March 2016

Equal Protection: Access to Justice and Fairness in the American Criminal Justice System?

James M. Durant III

Follow this and additional works at: https://via.library.depaul.edu/jsj

Recommended Citation
Available at: https://via.library.depaul.edu/jsj/vol8/iss2/8

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal for Social Justice by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
Access to justice and fairness in the criminal justice system are the hallmarks of American jurisprudence. A system that is well grounded, in writing, upon sacred principles first enunciated in certain Articles of the Magna Carta (June 1215), and later in the black letter language of the 14th Amendment of the Constitution of the United States (July 1868):

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof

---

Mr. Durant is Chief Counsel for the U.S. Department of Energy, Office of Science. Prior to his appointment at the U.S. Department of Energy, Mr. Durant served in the United States Air Force as a Judge Advocate for over two decades, including two assignments as a special assistant US Attorney, wherein he prosecuted 100s of cases sustaining a high conviction rate. In Bosnia-Herzegovinian, Mr. Durant served as an international commissioner (judge) where he presided over international war claims cases. Mr. Durant is a former US Air Force Academy law professor and Deputy Department Head. In 2013, Mr. Durant retired from the military at the rank of full Colonel (O-6) to accept his current appointment with the U.S. Department of Energy. The commentary expressed herein is solely that of the author, and do not reflect the views or policy of the U.S. Department of Energy or the U.S. Air Force.

1 Article 38 of the Magna Carta reads, “In Future[the] future no official shall put anyone to trial merely on his own testimony, without reliable witnesses produced for this purpose.” The US Constitution IV Amendment grants a right against self-incrimination. Article 39 reads, No freeman shall be arrested or imprisoned or deprived of his freehold or outlawed or banished or in any way ruined, nor will we take or order action against him, except by the lawful judgment of his equals and according to the law of the land.” The US Constitution VI Amendment grants a right to a trial by an impartial jury of one’s peers. Magna Carta, June 15, 1215, art. 138 (U.K.).
are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws. US Const. Section 1, 14th Amendment

An idealistic and universally balanced and principled Amendment; but, are some US citizens systematically and intentionally denied those “privileges or immunities of citizens of the United States?” As such, the fundamental question is whether Section 1 of the 14th Amendment has in actuality protected the rights and privileges of all American citizens equally. Does the Equal Protection Clause dictate in the clearest sense what it means to be an American citizen; i.e., what protections under law are afforded based upon citizenship? Is it arguably a protective measure for all American citizens? Does it adequately guide those empowered under the color of State law to enforce the laws of their jurisdictions equally across race, ethnicity, religion, gender, class, etc.? Or does it shed a blind eye to some jurisdictions, granting them wide latitude and unbridled discretion to act as they see fit or as they believe appropriate, no matter the facts or the circumstances of the issue they are legally and ethically empowered to resolve?

The undebatable and undeniable answer to the basic question of equal access to justice and fairness in the criminal justice system to all American citizens is a resounding “No.” A simple dance through recent history depicts, in the most lucent fashion, an unfortunate and quite lengthy landscape of unequaled access to justice and abject unfairness in the criminal justice system as it applies to a substantial segment of the American population. However, there are many examples of justifiable equity in judi-

---

2 U.S. Const. amend XIV, § 1.
cial discretion, or as some would call it, judicial balance. Our high court has, on occasion, actually reversed itself and halted a system of wrongdoing, e.g., *Plessy v. Ferguson* and *Brown v. Board of Education of Topeka*. Unfortunately, throughout American history, that element of balance has not always been the trial or case result from those honored tribunals, courts, juries, boards of review, etc., and fairness or equity seems to have been relegated only to aspirational goals which awaited the finest hour upon which manifest justice would reign supreme with fairness and equity for all American citizens. The status of affairs, or the unfortunate result of this root cause, is best evident from 1896 to circa 1968, wherein a substantial group of American citizens numbering well over 18,000,000\(^5\) endured an unfor-

---

3 *Plessy v. Ferguson*, (1896) 163 U.S. 537, 544 (1896), "The object of the amendment (14th Amendment US Const.) was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power..." Justice J. Brown, Opinion of the Court

4 Board of Education, (1954 and 1955) 347 U.S. 483; "Segregation of white and Negro children in the public schools of a State solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment - even though the physical facilities and other "tangible" factors of white and Negro schools may be equal." *Brown v. Pp. 486-496 Board of Education*, 347 U.S. 483, 494 (1954).

tunate and continued subordinated citizen status across the United States. For these Americans, the 14th Amendment was but a mere hope, or a dream for Equal Justice Under Law. They had yet begun to fully enjoy the true protection of the 14th Amendment; we called that status, “Jim Crow,” or as it is called today, the New Jim Crow. Despite the 14th Amendment’s


