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Mitchell S. G. Klein

Walter J. Burkard

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UNEQUAL JUSTICE
FOR THE POOR:
THEORY, RESEARCH,
AND COMMENTARY

MITCHELL S. G. KLEIN*
WALTER J. BURKARD**

During the 1960's and early 1970's, concern for providing equal justice for the poor in the United States reached its peak. The result was an increase in governmental funding of legal assistance programs and considerable research into the treatment of the poor under our legal system. Sparked by the “War on Poverty” and encouraged by the Warren Court’s decisions promoting the right to counsel and other constitutional safeguards for the criminally accused, attention was focused on assessing and remedying the inequalities of justice for the indigent. The recent ebbing of interest in poverty law and the raging battles over the elimination of such remedial programs as the federally funded Legal Services Corporation suggest the need for further examination of the relationship between money and justice in America. The purpose of this Article is to explore the current character and severity of unequal justice for the poor in the United States.

UNEQUAL JUSTICE—PERCEPTION AND REALITY

Traditionally, commentators have proclaimed that poor people receive inferior treatment from the law. Anatole France made this well-known satirical assertion: “The law, in its majestic equality, forbids all men to sleep under bridges, to beg in the streets, and to steal bread—the

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* B.A., 1974; M.A., 1975, State University of New York at Buffalo; Ph.D., Northwestern University, 1979.
* See Cramton, Crisis in Legal Services for the Poor, 26 VILL. L. REV. 521, 521-22 (1981).
rich and the poor."

The perceived failure to administer justice equally is reflected in American political folklore as well. Finlay Peter Dunne’s Mr. Dooley remarked that “a poor man has a chanst in coort. . . . He has th’ same chanst there that he has outside. He has a splendid poor man’s chanst.”

Political leaders, too, have pointed to the problem of unequal treatment under the law. Robert F. Kennedy once observed that “the poor man looks upon the law as an enemy, not as a friend. For him the law is always taking something away.”

Similarly, academicians have observed disparities in the nature of the law and its operation. Professor Lawrence Freidman has stated that “on the whole, it is reasonable to suppose that justice is not as blind and classless as it pretends; it squints in one direction.”

Despite this unanimity of pointed commentary, the connection between poverty and injustice in the United States cannot be said to be automatic. It would simply be inaccurate to assert that affluent people are invariable winners in our legal system and poor people are always losers. Surely, a legal system can be readily conceived which treats the poor far more inequitably. Addressing the question of discrimination by the judiciary, Herbert Jacob has warned: “[i]t is easy to jump to conclusions based on superficial observations; the reality is quite complicated.” For example, there is evidence demonstrating that the police response time in the United States is the same for the poor as for the rich, and that the sentencing disparities between the rich and the poor for the same crime are insubstantial. Indeed, a recent study of criminal justice in New York City concluded that once certain differential factors were taken into account, a defendant represented by the Legal Aid Society was, if anything, slightly less likely to be convicted, and if convicted, slightly less likely to receive a prison term than those who had private attorneys. Then too, during the last 50 years, the judiciary itself has engaged in remedial judicial activism beneficial to poor people. Clearly, there are subtleties in

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6 L. Friedman, The Legal System 182 (1975).

7 H. Jacob, Justice in America 7 (3d ed. 1978).


10 R. Hermann, E. Single & J. Boston, supra note 1, at 104-05. The authors concluded that “[a]ll else being equal, defendants represented by Legal Aid would fare as well as if not better than those who had private attorneys.” Id. at 105.

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the interrelationship of indigency and inequality of justice. Yet, examination of certain factors in our system still leads to the conclusion that "we have a concept of equality that is inversely linked to the prime rate." The following discussion analyzes the impact of these factors on the treatment of the poor under our legal system.

LEGAL PARTICIPANTS

Lawyers

The availability of diligent legal assistance is, of course, essential to the goal of equal justice for the poor. Although certain political rights are constitutionally guaranteed in the United States, the enforcement of those rights is often undermined by lack of access to adequate legal representation. Our country has sought to rectify the situation substantially, though belatedly, by providing free legal assistance. Many private organizations such as legal aid societies and general charitable organizations now make legal assistance available to the indigent. Additionally, since the mid-1960's, the federal government itself has assumed a major role in bringing legal services to poor people. In 1965, the Johnson administration instituted a legal services program under the aegis of the now dismantled Office of Economic Opportunity (OEO). The OEO program was followed in 1974 by the establishment of a permanent national legal services program, the Legal Services Corporation.

Despite these efforts, however, many of the poor must forego justice due to the unavailability of lawyers. In 1976, Thomas Ehrlich, the first President of the Legal Services Corporation, estimated that 40% of America's poor people lack access to legal assistance. Recently, it was estimated that the current Legal Services programs handle only about one-eighth of the legal needs of eligible persons. Speaking in favor of

14 A survey of the history of the provision of legal assistance to the poor in the United States can be found in Handler, United States of America in PERSPECTIVES ON LEGAL AID 318-40 (F. Zemans ed. 1979).
15 "Accessibility to the courts on equal terms is essential to equality before the law. If we cannot provide this foundational protection through the courts, most of the rest of our promises of liberty and justice for all remains a mockery for the poor and the oppressed." Weinstein, supra note 12, at 655.
17 See Cramton, supra note 2, at 524-25.
19 Cramton, supra note 2, at 530.
federal funding of legal assistance, Chief Judge Jack B. Weinstein of the federal district court for the Eastern District of New York recently remarked: "[e]qual access to the judicial process is the sine qua non of a just society. While we have made enormous strides towards that goal, it is still a glaring truth that equality of access is in the real world little more than a figment of jurisprudential imagination."

