), is a Title VII case which employs a three step process for determining cases of possible discrimination.

255. This is the first step of the *Albermarle* and many other Title VII cases burden of proof allocation. *Id.*

256. It is important that the standard which the plaintiff must satisfy is something like “prove,” “demonstrate,” “show” or “establish” rather than simply “articulate.” The Court has required the plaintiff to do more than just articulate a reason for the conduct in many cases. In *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), the Court indicated that the employer had the burden of “showing” business necessity. The *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977), Court stated that the plaintiff must “show” a prima facie case of discrimination, the employer must “prove” job-relatedness, and the plaintiff must “show” the existence of other selection devices. The Court in *New York City Transit Authority v. Beazer*, 440 U.S. 568, 584 (1979), required the plaintiff to “establish” a prima facie case and the employer’s “demonstration” of job-relatedness. The *Connecticut v. Teal*, 457 U.S. 440, 446-47 (1982), Court required the plaintiff to “show . . . a significantly discriminatory impact” to “establish” a prima facie case and the employer must “demonstrate” job-relatedness. See L. Camille Hebert, *Redefining the Burdens of Proof in Title VII Litigation: Will the Disparate Impact Theory Survive Wards Cove and the Civil Rights Act of 1990*, 32 B.C.L. REV. 1, 67 n.211 (1990).

257. The author advocates a clear and convincing standard of proof so that the government is compelled to make a showing truly supported by the evidence and which is not simply pretextual.

258. A compelling reason is appropriate because that is required under a strict scrutiny standard of review when a suspect class is discriminated against in the exercise of a fundamental right. See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

259. This is the third step of the *Albermarle* allocation of burdens standard, and is a critical prong of such standards in order for the plaintiff to be allowed to propose a less discriminatory alternative which the plaintiff could employ. *Albermarle*, 422 U.S. at 425.

tion, the plaintiff still has an opportunity to advance a better way to achieve the government ends without discriminating.

The legislature has attempted to take action to address racial discrimination in the criminal justice system. The Racial Justice Act, a legislative response to *McCleskey v. Kemp*, was included as part of the House of Representatives 1994 Crime Bill, but was not included in the final Congressional Omnibus Crime Bill.<sup>260</sup> The Racial Justice Act introduced into the House of Representatives by Mr. Edwards of California during March, 1994, proposed “[t]o amend Title 28, United States Code to prevent racially discriminatory capital sentencing.”<sup>261</sup> The Racial Justice Act would allow inmates on deathrow to contest their sentences if statistics showed that capital punishment fell disproportionately upon racial minorities.<sup>262</sup>

The Racial Justice Act offers a disparate impact standard similar to the one used in many other civil rights laws. The standard is that “evidence relevant to establish an inference that race was the basis of

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260. Another version of the Racial Justice Act was introduced in the first session of the 103d Congress by Representative John Conyers. This version specifically changed the Court’s equal protection intent standard for capital sentencing, and was meant “[t]o assure due process and equal protection of the law by permitting the use of statistical and other evidence to challenge the death penalty on the grounds of disproportionate patterns of imposition with respect to racial groups, to prohibit such patterns, and for other purposes.” H.R. 3329, 103d Cong., 1st Sess. (1993). The general principle behind this proposed law was that, “government shall not impose or carry out the penalty of death in criminal cases in a racially disproportionate pattern.” *Id.* at 62(a). A racially disproportionate pattern occurs “when the penalty of death is imposed (1) more frequently upon persons of one race than upon persons of other races convicted of crimes for which such penalty may be imposed; or (2) more frequently as punishment for crimes against persons of one race than as punishment for crimes against persons of another race; and the greater frequency is not explained by relevant nonracial circumstances.” *Id.* at 62(b).