Jim Crow was the name of the racial caste system, which operated primarily, but not exclusively in southern and border states between 1877 and the mid-1960s. Jim Crow was more than a series of rigid anti-black laws. It was a way of life. Under Jim Crow, African Americans were relegated to the status of second class citizens. Jim Crow represented the legitimization of anti-black racism. Many Christian ministers and theologians taught that whites were the Chosen people, blacks were cursed to be servants, and God supported racial segregation. Craniologists, eugenicists, phrenologists, and Social Darwinists, at every educational level, buttressed the belief that blacks were innately intellectually and culturally inferior to whites. Pro-segregation politicians gave eloquent speeches on the great danger of integration: the mongrelization of the white race. Newspaper and magazine writers routinely referred to blacks as niggers, coons, and darkies; and worse, their articles reinforced anti-black stereotypes. Even children’s games portrayed blacks as inferior beings (see “From Hostility to Reverence: 100 Years of African-American Imagery in Games”). The Jim Crow system was undergirded by the following beliefs or rationalizations: whites were superior to blacks in all important ways, including but not limited to intelligence, morality, and civilized behavior; sexual relations between blacks and whites would produce a mongrel race which would destroy America; treating blacks as equals would encourage interracial sexual unions; any activity which suggested social equality encouraged interracial sexual relations; if necessary, violence must be used to keep blacks at the bottom of the racial hierarchy. All major societal institutions reflected and supported the oppression of blacks. Jim Crow etiquette operated in conjunction with Jim Crow laws (black codes). When most people think of Jim Crow they think of laws (not the Jim Crow etiquette) which excluded blacks from public transport and facilities, juries, jobs, and neighborhoods. The passage of the 13th, 14th, and 15th Amendments to the Constitution had granted blacks the same legal protections as whites. However, after 1877, and the election of Republican Rutherford B. Hayes, southern and border states began restricting the liberties of blacks. Unfortunately for blacks, the Supreme Court helped undermine the Constitutional protections of blacks with the infamous Plessy v. Ferguson (1896) case, which legitimized Jim Crow laws and the Jim Crow way of life. Dr. David Pilgrim, Professor of Sociology, Ferris Stated University (2012), www.ferris.edu

Volume 8, Number 2 Spring 2015

https://via.library.depaul.edu/jsj/vol8/iss2/8
promise of life and liberty under the law, this group of Americans found themselves subject to another law, known as the "Jim Crow Laws." Though the reprehensible Jim Crow era has passed, many may observe our current state of affairs and reach

7 According to Dr. David Pilgrim at Ferris State University, "Jim Crow was the name of the racial caste system which operated primarily, but not exclusively in southern and border states, between 1877 and the mid-1960s. Jim Crow was more than a series of rigid anti-black laws. It was a way of life. Under Jim Crow, African Americans were relegated to the status of second class citizens. Jim Crow represented the legitimization of anti-black racism. Many Christian ministers and theologians taught that whites were the Chosen people, blacks were cursed to be servants, and God supported racial segregation. Craniologists, eugenicists, phrenologists, and Social Darwinists, at every educational level, buttressed the belief that blacks were innately intellectually and culturally inferior to whites. Pro-segregation politicians gave eloquent speeches on the great danger of integration: the mongrelization of the white race. Newspaper and magazine writers routinely referred to blacks as niggers, coons, and darkies; and worse, their articles reinforced anti-black stereotypes. Even children's games portrayed blacks as inferior beings. . . .

All major societal institutions reflected and supported the oppression of blacks. The Jim Crow system was undergirded by the following beliefs or rationalizations: whites were superior to blacks in all important ways, including but not limited to intelligence, morality, and civilized behavior; sexual relations between blacks and whites would produce a mongrel race which would destroy America; treating blacks as equals would encourage interracial sexual unions; any activity which suggested social equality encouraged interracial sexual relations; if necessary, violence must be used to keep blacks at the bottom of the racial hierarchy. . . . Jim Crow etiquette operated in conjunction with Jim Crow laws (black codes). When most people think of Jim Crow they think of laws (not the Jim Crow etiquette) which excluded blacks from public transport and facilities, juries, jobs, and neighborhoods. The passage of the 15th, 14th, and 15th Amendments to the Constitution had granted blacks the same legal protections as whites. However, after 1877, and the election of Republican Rutherford B. Hayes, southern and border states began restricting the liberties of blacks. Unfortunately for blacks, the Supreme Court helped undermine the Constitutional protections of blacks with the infamous Plessy v. Ferguson (1896) case, which legitimized Jim Crow laws and the Jim Crow way of life." David Pilgrim, What was Jim Crow, Ferris State University Jim Crow Museum of Racist Memorabilia (2012), available at http://www.ferris.edu/jimcrow/what.htm
the conclusion that we have simply entered the era of the New Jim Crow.\textsuperscript{8}

How do we explain, for example, numerous American public schools being racially segregated, black and white, by operation of law from 1896 to 1969?\textsuperscript{9} Surprisingly, some schools were