In addition to the limited availability of lawyers for the poor, difficulties and injustices are also encountered in qualifying for the assistance available. To receive legal services, the applicant must often prove his indigency. In criminal cases, judges frequently use the "operational" test of whether a defendant can meet bail to determine eligibility. Thus, a criminal defendant qualifies by failing to meet bail and remaining in jail until his case is heard. One study suggests that judges are now willing to tolerate the almost automatic appointment of a Legal Aid Society lawyer in criminal cases because eligibility guidelines are formulated on unrealistic standards of poverty and not on the actual cost of engaging a competent attorney in an urban area. Many defendants would otherwise be ineligible for assistance, and yet still be unable to pay for a criminal defense. In civil cases, the defendant also must meet eligibility requirements and have the type of case that a legal assistance program is willing to accept. In order to qualify under current Legal Service Corporation eligibility standards, a single person can earn no more than $5,388 and a litigant with a family of four can earn no more than $10,563. Additionally, because of its limited resources and overworked staff, an office may often refuse certain cases.

Because of the unavailability of legal aid or a defendant's ineligibility for funded programs, the poor are often forced to engage "low-budget" lawyers who are willing to take their cases. To a large degree, this increases the likelihood that they will be represented by low-status lawyers on the fringe of the profession. The result, it is submitted, is that the legal assistance a poor person will receive is generally inferior to the assistance available to the affluent.

Several factors play a role in preventing the poor from obtaining

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19 Weinstein, supra note 12, at 655.
20 H. Jacob, supra note 7, at 68-69.
21 R. Hermann, E. Single & J. Boston, supra note 1, at 79-80. The authors have observed that, in 1976, for example, the Legal Aid guidelines provided that a client would be ineligible for legal assistance if he earned more than $85 a week (plus $10 for each dependent). Id. at 80.
23 R. Hermann, E. Single & J. Boston, supra note 1, at 80.
superior legal representation. First, poor people often simply lack the economic resources which would bring them into contact with a good attorney. Family income and property ownership are considered strong predictors of contact with attorneys.\textsuperscript{26} The poor rarely have ongoing contact with lawyers because the legal profession emphasizes property matters, often to the virtual exclusion of the kinds of problems experienced by the poor.\textsuperscript{26} Second, the poor generally are undesirable clients. A lawyer's status is determined not only by his income, but also by the social characteristics of his clientele and the nature of his clients' legal problems.\textsuperscript{27} Additionally, few poor people know where or how to obtain qualified legal help.\textsuperscript{28} Lawyers rarely list areas of specialization. Notwithstanding the removal of formal prohibitions against advertising, many qualified attorneys remain reluctant to advertise. Thus, a poor person seldom knows if a particular lawyer is capable of handling his case, or whether the fees he is being charged are competitive or fair.

The disparity in the quality of legal services available to the poor stems also from the stratification which exists in the legal profession itself. Lawyers, according to Alexis de Tocqueville, "naturally constitute a body."\textsuperscript{29} Yet, lawyers in contemporary America are no longer members of a homogenous fraternity. As sociologist Jack Ladinsky has noted, during "the past sixty years, a highly stratified bar has evolved in urban America."\textsuperscript{30} The bar, it has been suggested, is stratified into four categories consisting of solo practitioners, small-firm lawyers, middle-sized firm lawyers and large-firm lawyers.\textsuperscript{31} Because of socialization and organizational recruitment processes, lawyers who practice in small firms or as solo practitioners are generally graduates of state or proprietary schools, from working-class or small-merchant families, exposed to lower level courts and agencies and appear to have lower-class clientele. At the other extreme, large-firm lawyers are generally graduates of prestigious, highly competitive law schools, from high status backgrounds, have relatively high incomes, have higher status clients and work with higher level courts and agencies. This suggests that the corporate clients of big firms receive the benefits of the disproportionate pooling of highly qualified, socially well-situated, well-trained lawyers in large firms.\textsuperscript{32}
It is further submitted that the economics of serving low-income clients often results in less ethical conduct by lawyers. In his 1966 study of New York City attorneys, sociologist Jerome Carlin found a strong relationship between a lawyer's status in the bar and his adherence to ethical norms. The lower the status of a lawyer's clientele, the more precarious and financially insecure his practice. Given that the solo practitioner's clients are generally "one time" affairs, he is highly susceptible to the temptation of exploiting "expendable" clients. Notably, Carlin observed:

The majority of lawyers in large firms are high conformers. As firm size decreases, the proportion of high conformers decreases from 57 per cent of large-firm lawyers to 20 per cent of individual practitioners. Correspondingly, as size of the firm increases, the proportion of violators decreases, from 30 per cent of individual practitioners to only 5 per cent of large-firm lawyers.33

Given existing economic pressures on poor people's lawyers, it appears likely that lower-status clients may be victimized more often by their lawyers.34