The resolution’s proof requirements specifically designated that “it shall not be necessary to show discriminatory motive, intent, or purpose on the part of any individual or institution.” *Id.* This house resolution therefore clearly rejected the current *Washington v. Davis* equal protection intent standard, and instead imposed a disparate impact burden shifting scheme. Under this scheme, to establish a prima facie showing that a racially disproportionate pattern exists, it may be shown “that death sentences are being imposed or executed upon persons of one race with a frequency that is disproportionate to their representation among the total numbers of persons arrested, charged or convicted of death eligible crimes.” *Id.* at 63(b). “To rebut that prima facie showing of a racially disproportionate pattern, a government must establish by clear and convincing evidence that identifiable and pertinent nondiscriminatory factors persuasively explain the observable racial disparities comprising the disposition.” *Id.* at 63(c). Although this house resolution did not make it out of the Committee of the Judiciary during this Congressional Session, the fact that a law was proposed in Congress to change the *Washington v. Davis* equal protection intent standard and impose a more workable and realistic disproportionate impact standard is an important step in the development of equal protection jurisprudence.

261. H.R. 4017, 103d Cong., 2d Sess. (1994).

262. Bob Cohn, *Buying Off the Black Caucus*, NEWSWEEK, Aug. 1, 1994, at 24.



a death sentence may include evidence that death sentences were . . . being imposed significantly more frequently . . . upon persons of one race than upon persons of another race.”<sup>263</sup> Therefore, an inference of racial discrimination can be established through the use of statistical evidence showing a significant discriminatory racial effect.<sup>264</sup>

The Act is a civil rights measure and adopts evidentiary procedures similar to those employed against racial discrimination in other civil rights laws. It is based on the realization that prosecutors, judges and jurors will rarely if ever admit that they were purposefully discriminatory in seeking or imposing the death sentence in a particular case. The Act allows the use of statistical evidence to establish an inference of racial discrimination.<sup>265</sup>

To prove the influence of race in a particular case, the Act allows courts to consider evidence showing a consistent pattern of racially discriminatory death sentencing in the jurisdiction, taking into account the nature of the cases being compared, the prior records of the offenders, and other appropriate statutorily non-racial characteristics.<sup>266</sup> If the inference that race was the basis of a death sentence is established then the death sentence may not be carried out unless the government rebuts the “inference by a preponderance of the evidence.”<sup>267</sup> If the State shows that pertinent non-racial factors explain the racial disparities or that a particular sentence does not fall within any racially discriminatory pattern or the State can otherwise rebut the inference, then the death sentence will be carried out.<sup>268</sup>

Although the Racial Justice Act passed the House of Representatives, it had little chance of being included in the Congressional Crime Bill negotiated between the House and Senate at a time when the country is so concerned with being “tough on crime.”<sup>269</sup> The Clinton administration, concerned about delaying the entire crime bill, offered to appoint a commission to study racial bias in death sentences rather than support the Racial Justice Act.<sup>270</sup> North Carolina Representative Melvin Watt responded, “I don’t need a commission to tell me the death penalty has been administered in a discriminatory fashion.”<sup>271</sup>

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263. H.R. 4017, 103d Cong., 2d Sess. (1994).

264. *Id.* at § 2921(c).

265. H.R. REP. NO. 458, 103d Cong., 2d Sess. 4 (1994).

266. *Id.* at 1.

267. H.R. 4017, 103d Cong., 2d Sess. § 2921(b) (1994).

268. H.R. REP. NO. 458, 103d Cong., 2d Sess. (1994).

269. Cohn, *supra* note 269, at 24.

270. *Id.*

271. *Id.*

The crime bill has been criticized for failing to address parts of the criminal justice system which disadvantage African-Americans.<sup>272</sup> For example, there is a "severe shortage of high-quality legal help for poor suspects."<sup>273</sup> Also, the war on drugs disproportionately impacts upon inner-city youths.<sup>274</sup> This is evidenced by the fact that blacks have been shown to receive higher sentences for crack-cocaine violations than the sentences given to whites who deal powder cocaine.<sup>275</sup> As Representative Melvin Watt said, "This is not an issue of getting tough on crime. This is a civil rights issue, a decency issue."<sup>276</sup>