\textsuperscript{9} "The problem was that in the 1960s, most black Mississippians really did not have freedom of choice. Between 1964 and 1969, black parents who chose white schools for their children were subjected to numerous forms of intimidation: some were pressured or fired by their employers; some lost their housing; some lost their credit at the local bank; and others received threatening phone calls, had crosses burned on their lawns, or were victims of physical intimidation. In 1968, largely because of the continuing resistance of white Southerners to school desegregation, the Supreme Court ruled in Green v. County School Board of New Kent County: It was such dual systems that, 14 years ago, Brown I held unconstitutional, and, a year later, Brown II held must be abolished; school boards operating such school systems were required by Brown II "to effectuate a transition to a racially nondiscriminatory school system." 349 U.S. at 301. It is, of course, true that, for the time immediately after Brown II, the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. . ..In determining whether respondent School Board met that command by adopting its "freedom of choice" plan, it is relevant that this first step did not come until some 11 years after Brown I was decided and 10 years after Brown II directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." Watson v. City of Memphis, supra, at 529; see Bradley v. School Board, supra; Rogers v. Paul, 382 U.S. 198. Moreover, a plan that, at this late date, fails to provide meaningful assurance of prompt and effective desegregation of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," Griffin v. County School Board, 377 U.S. 218, 234; "the context in which we must interpret and apply this language [of Brown II] to plans for desegregation has been significantly altered." [p439]Goss v. Board of Education, 373 U.S. 683, 689. See Calhoun v. Latimer, 377 U.S. 

Volume 8, Number 2 Spring 2015
however actually desegregated since the mid-1950’s.\textsuperscript{10} What

263. The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.” Green v. County School Board, 391 U.S. 430 Cornell University Law School Green v. County School Board of Kent County; www.law.cornell.edu/supremecourt /tet/391/430

In October 1969, the Supreme Court essentially said enough is enough, and in a landmark decision involving thirty Mississippi school districts, \textit{Alexander v. Holmes}, the court ordered the immediate termination of dual school systems and the establishment of unitary ones. Thus, many Mississippi school districts had to begin the complete integration of their school systems in mid-year, during January and February of 1970.” Charles Bolton

\textsuperscript{10} The problem was that in the 1960s, most black Mississippians really did not have freedom of choice. Between 1964 and 1969, black parents who chose white schools for their children were subjected to numerous forms of intimidation: some were pressured or fired by their employers; some lost their housing; some lost their credit at the local bank; and others received threatening phone calls, had crosses burned on their lawns, or were victims of physical intimidation. In 1968, largely because of the continuing resistance of white Southerners to school desegregation, the Supreme Court ruled in Green “It was such dual systems that, 14 years ago, \textit{Brown I} held unconstitutional, and, a year later, \textit{Brown II} held must be abolished; school boards operating such school systems were required by \textit{Brown II} “to effectuate a transition to a racially nondiscriminatory school system. . . It is, of course, true that, for the time immediately after \textit{Brown II}, the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. . .In determining whether respondent School Board met that command by adopting its "freedom of choice" plan, it is relevant that this first step did not come until some 11 years after \textit{Brown I} was decided and 10 years after \textit{Brown II} directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine. . .Moreover, a plan that, at this late date, fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere ‘deliberate speed’ has run out.” \textit{Green v. County School Board of New Kent County}, 349 U.S. 301, 435-38. In October 1969, the Supreme Court essentially said enough is enough and, in a landmark decision in \textit{Alexander v. Holmes}, involving thirty Mississippi school districts, the court ordered the immediate termination of dual school systems and the establishment of unitary ones. \textit{Alexander v. Holmes} 396 U.S. 19, 20 (1969). The result was that many Mississippi school districts were forced to begin integration in 1970.

Volume 8, Number 2 Spring 2015
about de facto re-segregation today in which, "just over 10 percent of white students attend schools that have a predominately minority population...[and] over 37 percent of black and Latino students attend 90-100 percent minority schools?" How do we explain pernicious miscegenation laws in effect up to

11 The full text of this statistic, quoted in a book by Charles Ogletree reads: "The effective compromise reached in the United States at the close of the twentieth century is that schools may be segregated by race as long as it is not due to direct government fiat. Furthermore, although Brown I emphasized that equal educational opportunity was a crucial component of citizenship, there is no federal constitutional requirement that pupils in predominantly minority school districts receive the same quality of education as students in wealthier, largely all-white suburban districts. At the start of the twenty-first century, the principle of Brown seems as hallowed as ever, but its practical effect seems increasingly irrelevant to contemporary public schooling. Indeed, the United States has been in a period of re-segregation for some time now. Resegregation is strongly correlated with class and with poverty. Today, white children attend schools where 80 percent of the student body is also white, resulting in the highest level of segregation of any group. Only 15 percent of segregated white schools are in areas of concentrated poverty; over 85 percent of segregated black and Latino schools are [in areas of concentrated poverty]. Schools in high poverty areas routinely show lower levels of educational performance; even well-prepared students with stable family backgrounds are hurt academically by attending such schools. U.S. public schools as a whole are becoming more nonwhite as minority enrollment approaches 40 percent of all students, nearly twice the percentage in the 1960s. In the western and southern regions of the country, almost half of all students are minorities. In today's schools, blacks make up only 8.6 percent of the average white student's school, and just over 10 percent of white students attend schools that have a predominately minority population. Even more striking is the fact that over 37 percent of black and Latino students attend 90-100 percent minority schools." CHARLES OGETREE, ALL DELIBERATE SPEED, Professor Charles Ogletree, W.W. Norton & Co. 384 (2004).