In short, poor people in the United States are less likely to obtain effective and highly ethical legal assistance. Justice cannot be entirely equal when big business and wealthy individuals are able to purchase the best trained, most highly skilled attorneys. The wider availability of legal services, reflected in the creation of the Legal Services Corporation and the increase in public defender programs, has narrowed the gap between the rich and poor to a slight extent.35 Yet, as described above, these programs have only alleviated a small percentage of the need. Even these

expense of individual citizens." Id. at 201.
33 J. CARLIN, supra note 31, at 55.
34 Jerome Carlin has advocated remedial "measures such as government subsidy, prepaid insurance plans and group legal practice" to "increase and stabilize the demand for legal services, thereby enhancing the economic security of marginal practitioners." J. CARLIN, supra note 31, at 181. Carlin's proposals have the dual benefit of broadening the availability of legal services, while at the same time increasing the financial security of lawyers practicing at the lower levels of the bar, thus "strengthening their capacity to conform to ethical norms." Id. at 180.
35 See generally J. HANDLER, E. HOLLINGSWORTH & H. ERLANGER, supra note 1, at 46-47. The Supreme Court decisions expanding the provision of lawyers for indigents in the criminal justice system spurred the development of both government-funded legal assistance programs and public defender offices. In 1961, defender programs existed in only three percent of the counties of the country and served only one-quarter of the population. By 1973, 650 defender programs were providing services in 28% of all United States counties, reaching two-thirds of the population. Id. at 39. The creation of the Legal Services Corporation provided an "institutional framework . . . favorable to a proactive, social-reform-oriented program with lawyers who are expressly allowed to seek social change on behalf of the poor." B. GARTH, NEIGHBORHOOD LAW FIRMS FOR THE POOR: A COMPARATIVE STUDY OF RECENT DEVELOPMENTS IN LEGAL AID AND IN THE LEGAL PROFESSION 46-47 (1980).
programs are currently endangered by possible budget cutbacks.

Judges

Judges in the United States do not, of course, represent a random cross-section of the American population. Few Americans expect judges to be representative in background characteristics. After all, as John R. Schmidhauser has noted, the Supreme Court "has always been veiled . . . in an aura of inaccessibility." Hence, notwithstanding the Horatio Alger dream, "it is hardly likely that many young men of humble origin have lost sleep contemplating their prospects for attaining a seat on the Supreme Court of the United States." This does not mean that individuals from an impoverished background have never served on the Supreme Court. For example, Arthur Goldberg's father was a pushcart peddler and William O. Douglas' widowed mother washed clothes to support her family. It has been documented that most of the justices from humble origins were appointed by presidents who actively sought support from lower-economic-status voters—Andrew Jackson, Martin Van Buren and Franklin Roosevelt. Sheldon Goldman and Thomas Jahnige found that 28% of justices appointed by Democratic presidents were from humble origins, compared to 9% of justices appointed by Republicans.

The presence of a few exceptions, however, does not mask the fact that nearly all justices have had upper-status backgrounds. As Schmidhauser has demonstrated: "[t]hroughout American history there has been an overwhelming tendency for presidents to choose nominees for the Supreme Court from among the socially advantaged families." Henry J. Abraham has developed a composite picture of the members of the Supreme Court. Justices are generally (1) native; (2) male; (3) caucasian; (4) Protestant; (5) 50 to 55 years old at the time of appointment; (6) Anglo-Saxon ethnic stock; (7) upper-middle to high social status; (8) reared in an urban environment; (9) a member of a politically active, economically comfortable family; (10) experienced in public office and (11) generally well educated.

In effect, then, there seem to be certain unwritten requirements for serving on the Supreme Court. For example, given that justices are first attorneys, a threshold barrier exists preventing the disadvantaged from moving into the ranks of the judiciary. Because a judge must first be a lawyer, noted James Eisenstein, "all of the social, economic, and cultural

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37 Id.
39 J. SCHMIDHAUSER, supra note 36, at 55.
factors that limit the opportunities of the poor and minority group members in our society to obtain a college education operate to restrict access to the legal profession.\footnote{J. Eisenstein, Politics and the Legal Process 56 (1973).} A study of federal appeals and district court judges by Goldman indicated that they too come from upper middle class backgrounds.\footnote{Goldman, Judicial Backgrounds, Recruitment and the Party Variable: The Case of the Johnson and Nixon Appointees to the United States District and Appeals Courts, 1974 Ariz. St. L.J. 211, 221.} Most appointees by both Lyndon Johnson and Richard Nixon attended prestigious universities. At the same time, the Johnson appointees, however, were more likely to come from smaller firms, were often of a Catholic or Jewish religious affiliation and included more women and blacks than the Nixon appointees. Nevertheless, it seems unquestionable that many barriers still prevent a disadvantaged person from serving as a judge.

The crucial aspect of this discussion is that we can expect that the social backgrounds of judges will have at least some impact on the kinds of decisions they make. Richard J. Richardson and Kenneth Vines have concluded that the nature of recruitment is especially important for the judiciary "because of the quasi-insulated character of courts. Once judges are selected they tend to be shielded from political pressures, except for those pressures that are admissible under the severely controlled channels of the legal process."\footnote{R. Richardson & K. Vines, The Politics of Federal Courts 56 (1970).} Analyzing the Supreme Court, John R. Schmidhauser has determined:

If . . . the Supreme Court is the keeper of the American conscience, it is essentially the conscience of the American upper-middle class sharpened by the imperative of individual social responsibility and political activism, and conditioned by the conservative impact of legal training and professional legal attitudes and associations.\footnote{J. Schmidhauser, supra note 36, at 59.}

Hence, it would seem that excluding economically disadvantaged individuals from the judiciary affects the nature of our legal system. For example, Schmidhauser has found that justices from humble origins were more likely to abandon precedents than justices who came from upper-status families.\footnote{J. Schmidhauser, Constitution al Law in the Political Process 513 (1963).} Moreover, Stuart Nagel has concluded that Democratic judges were more likely to vote for the "underdog" in cases before them.\footnote{See Nagel, Political Party Affiliation and Judges' Decisions, 55 Am. Pol. Sci. Rev. 843, 845 (1961).}

Given the nature of judicial personnel, the quality of justice received by a defendant may sometimes depend upon such extra-legal factors as race, sex and socioeconomic status. Notably, Richard Quinney has con-
cluded: "Obviously judicial decisions are not made uniformly. Decisions are made according to a host of extra-legal factors, including the age of the offender, his race, and social class."47 A recent analysis by John Hagan, however, suggested that extra-legal attributes may not play as strong a role in determining sentences as is commonly believed.48 Studies have been unable to explain a very large portion of the variance in sentencing decisions by looking at extra-legal factors alone. Yet, it may be that some judges are relatively harsh with the disadvantaged, while others are lenient. Indeed, Hagan conceded that "it is certainly plausible to expect variation in the attitudes of judges toward different groups of offenders."49 Moreover, it is important to note that the same judge will often treat white collar crimes far more leniently than street crimes of a similar nature.50 Harsher penalties for certain types of crimes almost invariably work to the detriment of the disadvantaged.