The House of Representatives report describing the background of the Racial Justice Act stated,

The Fourteenth Amendment's guarantee of equality under the law is tested most profoundly by whether a legal system tolerates race playing a role in determining who is put to death in carrying out a criminal sentence. Today in America the death penalty is being administered in some jurisdictions in a pattern that evidences a significant risk that the race of the defendant or of the victim influences the imposition of this ultimate penalty. The persistent racial patterns reflected in the implementation of the death penalty in some parts of this nation require Congress to adopt remedial legislation that will counteract the lingering effects of racial bias and enforce the constitutional guarantee of equal justice for all.<sup>277</sup>

Of course this constitutional guarantee of equal justice should not only apply to racially disproportionate capital sentencing but also must apply to all instances of racial discrimination in the criminal justice system. In every criminal case where there is the possibility of incarceration, the basic right to liberty is implicated. Therefore, either the courts or the legislature must take action to address racism in our criminal justice system in all forms, including the underfunding of public defenders which disproportionately denies racial minorities their fundamental right to effective counsel.

### VIII. Proposals

The Court should relax the *Washington v. Davis* strict intent requirement for cases challenging the underfunding of public defender

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272. Ted Guest, *Crime's Bias Problems*, U.S. NEWS & WORLD REPORTS, July 25, 1994, at 32.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. H.R. REP. NO. 458, 103d Cong., 2d Sess. (1994).

offices due to the negative impact that underfunding has upon the legal representation of racial minorities. The current intent standard makes it almost impossible to challenge this discrimination within the criminal justice system. A more appropriate legal standard for the Court to adopt is either a disparate impact or burden-shifting scheme which would allow plaintiffs to prove that their racial group was being disparately impacted without having to prove actual intent to discriminate. If the courts will not adopt this more realistic, fairer standard of proof, Congress must lower the required standard of proof as it has in the employment and housing contexts. The impact upon racial minorities of the underfunding of public defender offices nationwide has substantial civil rights implications and Congress should take legislative action if the Court refuses to act. If the underfunding of public defenders is ruled unconstitutional, either as a result of judicial or legislative action, then there would be a constitutional mandate for proper funding.

Of course, the best way to correct the problem of racial minorities being disproportionately denied their fundamental right to counsel would be to actually ensure effective counsel for all indigent defendants by providing adequate resources for every public defender office. Public defender systems deserve the same support that other parts of the criminal justice system receive in order to ensure real justice. If more money is going to be spent on police, jails and prosecutors' offices to fight a "war on drugs" or a "war on crime," then there must also be a corresponding increase in funding for public defender offices in order to represent the increasing number of people who will be arrested and charged with crimes.

As Chief Justice Burger explained at the 1971 ABA Annual Meeting, the criminal justice system is like "a three-legged stool comprised of the courts, prosecution, and defense, within each leg needing equal funding to maintain proper balance."<sup>278</sup> In its frenzy to stop violence and crime, this country is ignoring the rights of criminal defendants. As Robert B. Remar of the American Civil Liberties Union noted, "The root problem is that government, and I guess society in general, does not recognize the fact that the resources that go into protecting constitutional rights ought to be equal to those that go into prosecuting crimes."<sup>279</sup>

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278. Dean Trebesch, *New Challenges in Indigent Defense*, 29 NOV. ARIZ. ATT'Y 25 (1992).