12 Miscegenation; "Sexual is defined as sexual relations or marriage between people of two different races (such as a white person and a black person)"). MISCEGENATION, MERRIAM-WEBSTER. DICTIONARY, 2015, http://www.merriam-webster.com/dictionary/miscegenation. "In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959,
1967? Further, how do we explain the subtle, often outright, and often over-looked illegal practice of racial exclusionary jury empanelment practices that excluded certain American citizens based solely upon race up until the 1980s. Even worst, how do we explain a continued practice, once in law, of Americans of African descent not being allowed to testify against Americans of European descent in a duly constituted court of law, prevalent up until the 1950s? Last, how do we explain legally enforced disenfranchisement across a wide spectrum against

the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." Loving v. Virginia, 388 U.S. 1, 3 (1967).

Virginia’s statutory scheme to prevent marriages between persons solely on the basis of racial classification held to violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment.( Pp 4-12, 1967).

13 Batson v. Kentucky, 476 U.S. 79 (1986)(Powell, J.): In a 7–2 decision, the Court held that, while a defendant is not entitled to have a jury completely or partially composed of people of his own race, the state is not permitted to use its peremptory challenges to automatically exclude potential members of the jury because of their race. “The Equal Protection Clause guarantees the defendant that the state will not exclude members of his race from the jury venire on account of race or on the false assumption that members of his race as a group are not qualified to serve as jurors.” “The 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.” A defendant in a criminal case can make an Equal Protection claim based on the discriminatory use of peremptory challenges at a defendant’s trial. Once the defendant makes a showing that race was the reason potential jurors were excluded, the burden shifts to the state to come forward with a race-neutral explanation for the exclusion. 

Unites States Courts

certain American citizens? We just witnessed the eroding of a protection against disfranchisement with the Shelby15 case. The common denominator with the preceding examples, and others, is that the 14th Amendment was in full force and effect during a period of time when de jure discrimination existed across the United States. Suffice it to say, a simple reading of some decisions from US Supreme Court and state supreme courts will show a marked departure from Section 1 of the 14th Amendment, or a valid indictment on the applicable selectivity or deniability of the Equal Protection Clause of the US Constitution. Fortunately, all is not bleak; time has witnessed the element of fairness, and this element of fairness has appeared to manifest its head and meaning, but the elements of politics have seemed to dictate this particular change in the American rule of law, some call it being politically correct. Not surprisingly, we have and will continue to witness maturation in the application of the 14th Amendment. The unfortunate truth of the matter is that these questions and others will continue to haunt the halls of justice as we interpret the true meaning of fairness and equal access to justice, for all Americans.

But what about equal protection today? We are arguably no longer under Jim Crow or de jure discrimination; however, unfortunately and regrettably, we are presently realizing manifest de facto discrimination, or the new Jim Crow.16 Today's statistics and trends detail and depict a sustained process of de facto discrimination, as well as a continued departure from Section 1 of the 14th Amendment, which is a regrettable unfairness.

Here are a few statistics:

15 Shelby CountyCnty., Ala v. Holder, 186 L. Ed. 2d 651 (2013), holding that Section 4 of the Voting Rights Act is unconstitutional; its formula can no longer be used as a basis for subjecting jurisdictions to preclearance, 570 U.S. ___ (2013).
Pipeline school to prison: 17 Forty (40%) percent of students expelled from US schools each year are Americans of African descent; 70% percent of students involved in “in-school” arrest or referred to law enforcement are Americans of African descent or Latino; American students of African descent are 3.5 times more likely to be suspended than Caucasian students (Community Coalition). According to the US Department of Education Office for Civil Rights, African American preschoolers (ages 4 and 5) constitute almost 50% percent of school suspensions for preschoolers. 18 To further shed light upon the dilemma, let’s look at the number of African American males in the United States alone: 6.5% (US percent (U.S. Census Bureau (V2013)), and compare this to the percentage of African American males in US Prisons, 19 over 40% percent. 20 What about the denial of

17 "Students from two groups—racial minorities and children with disabilities—are disproportionately represented in the school-to-prison pipeline. African-American students, for instance, are 3.5 times more likely than their white classmates to be suspended or expelled, according to a nationwide study by the U.S. Department of Education Office for Civil Rights. Black children constitute 18 percent of students, but they account for 46 percent of those suspended more than once." The School-to-Prison Pipeline, Teaching Tolerance, A Project of the Southern Poverty Center, #Issue Number 43, Spring 2013, available at http://www.tolerance.org/magazine/number-43-spring-2013/school-to-prison.

18 "Across all grade levels, black students represent about 16 percent of the overall student population, but are 32 to 42 percent of students who face out-of-school suspension, 27 percent of students referred to law enforcement and 31 percent of students who experience a school-related arrest. Black students are suspended or expelled at a rate three times higher than white students. Twenty percent of black boys and 12 percent of black girls face out-of-school suspensions" Mychal Denzel Smith, The School-to-Prison Pipeline Starts in Preschool, March 31, 2014 The Nation (March 31, 2014), available at http://www.thenation.com/blog/179064/school-prison-pipeline-starts-preschool#.