Police

The most immediate instrumentality of society to prevent crime and apprehend criminals is the police force. It often has been asserted that police provide inferior services in low income neighborhoods. It may well be that the "thin blue line" is "thinner" in poor areas than in the affluent areas of a community. The evidence suggests, however, that police response time to calls from poor city neighborhoods is no less rapid than responses to calls from the affluent. In their study, Mladenka and Hill concluded: "The police do not respond less quickly to calls for assistance from black and other low income neighborhoods nor do they favor wealthy areas of the city in terms of manpower allocation."51

Obviously, this does not mean that the police are free from discrimination in all their dealings with the poor. In other aspects, however, low income people are more likely to be victims of police discretion and abuse. James Eisenstein has noted that "[p]olice seem to show less respect for the disadvantaged. . . . They are more likely to believe middle-class victims and treat them politely than they do lower-class victims."52 Additionally, an individual is more likely to be stopped as a suspect for a crime if he is poor. As James Q. Wilson has pointed out, "Patrolmen believe they would be derelict in their duty if they did not treat such per-

48 See Hagan, supra note 9, at 375.
49 Id. at 380.
50 See THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON SENTENCING PRACTICES IN THE FEDERAL COURTS IN NEW YORK CITY in JUSTICE IN SENTENCING 177, 181 (L. Orland & H. Tyler eds. 1974).
51 Mladenka & Hill, supra note 8, at 24.
52 J. EISENSTEIN, supra note 41, at 324.
sons [teenagers, blacks, and the poor] with suspicion, routinely question them on the street, and detain them for longer questioning if a crime has occurred in the area." As police "handle situations" they may well speak harshly and discourteously or illegally search the citizen who has been stopped—particularly if he is poor or black. Nearly all police-citizen contacts involving excessive police force involved a poor or young person. Since the police apparently perceive the middle class individual as non-threatening, such a person can be approached in a more relaxed manner—if indeed he need be approached at all.

**Juries**

Another important participant in the legal process is the jury. Juries make important decisions of guilt and innocence. Given their critical role in dispensing justice, it is disturbing to learn that often juries do not represent a true cross-section of the population. The vision of the jury as "a certain number of citizens chosen indiscriminantly" becomes blurred by the fact that many people are systematically excluded from serving. For example, teachers, doctors, firemen and policemen are among those typically excused from jury duty because of their value to the community. These exemptions are often seen as unfortunate because of the supposed "superior ability" of these groups for jury duty. Far more important, however, is the fact that working class people and blacks are under-represented on juries in favor of professionals, managers and proprietors. Despite the fact most criminal defendants come from the disadvantaged, there are few lower-economic-status jurors. Thus, in the contemporary criminal justice system, the fate of the defendant rarely rests with his peers. This may account for the fact that "juries are notoriously prone to convict." At the same time, it should be noted that the underrepresentation of the working class on juries rarely results from conscious efforts to exclude them. Rather, exemptions are granted to certain classes of people who cannot afford to serve on a jury. Then too, many disadvantaged people may be excluded from the original listing from which jurors are called because they are not registered voters. Continued exclusion of the disadvantaged from juries seems more an over-

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54 See id. at 45 (citing President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 1, 146-49, 180-83 (1967)).
56 See H. Jacob, Crime and Justice in Urban America 54 (1980).
57 See H. Jacob, Crime and Justice in Urban America 54 (1980).
58 1 A. de Tocqueville, supra note 29, at 287.
59 H. Jacob, supra note 7, at 127.
60 Id. at 128.
61 A. Blumberg, Criminal Justice Issues & Ironies 191 (2d ed. 1979).
62 H. Jacob, supra note 7, at 127.
sight then a malicious or deliberate effort.

Criminal Justice

The criminal courtroom is a veritable ghetto of the poor. Any effort, therefore, to increase the rights of those accused of a crime presumably will be of some benefit to the poor.61 In this light, the effect of the Warren Court in the criminal justice realm must be considered. As Jonathan D. Casper has recognized: "[r]ecent developments have attempted to remove some of the infirmities attached to being poor, though they have not yet resulted in removing them completely."62 One of the most far-reaching cases in this area is *Gideon v. Wainwright*,63 wherein the Supreme Court adopted a broad rule requiring that indigents receive counsel in state courts in all cases involving possible imprisonment.64 The Warren Court also has ruled that, under certain circumstances, the state must provide counsel to indigents before interrogation by police,65 at the preliminary hearing,66 at the first appeal from a criminal conviction67 and at a line-up.68 During the Warren years, the "rules of the game" in criminal courts, as articulated by Supreme Court doctrine, were altered substantially. One might naturally expect, therefore, that a poor person accused of a crime will receive far better treatment than would a person in similar circumstances prior to the Warren era. Nevertheless, these decisions cannot be interpreted to mean that there is an absence of discrimination against the poor in contemporary criminal law and its administration.69 Indeed, the effects of the decisions are still unclear. For example, despite gloomy predictions, the *Miranda*70 decision apparently has not reduced the conviction rates of the criminal justice system.71 The reason, it is suggested, is that lawyers appointed to assist the accused actually serve a quasi-bu-