279. Applebome, *supra* note 58, at B5.

The integrity and constitutionality of the entire criminal justice system collapses when both sides are not given sufficient resources to accomplish their roles effectively. Therefore, an equalized re-distribution of the resources must be available within the justice system. One state, Tennessee, links prosecution and indigent defense funding by requiring that "any increase in the number of authorized assistant district attorney positions or increase in local funding for positions or office expense[s] shall be accompanied by an increase in funding of seventy-five percent (75%) to the office of the public defender."<sup>280</sup>

It has been suggested that if the government is not going to take responsibility and do something about this crisis in indigent defense, the legal profession itself has a duty to provide help.<sup>281</sup> For instance, bar associations could require all lawyers licensed in a particular state to pay an annual fee which would be used to hire lawyers who could represent indigent defendants.<sup>282</sup> After all, a "mechanism . . . is already in place" to collect such fees because "every state now requires that lawyers actively practicing in that state to pay annual or biennial registration fees or dues."<sup>283</sup> Further, a state bar association agency could be appointed to determine the amount needed to subsidize the public defender agency in that state.<sup>284</sup> Although lawyers may complain that this is unfair and the expense should be shared equally by taxpayers, it has been said that,

[l]awyers . . . are especially qualified to recognize deficiencies in the delivery of legal services and realize the need to insure constitutional and professional standards in the defense of all. The legal profession, having a monopoly on the provision of legal services, has the burden to insure that everyone whose liberty is at stake receives competent representation.<sup>285</sup>

Additional funding also could come from the interest accrued by Lawyers Trust Accounts.<sup>286</sup> Lawyers secure their clients funds by placing either small amounts of money or money expected to be held for a short time in aggregated non-interest-bearing trust accounts for future use.<sup>287</sup> The funds belong to the clients, so the lawyer may not receive any interest and banks where the money is deposited use the

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280. Klein & Spangenberg, *supra* note 32, at 16.

281. Klein, *supra* note 61, at 687-88.

282. *Id.* at 686.

283. *Id.*

284. *Id.* at 686-87.

285. *Id.* at 687-88.

286. *Id.* at 688.

287. *Id.*

funds without payment of interest.<sup>288</sup> In the early 1980's, many Interest on Lawyers' Trust Accounts (IOLTA)<sup>289</sup> programs were created which combined trust accounts and used the interest from those accounts to subsidize civil legal service programs.<sup>290</sup> This money could be used to help subsidize criminal defense systems as well.<sup>291</sup>

Others have suggested that the Bar should certify indigent defense work as pro bono and allow qualified lawyers to handle pro bono overflow cases so that public defenders could represent fewer clients more effectively.<sup>292</sup> The Bar could implement more appropriate caseload guidelines and attorney salaries to assure adequate representation to indigent defendants.<sup>293</sup> More attempts at diversion programs and other means of punishment for non-violent crimes also should be explored instead of long prison terms and full prosecution.<sup>294</sup> Some of these alternatives to incarceration include: intensive probation, restitution, house arrest/ electronic bracelets, drug treatment programs, boot camps, work programs, and community service programs.<sup>295</sup> Efforts to modify sentencing guidelines to reverse the national trend over the last decade of adopting mandatory minimums and habitual offender laws also would decrease the burden placed upon public defenders and the courts and correctional facilities.<sup>296</sup> Minor misdemeanors could also be decriminalized and treated as infractions.<sup>297</sup> Also, prosecutors should be given discretion to charge certain non-violent misdemeanors as civil infractions so that counsel and a jury trial would not be necessary.<sup>298</sup>

There also have been attempts to gain additional sources of funding for public defense systems. Many states now are using a "mixed" funding system for their indigent defense services.<sup>299</sup> Under such a

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288. *Id.* at 688-89.

289. *Id.* at 689. Interest on Lawyers' Trust Accounts (IOLTA) existed in forty-one states and the District of Columbia as of 1981.

290. *Id.*

291. Unfortunately, the money currently raised from IOLTA accounts is not even sufficient to address the needs of all the civil legal service programs that require it, so dividing this limited resource even further could create a new funding crisis.

292. Trebesch, *supra* note 278, at 28. There is some concern regarding the effectiveness of the assistance given under such a system especially because a majority of lawyers who might be available to take on such a pro bono case would likely be civil lawyers.

293. *Id.*

294. *Id.*

295. Klein & Spangenberg, *supra* note 32, at 22.

296. *Id.* at 21.