19 Racial Disparities in Incarceration: NAACP Report: African Americans now constitute nearly 1 million of the total 2.3 million incarcerated population African Americans are incarcerated at nearly six times the rate of whites. Together, African American and Hispanics comprised 58% of all prisoners in 2008, even though African Americans and Hispanics make up approximately one quarter of the US population According to Unlocking America, if African American and Hispanics were incarcerated at the same rates of whites,
right to vote for those convicted for felonious crimes; according to the National Conference of State Legislatures, “5,300,000 Americans were unable to vote due to a felony conviction in the 2008 elections; this included 1,400,000 male Americans of African descent, 676,000 women and 2,100,000 ex-offenders who completed their sentences.”

Evaluate the number of Amer-

today’s prison and jail populations would decline by approximately 50% One in six black men had been incarcerated as of 2001. If current trends continue, one in three black males born today can expect to spend time in prison during his lifetime 1 in 100 African American women are in prison Nationwide, African-Americans represent 26% of juvenile arrests, 44% of youth who are detained, 46% of the youth who are judicially waived to criminal court, and 58% of the youth admitted to state prisons (Center on Juvenile and Criminal Justice). NAACP 2015 www.naacp.org/pages/criminal-justice-fact-sheet

Racial Disparities in Incarceration: NAACP Report: African Americans now constitute nearly 1 million of the total 2.3 million incarcerated population African Americans are incarcerated at nearly six times the rate of whites Together, African American and Hispanics comprised 58% of all prisoners in 2008, even though African Americans and Hispanics make up approximately one quarter of the US population According to Unlocking America, if African American and Hispanics were incarcerated at the same rates of whites, today’s prison and jail populations would decline by approximately 50% One in six black men had been incarcerated as of 2001. If current trends continue, one in three black males born today can expect to spend time in prison during his lifetime 1 in 100 African American women are in prison Nationwide, African-Americans represent 26% of juvenile arrests, 44% of youth who are detained, 46% of the youth who are judicially waived to criminal court, and 58% of the youth admitted to state prisons. Criminal Justice Fact Sheet, NAACP.ORG (2015), available at www.naacp.org/pages/criminal-justice-fact-sheet

Categories of Disenfranchisement

State approaches to felon disenfranchisement vary tremendously. In Maine and Vermont, felons never lose their right to vote, even while they are incarcerated. In Florida, Iowa, Kentucky, and Virginia, felons and ex-felons permanently lose their right to vote, without a pardon from the governor. Virginia and Florida have supplementary programs which facilitate gubernatorial pardons. The remaining 45 states have 45 different approaches to the issue. In 38 states and the District of Columbia, most ex-felons automatically gain the right to vote upon the completion of their sentence. In some states, ex-felons must wait for a certain period of time after the completion of their sentence before rights can be restored. In some states, an ex-felon must apply to have voting rights restored. Felon Voting Rights, NATIONAL CONFERENCE
can citizens who have little choice but to be represented by an already overworked Public Defender system?\textsuperscript{22} What is the conviction rate to those represented by independent and private counsel?\textsuperscript{23} Consider the now infamous Stand Your Ground legislation, which garnered national attention in 2012 when a 17-year-old African American teenager was fatally shot by a man who successfully used Florida’s Stand Your Ground statute as a defense after he perfected the very circumstances that presumptively warranted in his mind the use of his weapon. Of particular note is the Stand Your Ground legislation’s success rates for Caucasian males versus that of African American males. According to the American Bar Association, 2013 Task Force on Stand Your Ground legislation, 38 percent of Caucasians were able to successfully use Stand Your Ground laws when they killed an American of African descent; compare this to just 3 percent of Americans of African descent who successfully used Stand Your Ground legislation as an affirmative defense after

\textsuperscript{22} In State prisons, while 69\% of white inmates reported they had lawyers appointed by the court, 77\% of blacks and 73\% of Hispanics had public defenders or assigned counsel. In the Federal system, blacks also were more likely to have public defenders or panel attorneys than other inmates; 65\% of blacks had publicly financed attorneys. About the same percentage of whites and Hispanics used publicly financed attorneys (57\% of whites and 56\% of Hispanics). U.S. Dept of Justice Office of Justice Programs, Bureau of Justice Statistics Special Report, Defense Counsel in Criminal Cases, November 2000.

\textsuperscript{23} In State prisons, while 69\% of white inmates reported they had lawyers appointed by the court, 77\% of blacks and 73\% of Hispanics had public defenders or assigned counsel. In the Federal system, blacks also were more likely to have public defenders or panel attorneys than other inmates; 65\% of blacks had publicly financed attorneys. About the same percentage of whites and Hispanics used publicly financed attorneys (57\% of whites and 56\% of Hispanics). BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, U.S. DEP’T OF JUSTICE OFFICE OF JUSTICE PROGRAMS, PUB. NO. NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES (November 2000).
killing a Caucasian male. Twenty-three (33) states currently have Stand Your Ground legislation in effect. What about differences on race with certain sentencing guidelines? According to a recent law review article written by Joshua Fischman and Max Schanzenbach, when sentencing authorities are given some latitude to depart from such guidelines, racial disparities can actually be reduced by this judicial discretion, "at least in the context of guidelines sentencing."25