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61 Professor Jacob has summarized the situation as follows: "All the evidence available indicates that the criminal courts are fundamentally courts against the poor." H. Jacob, supra note 7, at 185.
64 Id. at 344.
66 White v. Maryland, 373 U.S. 59, 60 (1963) (per curiam).
69 See, e.g., Reid, Optimism Is Not Warranted: The Fate of Minorities and the Economically Poor Before the Burger Court, 20 How. L.J. 346, 347 (1977). Ms. Reid, who was General Counsel of the New York State Division for Youth at the time, charged that "[t]he Burger Court has brandished the conservative tool of law as a rich instrument not only of a changeless society but also of a regressive society." Id.
71 H. Jacob, supra note 7, at 189.
reaucratic system, the aim of which is to obtain convictions as efficiently as possible. It appears that many of those who plead guilty to a crime do so under the advice of their own counsel. Public defenders and, especially, assigned counsel are often less effective than criminal lawyers privately hired. As James Eisenstein has suggested: "[t]he adversarial ideal is nothing like what happens to the overwhelming majority of people (on the order of 90 percent) who find themselves in a state felony court. Rather, they encounter . . . the bureaucratic reality of state felony courts."\(^7\)

As Professor Jacobs has pointed out, affluent people who are accused of a property crime enjoy certain advantages over their less affluent counterparts.\(^7\) They can avoid pretrial detention by paying bail. The affluent can hire a renowned criminal specialist as an attorney. Furthermore, psychiatrists and medical doctors may provide qualified assistance and valuable testimony. A wealthy individual qualifies as a good probation risk because he maintains a job and strong family ties. Finally, he can delay or avoid serving his sentence, if convicted, through appeals. These strategies often are unavailable to the disadvantaged defendant. The economically disadvantaged therefore are far more at the mercy of the bureaucratic processes of our criminal justice system.

A stunning example of economic discrimination in the criminal justice system is found in bail practices. Indigent defendants are often required to submit to pretrial imprisonment merely to obtain legal assistance. In many communities, existing practices presume that if a defendant can afford bail he can also provide himself with an attorney.\(^7\) The equity of these bail practices is questionable. Indeed, Jonathan D. Casper has concluded that "[t]he very concept of money bail means that the rich will be more likely to be free during the period between arraignment and trial than the poor."\(^7\) Similarly, Daniel Fried and Patricia Wald have noted, "[t]hose who go free on bail are released not because they are innocent but because they can buy their liberty. The balance are detained not because they are guilty, but because they are poor."\(^7\) In his study of criminal justice in New York City, Abraham S. Blumberg found that bail was "the greatest disparity between those who have money and those who do not."\(^7\) Notably, nearly three-quarters of the indigents he examined were unable to raise bail.

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\(^7\) J. Eisenstein, supra note 41.

\(^7\) See H. Jacobs, supra note 7, at 185-86.

\(^7\) Id. at 68.

\(^7\) J. Casper, supra note 62, at 200.


\(^7\) A. Blumberg, supra note 59, at 175.
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In *Stack v. Boyle*, the Supreme Court stated that bail was constitutionally permissible only as a means to ensure that the defendant would appear at his trial. The Court ruled that a “figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment.” Unfortunately, however, the Court suggested no specific standards. As a result, it is common practice for judges to take varying factors into account when setting bail. Failing to meet bail not only means that a defendant is unable to assist in preparing for his defense, but also that he is unable to be with his family. Recently, attempts have been made to lessen the harmful effects of bail requirements on the poor. A prime advocate of bail reform has been the Vera Institute of Justice. Under the Vera system, an effort is made to gather data to determine the probability of a defendant’s appearing at trial. Among the facts gathered are employment history, stability of family ties, nearby relatives and community roots. The aim of the Vera system is to ensure that the accused will be released on his own recognizance if it appears he is a good risk. Of course, many of the poor still cannot meet these standards and cannot afford the bail which is set. Additionally, despite the reform efforts of the last decade, the evidence suggests that bail reform has not changed the plight of the economically disadvantaged.

Beyond the issue of pretrial detention, we must look to the very

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78 342 U.S. 1 (1951).
79 Id. at 5.
80 Id. The *Stack* holding was limited to application in the federal courts, but it is considered to be the origin of the “key concepts” which played a large role in the subsequent bail reform movement. J. Goldkamp, *Two Classes of Accused: A Study of Bail and Detention in American Justice* 19 (1979).
82 See Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. Rev. 671 (1963). The Vera Institute work began in 1961 and continued into the early 1970’s. It was the impetus for many of the early “release on recognizance” reform projects which were undertaken in the United States in the 1960’s. J. Goldkamp, *supra* note 80, at 5.
83 See W. Thomas, *Bail Reform in America* 11-12 (1976). Much of the legislation, case law and sociological studies of the last decade regarding bail have involved the search for workable criteria to be considered in the pretrial release decision. See, e.g., United States v. Wright, 483 F.2d 1068, 1069 (4th Cir. 1973); United States v. Honeyman, 470 F.2d 473, 474 (9th Cir. 1972); Bail Reform Act of 1966, 18 U.S.C. § 3146(b) (1976).
84 Professor Goldkamp, in his recent analysis and reexamination of bail and detention issues after 15 years of reform, concluded: “[t]he most striking consequence of this investigation... is the realization that, in spite of the herculean efforts of reformers during the last decade, there has been little impact on a number of what by now are certainly very old issues.” J. Goldkamp, *supra* note 80, at 231. His study of characteristics of defendants detained in United States jails suggested that “the persons originally seen as most disadvantaged by the American system of bail and detention—minorities and low-income defendants—may still be the principal ‘clients’ of pretrial detention.” Id. at 88.
structure of criminal penalties. It is here that the sharpest inequalities in criminal justice can be found. Generally, street crimes are committed by poor people. This does not mean, of course, that affluent people never violate the law. Often, however, white collar crime goes undetected or unpunished. The more liberal attitude toward white collar criminals represents a serious inequity in our society. James Eisenstein has noted that "there is probably some truth to the assertion that the content of criminal law tends to fall more heavily on the poor. The activities the least well-off engage in are far more likely to be formally labeled as criminal."