297. *Id.* at 20.

298. *Id.*

299. John B. Arango, *Defense Services for the Poor*, CRIM. JUST., Spring 1990, at 33.

system, general fund appropriations for indigent defense are supplemented with fees or add-on court costs. Tennessee, for example, has added on \$6 to all major court costs to replace a general fund appropriation.<sup>300</sup> Other states have proposed taxes on liquor to help fund indigent defense systems since "alcohol is often a contributing cause of crime."<sup>301</sup> A legislative provision in Washington allows some counties to increase local sales taxes by 1/10 of one percent to support local criminal justice services.<sup>302</sup> At least six states have considered assigning a percentage of the forfeited funds from drug cases to indigent defense.<sup>303</sup> However they do it, the federal, state, city and county governments must find ways either to allocate enough money for indigent defense services themselves or help pass other taxes that will ensure public defenders adequate resources to provide effective assistance.

There also has been a great deal of emerging litigation in this area to try to force the courts to correct the "systematic deficiencies in indigent programs."<sup>304</sup> Indeed, there have been cases challenging everything from excessive caseloads in public defender offices to insufficient funding for assigned counsel.<sup>305</sup> Affirmative litigation by public defenders' clients also has been suggested on the grounds that they are systematically being denied their constitutional right to effective assistance of counsel because of insufficient funding.<sup>306</sup> This type of affirmative litigation also could be brought on behalf of indigent defendants of color who have both a valid Sixth Amendment right to counsel claim and Fourteenth Amendment equal protection claim.<sup>307</sup>

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300. *Id.*

301. *Id.*

302. Klein & Spangenberg, *supra* note 32, at 16.

303. *Id.* at 17.

304. Arango, *supra* note 299, at 33.

305. *Id.*

306. For instance, in *State v. Smith*, 681 P.2d 1374 (Ariz. 1984), the Mohave County indigent defense system was challenged as systematically denying effective assistance of counsel. The Arizona Supreme Court said, "It is obvious that the caseload of the defendant's attorney was excessive, if not crushing." *Id.* at 1380. In response to this case, public defenders in several counties in Arizona have been successful in limiting the caseloads of individual public defenders to conform to the NAC [National Advisory Council] numerical limits. Klein & Spangenberg, *supra* note 32, at 17. *See also*, Klein, *supra* note 25, at 408.

307. After the decision in *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992), these cases for affirmative relief may be barred in federal courts because of the abstention doctrine. In *Luckey*, a class action was brought in federal court to challenge the adequacy of Georgia's indigent criminal defense system under the Sixth, Eighth and Fourteenth Amendments. The Eleventh Circuit Court of Appeals held that a federal court should refrain from interfering with a state court's administration of its criminal justice system. The court held that "[a]bstention from interference in state criminal proceedings served the vital consideration of comity between state and national governments." *Luckey*, 976 F.2d at 676.

There also may be some ways in which public defenders' offices can use the money they do get more effectively for their clients. One cost-saving experiment is a horizontal representation system in which defendants are processed by different lawyers at each stage of their proceedings. The public defender is assigned to a particular courtroom instead of a case, and that attorney is responsible for all the cases which appear in the courtroom on a particular day.<sup>308</sup> The defender only has contact with the client at one stage of the proceeding.

However, this system has been criticized because it makes it difficult to establish good working relationships and develop trust with clients when they are continuously shuffled from attorney to attorney.<sup>309</sup> Moreover, it prevents the defense from developing a comprehensive strategy because the public defenders never get a chance to see "the whole picture."<sup>310</sup> Under a horizontal representation system, one defendant may have to deal with two to three to a dozen or more attorneys during the case.<sup>311</sup> Whatever the merits of a horizontal as opposed to the traditionally prevalent vertical system of representation, it seems clear that the best solution would be for public defenders' offices to have sufficient resources to provide each client with a lawyer who has enough time and resources to represent each defendant competently.