In general, to ensure the protections afforded under the 14 Amendment, we need to continue to question, and remain focused on the statistics, trends and developments, i.e., the numbers and the obvious that allude to a disparate impact on a certain segment of the American populace. According to a 2004 report, Judged Discrimination: Assessing the Theory and Practice submitted to the Department of Criminal Sentencing, Charles Ostrom, Brian Ostrom and Matthew Kleiman examined sentencing decision by judges:

25 The United States Sentencing Guidelines restrict judicial discretion in part to reduce unwarranted racial disparities. However, judicial discretion may also mitigate disparities if judges use discretion to offset disparities emanating from prosecutorial discretion or sentencing policies that have a disparate impact. To measure the impact of judicial discretion on racial disparities, we examine doctrinal changes that affected judges’ discretion to depart from the Guidelines. We find that racial disparities are either reduced or little changed when the Guidelines are made less binding. Racial disparities increased after recent Supreme Court decisions declared the Guidelines to be advisory; however, we find that this increase is due primarily to the increased relevance of mandatory minimums, which have a disparate impact on minority offenders. Our findings suggest that judicial discretion does not contribute to, and may in fact mitigate, racial disparities in Guidelines sentencing. Joshua B. Fischman and Max M. Schanzenbach, Racial Disparities under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums. Schanzenbach. Michigan State University, National Center for State Courts (with the cooperation of the Michigan Sentencing Commission and the Michigan Department of Corrections) (2003)2003, available at http://www.fjc.gov/public/pdf.nsf/lookup/NSPI201212.pdf/$file/NSPI201212.pdf
The racial mix of prison population has remained remarkably stable over the past two decades. While blacks make up 12% percent of the US population, they account for about one half of the prison population: African Americans are still over-represented in state prison population versus the total population in all states. The average incarceration rate for Blacks is 1,547 per 100,000 while the average for Whites is 188 per 100,000; the incarceration rate for Blacks is approximately eight (8) times higher than for Whites. On the surface, these numbers raise the specter of discrimination. Should we question non-probable cause apprehensions or stops under the Color of the Law? What about California’s Three Strikes and You are Out legislation? What does a third conviction strike these citizens out of, society? According to a 1996 LA Times article, “Two years after it was signed into law, California’s controversial “three strikes and you’re out” law...this singular piece of legislation has resulted in an imprisonment rate for African Americans that is more than 13 (thirteen) times that of whites.” Greg Kriorian, Times Staff Writer Greg Kriorian.

Similar to the U.S. Supreme Court reversing itself after sixty years of de jure discrimination with Brown v. Board of Education of Topeka, California did the same after two decades of “Three Strikes and You Are Out” legislation with Proposition 36 and 47. Unfortunately, and again, this change came about ac-
cording to the nonprofit Center on Juvenile and Criminal Justice, means that blacks made up 43% of about 1,200 “third strike” defendants imprisoned under the law as of Dec. 31, 1995. The state Department of Corrections previously reported that 37% of the almost 16,000 defendants imprisoned under the law for “second strike” or “third strike” offenses are African American. The study adds to a similar report released by the same center last month that found that 39% of the state’s young African American men were somewhere in the criminal justice system. The “three strikes” study does not include data about the criminal backgrounds of inmates of various racial groups or the nature of their crimes. But a recent analysis by the Department of Corrections found that 85% of all inmates incarcerated under the new law were found guilty of nonviolent offenses in their second or third convictions. A co-author of the new study said there was no scientific basis to conclude that the disparity between blacks and other groups in the application of “three strikes” stems from a significantly higher rate of violent crimes committed by African Americans. March 05, 1996, Greg Krikorian, LA Times.”

30 BallotPedia, California Proposition 36, Changes in the “Three Strikes” Law (2012), available at http://ballotpedia.org/California_Proposition_36_Changes_in_the_%22Three_Strikes%22_Law_(2012). BallotPedia, California Proposition 47, the Reduced Penalties for Some Crimes Initiative, (2014), available at http://ballotpedia.org/California_Proposition_47_Reduced_Penalties_for_Some_Crimes_Initiative_(2014). Proposition 47 was on the November 4, 2014 ballot in California as an initiated state statute. The measure was approved. The initiative reduces the classification of most “nonserious and nonviolent property and drug crimes” from a felony to a misdemeanor. Specifically, the initiative: Mandates misdemeanors instead of felonies for “non-serious, nonviolent crimes,” unless the defendant has prior convictions for murder, rape, certain sex offenses or certain gun crimes. A list of crimes that will be affected by the penalty reduction are listed below. Permits The measure also permits re-sentencing for anyone currently serving a prison sentence for any of the offenses that the initiative reduces to misde-
meandors. About 10,000 inmates will be eligible for resentencing, according to Lenore Anderson of Californians for Safety and Justice.[3] Requires a “thorough review” of criminal history and risk assessment of any individuals before re-sentencing to ensure that they do not pose a risk to the public. [Prop 47] Creates a Safe Neighborhoods and Schools Fund; the fund will re-
cieve appropriations based on savings accrued by the state during the fiscal year, as compared to the previous fiscal year, due to the initiative’s imple-
ter two-decades of unfairness in the criminal justice system with astounding disparities between American citizens of different races. Sadly, the landscape is not smooth for Prop 47 or 36. In light of the many statistics depicting a marked unfairness with Three Strikes, certain legislation has been introduced that rights away the root purpose of Prop 36 and 47. For example, Senate Bill 333 and Assembly Bill 46; this\textsuperscript{31} allows felony charges for mere possession of certain date-rape drugs; Assembly Bill 390, this measure\textsuperscript{32} requires DNA samples for those convicted of cer-