There is no inherent reason, it is submitted, why white collar crimes of the affluent should be dealt with less severely than the street crimes of the poor. Indeed, the economic loss to the nation from white collar crimes is far greater than the loss due to street crimes. It has been estimated that the cost of white collar crime exceeds the cost of burglary and robbery by several billions of dollars. In 1977, the United States General Accounting Office reported that white collar crime within government agencies cost over $25 billion yearly, while the Uniform Crime Reports for that year estimated loss of the value of stolen property to be $4 billion. Nonetheless, prisons are disproportionately filled with the poor. While 41% of the general labor force is white collar, only 14% of the prison population comes from those ranks. Meanwhile, 43% of prisoners are manual laborers or service workers, compared to only 17% of the labor force. Then too, the living conditions at prisons populated by the affluent often are far superior to the conditions at prisons inhabited by the poor.

It also should be noted that a disproportionate number of the victims of crime are low in status. Paradoxically, street crimes are for the most part committed by the poor against the poor. As Eric Wright has noted:

"This is one of the great ironies of crime: the poor are more likely to steal from the poor than from the rich because it is easier and safer. It is also easier and safer for the rich and powerful to steal from the poor and powerless—through consumer fraud, price fixing, loan sharking, and indirectly, even through tax evasion." It is small wonder that our country traditionally has done so little to assist the victims of crime; victims tend to be the powerless poor. Moreover, the disadvantaged suffer not only material losses as a result of crime, but

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87 J. Eisenstein, supra note 41, at 328.
89 C. McCaghy, supra note 87, at 246.
91 Id. at 38.
also experience a general state of anxiety. The segregation of poor people in a substandard environment means that the poor live in fear of being victims of crime. In one study, a 1974 sample was asked: "Is there any area right around here—that is, within a mile—where you would be afraid to walk alone at night?" Only 28% of those with incomes of $15,000 and over were fearful. Meanwhile, 58% of those with incomes under $3,000 said they were afraid to walk alone at night. This fear of crime further impoverishes the lives of poor people.

CIVIL JUSTICE

It is submitted that a substantial amount of discrimination can also be found in the civil courts. Despite increased legal aid to the poor, many poor people apparently fail to receive adequate legal assistance. Legal aid programs remain underfinanced, seriously limiting the kinds of cases that can be taken and the amount of effort invested in a given case. Herbert Jacob has noted that "[l]egal aid has not thus far made the courts a resource of the poor to a significant degree." Notwithstanding legal aid, the poor person rarely uses the courts aggressively to assert his rights. Most legal aid cases deal with family matters or defenses against landlords, merchants or governmental agencies. In part, changes are needed in the legal attitudes of the poor. Disadvantaged people have little knowledge of the law, few friends with such knowledge and a skepticism about their chances of success in the courtroom. At the same time, serious problems still arise in the administration of legal aid. One legal aid worker has recently commented:

We have inadequate resources, a lack of advertisement funds, low-salaried and non-dedicated personnel, pressure from the bar and business organizations that finance us, and attorneys who are often not responsive to clients because they feel their services to the poor are a privilege and not a constitutional right of the poor. How can the public wonder why we have not provided adequate legal representation for the poor?

It is important to note that legal aid organizations are faced with external obstacles as well in the content and administration of the civil law.

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82 Id. at 55.
83 H. Jacob, supra note 7, at 206.
84 This is taken from an interview conducted by the authors with a legal aid worker.
85 Indeed, a recent study suggested that the early concern of many commentators with respect to the competence of attorneys has now turned to focus on a number of system-related problems in determining the causes of inadequate representation for the poor. J. Gilboy, The Social Organization of Legal Services to Indigent Defendants, 1981 Am. B. Foundation Research J. 1023, 1024.
Civil courts, it is suggested, "are the courtrooms of the 'haves' rather than the 'have nots.'" Discrimination against the poor is greatest in debt collection and housing cases. Here, the poor are nearly always defendants, but plaintiffs almost invariably win. Notably, James Eisenstein has concluded:

At the lower levels, then, the civil process actually operates as an instrument for the commercial and the propertied interests to use in dealing with the poor. Landlords and creditors utilize the formal coercive power of the state to evict tenants, repossess merchandise, seize money (garnishments) and conduct forced sales of goods.

Moreover, it has been noted that civil actions generally are initiated by strong interests such as banks, department stores, hospitals, doctors and lawyers. Organizations nearly always win in head-to-head combat against individuals. Thus, civil courts may often appear to be mere vehicles by which organizational plaintiffs gain goods and opportunities at the expense of individual clients, who often are poor.