Some increase in the resources provided to public defender systems is an absolute necessity. Without enough money, any attempts at effective representation are doomed to fail. "The Constitutional rights that protect all citizens will become meaningless if there are not enough competent defense attorneys to insist on their application in every case."<sup>312</sup> If indigent defense attorneys are forced to continue practicing in such desperate situations without proper resources, the promises of *Gideon* seem destined to go unfulfilled and basic constitutional rights will continue to be violated. As Professor Deborah L. Rhode stated, "We want to subscribe to equal justice in principle, but

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308. Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 484 (1982).

309. It has been said of horizontal representation that, "Whatever the relative economics, there are serious costs in terms of the legal representation provided. This system may on occasion contribute to serious errors, and even to incompetent representation, either because it discourages personal responsibility or simply because important information cannot be gleaned from the notes made by the attorney who last had the file." Mounts, *supra* note 308, at 484.

310. Goldberg & Hartman, *supra* note 13, at 10.

311. Mounts, *supra* note 308, at 484.

312. Trebesch, *supra* note 278, at 28 (quoting Barbara R. Levine, *Funding Indigent Criminal Defense in Michigan*, 71 MICH. BAY J. 148 (1992)).

we have no intention of providing resources to make it a reality."<sup>313</sup> Without adequate resources there will continue to be unequal justice in this country, and the constitutional guarantees of effective assistance of counsel and equal protection of the laws will not be provided. As the ABA Standing Committee on Legal Aid and Indigent Defendants advised, "We must be willing to put our money where our mouth is; we must be willing to make the constitutional mandate a reality."<sup>314</sup>

### Conclusion

Chief Justice Harold Clark of the Georgia Supreme Court said in 1992, "We need to remember that if the state can deny justice to the poor, it has within its grasp the power to deny justice to anybody."<sup>315</sup> How a society protects the rights of the most disenfranchised and vulnerable segments of its population reflects the strength of the entire system. In this country, we are failing miserably in our representation of the poor and of racial minorities.

The underfunding of public defender offices rises to extreme constitutional dimensions because racial minorities—the class afforded the highest scrutiny protection—are the people who disproportionately are being denied their fundamental right to counsel. A standard which will be truly enforced must be implemented in order to enable the courts to properly evaluate the situation. If racial minorities must show a disparate impact instead of purposeful discrimination in the employment context, then certainly that same disparate impact standard should suffice in the fundamental right to counsel context. The purposeful discrimination standard currently employed is erroneous because it does not account for the invidious nature of racism in this country and does not truly protect the rights of racial minorities against discrimination. This note has outlined problems with the purposeful discrimination doctrine, and it appears that a disparate impact standard, like the one used in the Title VII employment discrimination cases and advanced by the legislature in the Racial Justice Act, would be a much more appropriate means by which to evaluate the indigent defense system. The government should have to justify its policy of underfunding public defenders and denying racial minorities

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313. James Podgers, *Chasing the Ideal: As More Americans Find Themselves Priced Out of the System, the Struggle Goes on to Fulfill the Promise of Equal Justice For All*, ABA JOURNAL, August 1994, at 57-58.

314. Klein & Spangenberg, *supra* note 32, at 10 (quoting American Bar Association and the National Legal Aid and Defender Association, *Gideon Undone! The Crisis in Indigent Defense Funding* (1982))

315. Smolowe, *supra* note 22.



their fundamental right to counsel under a disparate impact strict scrutiny analysis and be forced to provide a compelling reason for this discrimination.

Thirty years ago, the right to counsel was guaranteed in *Gideon*. Now that right is in severe jeopardy due to dire underfunding. Racial minorities are disproportionately poor, disproportionately incarcerated and now disproportionately the victims of ineffective assistance of counsel because public defenders do not have sufficient resources. Some action must be taken to ensure that indigent defense systems have adequate funding to provide effective assistance. The Sixth Amendment right to counsel, the Fourteenth Amendment equal protection doctrine and the integrity of the entire criminal justice system are at stake.