"This bill would instead provide, without regard for a person's prior convictions, that possession of Ketamine and flunitrazepam is either a misdemeanor, punishable by imprisonment in a county jail for not more than one year, or a felony, punishable by imprisonment in a county jail for 16 months, or 2 or 3 years. The bill would also provide that the possession of GHB by a person who does not have a prior conviction for those certain enumerated crimes is either a misdemeanor, punishable by imprisonment in a county jail for not more than one year, or a felony, punishable in a county jail for 16 months, or 2 or 3 years."

\textsuperscript{32} Legislative Counsel's Digest, AB. 390, (Cal. 2015), available at http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0351-0400/ab_390_bill_20150218_introduced.html. The pertinent texts of the bill reads:
tain misdemeanors; Assembly Bill 150, this measure makes it a felony to steal a gun; and finally, Assembly Bill 1104, this allows jurisdictions to issue search warrants in cases amounting to misdemeanors. Ballotpedia 2015 ballotpedia.org/California_Proposition_47.

In this new Jim Crow era, is skin color a determinate to sentencing and, if so, is it consistent with the Equal Protection Clause? The American Bar Foundation has conducted recent research into greater sentences for convicted felons of darker skin color for the same crime of those with lighter skin color. And finally,

"Existing law, as amended by the DNA Act, requires a person who has been convicted of a felony offense to provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required for law enforcement identification analysis. This bill would expand these provisions to require persons convicted of specified misdemeanors to provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required for law enforcement identification analysis."

33 Legislative Counsel’s Digest, AB. 150, (Cal. 2015), available at http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0101-0150/ab_150_bill_20150115_introduced.html. The pertinent texts of the bill reads:

“This bill would make the theft of a firearm grand theft in all cases, punishable by imprisonment in the state prison for 16 months, or 2 or 3 years.”

34 Legislative Counsel’s Digest, AB. 1104, (Cal. 2015), available at http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_1101-1150/ab_1104_bill_20150227_introduced.htm. The pertinent texts of the bill reads:

“This bill would authorize the issuance of a search warrant on the grounds that the property or things to be seized consist of an item or constitute evidence that tends to show a violation of specified crimes, including shoplifting, fraud, petty theft, receipt of stolen goods, and possession of a controlled substance, or tends to show that a particular person has committed one of those crimes.”

35 "Colorism"—prejudice based on lightness/darkness of skin-plays a role in sentence length. Overall, in Georgia, in the years 1995-2002 in a sample of 67,379 convicted, criminal sentences of blacks were 4.25 longer than those of whites, even when controlling for criminal history and other relevant factors. In the same sample, sentences of blacks with "light" complexions were the
what about the death sentence—the ultimate sentence? Has Equal Protection been appended to all American citizens for sentencing purposes, especially those who face the death penalty? These and other trends, too numerous to dictate in this writing, tell the story of the New Jim Crow and the selective applicability or abject denial of the protections afforded under Section 1 of the 14th Amendment, the so called Equal Protection clause.

In the final analysis, what about the Rule of Law? Essentially any country in what is considered the free industrialized world could easily deem the United States to have clear human rights issues and a clear misapplication of the rule of law as it relates to its equal access to justice and fairness in the American criminal justice system across the entire populace. Is it therefore reasonable for the world to even question the level of fairness in America’s imposition of restraints on liberties, the taking of property, and, the ultimate, death. Outwardly, we must con-

---

36 According to a research study on the relationship between skin color and disparities in criminal sentencing in Georgia, from the American Bar Foundation, “[I]n Georgia, in the years 1995-2002 in a sample of 67,379 convicts, criminal sentences of blacks were 4.25 longer than those of whites, even when controlling for criminal history and other relevant factors. In the same sample, sentences of blacks with ‘light’ complexions were the same length as those for whites. Sentences for blacks with ‘medium’ and ‘dark’ complexions were 4.8% longer than those for whites and ‘light’ complected blacks.” American Bar Foundation 2014 Annual Report, Dr. Traci Burch, p.14

37 “The International Movement Against All Forms of Discrimination and Racism (IMADR) deplores condemned the recent decisions of grand juries in New York and Ferguson, Missouri, which failed to find white police officers guilty for the deaths of unarmed African Americans, Michael Brown and Eric Garner. The in a December 2014 open letter, the IMADR expressed their concerns about the current state of affairs by stating, “[t]he overrepresentation of racial and ethnic minorities in prison, especially Afri-
sider how America is viewed in the international community. In our role as a world's leader (and often the world's policing force), how we treat our citizens is a valid concern as we continually point fingers and reprimand other nations for their maleficent treatment of their racial/ethnic minorities. We debate in polite society essentially how other nations govern the issue of fairness with regards to and across their entire populace. As we begin yet another chapter of abject denial of the right and privileges enunciated in Section 1 of the 14th Amendment for American citizens, the world's eyes are now turned to the question of whether certain jurisdictional systems have engaged in a practice of failing to indict a certain race of offender for alleged crimes against a certain class of victim citizens. As we look carefully to the American grand jury system and the relaxed rules of evidence\textsuperscript{38} to include hearsay, upon which, in certain States, "se-