Perhaps, it is no accident that the civil court process is complicated. Historically, law in Western society was meant to uphold property rights and protect the interests of those who hold property. Commentators have pointed out that "the powerful spend large sums of money and devote substantial energy to keep the law in a favorable configuration. . . . [F]ine print which is always inimical to the interests of the poor and low-income wage earners . . . becomes the legal currency of the rich and powerful." While high-status members of society often are able to parlay their wealth into success on the legal front, large organizations likewise use their great resources to win favorable results in civil courts. Big business and government organizations are always well represented. The legal profession is organized around property-related problems to the virtual exclusion of those problems most frequently encountered by poor people. As one commentator has observed, "[t]he best legal talent is found in law firms located in downtown areas and specializing in corporation law, estates, tax matters, and the like. Few private attorneys specialize in problems of the poor or locate offices in their neighborhoods." Large organizations are "repeat players" in the civil

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96 H. JACOB, supra note 7, at 194.
97 J. EISENSTEIN, supra note 41, at 330.
100 LADINSKY, supra note 24, at 53.
101 J. EISENSTEIN, supra note 41, at 332.
102 Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal
courts, and can win favorable decisions on the rules of the game as well as the outcome of cases. Meanwhile, agencies for the poor often serve contrary interests. The Small Claims Court was created as a forum in which a poor plaintiff could pursue his legal rights without being hindered by legal technicalities and high costs. Nonetheless, it has been used by business to collect debts against the poor.

Because due process norms are commonly violated in the civil courts, it is not surprising to learn that the poor often perceive the legal system as inequitable based on their personal experiences. The system aims at processing cases efficiently, much as goods are processed on an assembly line. For example, civil commitment cases—though they involve the loss of liberty—receive only a few minutes of court time. On that score, evidence indicates that most of those in involuntary civil commitment proceedings are poor people. In addition, mentally ill indigents frequently are inadequately represented. As a result, civil commitment proceedings almost invariably lead to a commitment. Moreover, in the area of indebtedness, many debtors never receive notice that there is an action pending against them. For the poor, this "sewer service" results in the loss of countless cases each year through default. As Jacob has concluded: "Although the due process rituals of the adversarial process should protect them against unscrupulous complaints, they rarely do so."

Of late, there have been some beneficial changes in civil court rules, procedures, and policies. One commentator has concluded that "[p]ast inequalities in civil proceedings are . . . receding.


103 See J. Carlin, J. Howard, & S. Messinger, Civil Justice and the Poor 4-9 (1966).
105 Houseman, Equal Protection and the Poor, 30 Rutgers L. Rev. 887, 892 (1977).
106 H. Jacob, supra note 7, at 207.
107 Id. at 238.
111 See H. Jacob, supra note 7, at 138-39.
in substantive civil law. This partly reflects the fact that in 1970 the rules permitting groups to litigate issues affecting their interests were liberalized by the Supreme Court. The civil courts may be more accessible than other governmental institutions. As Jacob has noted, "[t]o be influential in legislatures, a group needs to occupy a strategic position in the economy or to claim the allegiance of a significant number of voters. No such prerequisites are required in the courts."

**JUDICIAL ACTIVISM**

Inequalities in the legal system can be rectified in part by judicial activism. Contemporary judicial activism consists, however, of a confused bundle of decisions—some actively pro-poor, others directly or indirectly contrary to the interests of poor people. A few cases will be illustrative. In *Brown v. Board of Education,* the Supreme Court began the process of desegregation of the school systems. Yet, since that landmark decision, several setbacks have occurred. Many affluent people have been able to escape desegregation efforts by sending their children to private schools or by making their home in the suburbs. The result has been less economic integration than racial integration of the poor and those of moderate income. Additionally, in *San Antonio Independent School District v. Rodriguez,* the Court failed to take action against school finance disparities from one school district to another. The result is that wealthy districts, often populated by affluent people, can more easily provide high quality education. Justice Thurgood Marshall described the majority's decision in *Rodriguez* as "an emasculation of the Equal Protection Clause." Similarly, by failing to take large-scale action against exclusionary zoning, the Supreme Court has permitted certain suburbs to become an exclusive haven for the affluent. Affluent people in affluent sub-

114 H. JACOB, supra note 7, at 138.
116 See id. For a chronology and discussion of the Supreme Court's decisions on school desegregation, see H. ABRAHAM, *FREEDOM AND THE COURT* 310-21 (1972).
119 See id. at 36. Professors Bolner and Eubanks have labeled the *Rodriguez* decision as "[t]he nadir of the constitutional progress of the poor." Bolner & Eubanks, supra note 116, at 377. In *Rodriguez,* "the issue of the social consequences of wealth was lucidly posed—and the Court responded by siding with the forces of wealth." *Id.*
urbs can enjoy municipal services and residential environments. In *Village of Belle Terre v. Boraas*, the Supreme Court upheld the authority of towns and villages to restrict land use to one-family dwellings. Two years later, in *Arlington Heights v. Metropolitan Housing Development Corp.* the Court upheld exclusionary zoning restrictions of a Chicago suburb. In short, the Court has refused to use the tool of judicial activism to alleviate discrimination based upon economic disparities.