\textsuperscript{38} Grand Jury Indictment Based on Incompetent Evidence. The Constitution of the United States provides for the grand jury in federal criminal practice, ' and when used,' it's indictment is a prerequisite for subsequent prosecution of the accused for a criminal offense.' But both the Constitution
selected" citizens are empowered to recommend or not recommend indictment, we again see a disparity in justice, specifically the US jury selection process. For example, in 2013, and the Federal Rules of Criminal Procedure are silent as to the kind of evidence which the grand jury may receive and upon which it may find an indictment William R. Berkman, *Grand Jury Indictment Based on Incompetent Evidence*, 43 Cal. L. Rev. 859 (1955). Available at: http://scholarship.law.berkeley.edu/californialawreview/vol43/iss5/8

39 Texas Code of Criminal Procedure, Chapter 19. Organization of The Grand Jury. Art. 19.01. [333] [384] [372] APPOINTMENT OF JURY COMMISSIONERS; SELECTION WITHOUT JURY COMMISSION. (a) The district judge, at or during any term of court, shall appoint not less than three, nor more than five persons to perform the duties of jury commissioners, and shall cause the sheriff to notify them of their appointment, and when and where they are to appear. The district judge shall, in the order appointing such commissioners, designate whether such commissioners shall serve during the term at which selected or for the next succeeding term. Such commissioners shall receive as compensation for each day or part thereof they may serve the sum of Ten Dollars, and they shall possess the following qualifications:

1. Be intelligent citizens of the county and able to read and write the English language;
2. Be qualified jurors in the county;
3. Have no suit in said court which requires intervention of a jury;
4. Be residents of different portions of the county; and
5. The same person shall not act as jury commissioner more than once in any 12-month period.

(b) In lieu of the selection of prospective jurors by means of a jury commission, the district judge may direct that 20 to 125 prospective grand jurors be selected and summoned, with return on summons, in the same manner as for the selection and summons of panels for the trial of civil cases in the district courts. The judge shall try the qualifications for and excuses from service as a grand juror and impanel the completed grand jury in the same manner as provided for grand jurors selected by a jury commission. Law.

40 "The Constitution of the United States provides for the grand jury in federal criminal practice, and when used, its indictment is a prerequisite for subsequent prosecution of the accused for a criminal offense. But both the Constitution and the Federal Rules of Criminal Procedure are silent as to the kind of evidence which the grand jury may receive and upon which it may find an indictment." William R. Berkman, *Grand Jury Indictment Based on Incompetent Evidence*, 43 Cal. L. Rev. 859 (1955), available at http://scholarship.law.berkeley.edu/californialawreview/vol43/iss5/8
the Washington Supreme Court blasted racism outright in the jury selection process. In an opinion from *State v. Saintcalle*, where the only African American potential juror was dismissed and which resulted in a 48-year sentence for the African American defendant, the court opined that “a growing body of evidence shows that racial discrimination remains rampant in jury selection.” Based upon past practices and schemes that have favored the race of the offender, the prediction is that once the American grand jury system is carefully evaluated and statistics are reported, the world will see yet again, a showing of a marked departure from Section 1 of the 14th Amendment.

Can we expect to see 100 percent equal treatment under the law? The notion that every law or amendment written is fair to all across the board is obviously an institutional fallacy. As we have seen, stealing a pizza could be the trigger that sends a man to prison for 25 years; to an institution that is lopsided in its racial composition to that of society (6.5 percent to over 40 percent). But, should the racial makeup of the institutions be similar to the geographic areas they serve?

The basic truth is that we are on the right road, but it is long and arduous and will take cleansing of the senses of fairness and a real dedicated tolerance of others for the true realization of Equal Protection for all Americans. We have time. At only 238 years old, the United States is still an infant compared to the world’s other superpowers. The question is, how long shall we wait as a Nation? How long until we ensure our laws and justice systems are equally applied to all American citizens? “Justice delayed is not justice denied; but,“ when it is unequally applied

---

43 WILLIAM EWART GLADSTONE, SPEECHES ON GREAT QUESTIONS OF THE DAY 141 (1870). Quote by former British Prime Minister, William Ewart
to any group of American citizens, it is a wrong that needs to be righted expeditiously. It took California 20 years to amend a pernicious unbalanced law that favored Caucasians over Americans of African descent; and it took the U.S. Supreme Court almost sixty years to correct a system of de jure discrimination; albeit, in law alone versus practice.

Through this paper, the inquisition of equal justice in the United States is summarily and further raised. Change is about change and in the area of equal protection under law, change has to benefit all Americans equally without due regard to race, gender, religion, ethnicity, class, geography, etc. The remainder ahead is certainly worthy of careful study, further fact-finding, healthy debate, concurrence and positive-corrective change with the singular goal of actual Equal Protection Under Law for all American citizens.

Gladstone (1809-1898), in his speech in State of Ireland at House of Commons on March 16, 1868.