Many commentators have suggested, however, that the judiciary may be the prime source for the equalization process. For example, Donald L. Horowitz has argued that “the judiciary tends to be far more sensitive to claims grounded in equal protection [than the legislative branch] and therefore more willing to order leveling of any kind.” Yet, from a historical standpoint, the Supreme Court has almost always employed judicial activism to preserve conservative values rather than to achieve liberal goals. The Horowitz hypothesis would be applicable to only a limited number of years in Supreme Court history—from 1937 to 1969. In his study of the Supreme Court, Glendon Schubert has divided Court decisionmaking into five major eras. The first three—covering nearly 150 years of American history—include the Federalist/Marshall period (1790-1835), the Taney/Miller period (1836-1890), and the period of Modern Conservatism (1890-1937). In each of these periods, the Court’s decisions were conservative and highly protective of property rights. The commerce clause was used to deny state authority to regulate business during the first period. In the second period, state authority to encourage eco-

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189 416 U.S. 1, 8-9 (1974).
191 One commentator has criticized the reluctance of the current Supreme Court to interfere in social issues:

I can think of no theory of justice, consistent with democratic principles, which would condone a caste system. When the Supreme Court upholds the constitutionality of governmental action (or inaction), it is in effect saying such action is not inconsistent with our fundamental democratic ideals. Thus in *Rodriguez*, the Court has put its stamp of approval on a system of financing public education which makes it impossible for the children of the very poor to get an education comparable to what more affluent children have access to. In declining to tackle the exclusionary-zoning issue, it has put its stamp of approval on a system of land-use planning which ensures that the poor will remain segregated in lower-class ghettos. And, in giving total deference to governmental welfare determination, the Court has opened the door to imposing on the poor a disproportionate share of the costs of the inflationary-recessionary era we now face. We should expect more from the Court. We should expect a statement of its willingness to intervene in an appropriate case and of its moral disapproval when such a case is at hand.

Kleven, supra note 116, at 857.


193 G. SCHUBERT, supra note 11, at 191.

194 Id. at 192.
nomic growth was promoted. Laissez faire was in its heyday during the third period. During that time, the due process and equal protection clauses of the fourteenth amendment were used primarily to protect private property from public interference.

The Supreme Court altered its philosophy from conservative to liberal during the depths of the depression. At the same time, the Supreme Court also shifted its basic focus from the issue of property rights to activism in behalf of civil rights and liberties. The most liberal of the Supreme Court eras, however, was under Chief Justice Earl Warren. During the Warren years, the Supreme Court focused on political equality, rights of the accused and racial equality. Additionally, in a series of key cases, the legal rights of indigents were extended.

With the appointment of more conservative justices, however, the Supreme Court has now entered an era of retreat in the pursuit of equality. Certainly, judicial attitudes have played a critical role in the decisions which courts make. Schubert has suggested that the era of Modern Liberalism has come to a close with Nixon’s conservative appointments of Burger, Blackmun, Rehnquist and Powell. An equally important, and related, factor in the retreat of the Supreme Court has been its reluctance to regard economic deprivation as a fundamental constitutional concern. There has been no broad legal movement to assist poor people similar to the civil rights movement of blacks. To date, the Court has not chosen to employ the fourteenth amendment’s equal protection clause to grant substantial, broadly-based economic rights to poor Americans. Given this failure, it is not surprising that the position of the poor relative to the affluent has changed little since the end of World War II.

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186 Id.
187 Id. at 194-95.
189 Levy, supra note 119, at 209.
191 See G. Schubert, supra note 11, at 198.
193 Another significant aspect of the Rodriguez decision was its rejection of the “suspect” classification for the indigent. 411 U.S. at 40. If the Court holds that a certain group is a suspect class, it will apply a higher level of scrutiny—a “strict scrutiny”—to governmental action impacting on that class. Cf. McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (Court applies rigid scrutiny to suspect classification of race). During the Warren Court era, decisions had indicated, in dicta, a willingness by the Court to find poverty status a suspect classification. See McDonald v. Board of Election Comm’rs, 394 U.S. 802, 807 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966). The Rodriguez decision rejected the suspect status for the poor, thereby precluding the opportunity for greater protection and activism by the Court.
UNEQUAL JUSTICE

CONCLUSION

This discussion has identified a series of inequalities in our legal system. In *A Theory of Justice*, John Rawls contends that socially just institutions are those which people would agree to if ignorant of their social status. Rawls argues that, in a state of ignorance, people would agree to institutions that maximize the well-being of the least advantaged. People would favor such institutions, explains Rawls, in order to minimize their own risks in life. Thus, only those inequalities which redound to the benefit of all, including the disadvantaged, would be retained. It has been shown above that our legal system contains countless inequalities. According to Rawls, however, inequalities should be retained in society only if, all things considered, the inequality in question somehow benefits the least advantaged. A suitable task for the policy analyst, then, is to identify the inequalities that are detrimental to the poor and those which, in some respects, may be beneficial.

Since a number of inequalities detrimental to the poor can exist in our legal system, according to Rawls, it is the responsibility of government to secure the equal distribution of rights. For example, poor people are negatively affected by the demographic unrepresentativeness of legal participants. Poor people would be better off in many respects if they were found in greater numbers as lawyers, judges, police and jurors. Greater representation in the bar, for example, would reflect increased social mobility for the poor to high-status positions in our society. Reducing the stratification within the bar would also benefit the poor since disadvantaged people are often served by the least effective lawyers. Because a judge’s background affects his decisions, increased representation of those with poverty backgrounds on the bench would likely advance the interests of the poor. A greater presence of the poor on the police force might reduce instances of police brutality and permit the poor to be less fearful of both crime and the police. Finally, more representative juries

185 See id. at 15.
186 Id. at 62.
188 See also Michelman, *The Supreme Court 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). Michelman proposed a “minimum protection” standard. *See id.* at 33. The approach would require identifying deprivations which would be intolerable to all in a just society. *Id.* at 35. Michelman suggested that his approach was more closely related to a due process inquiry than an equal protection analysis. For a recent provocative discussion which suggests that the issues being raised here would be better approached in terms of “rights” rather than “equality,” see Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).
189 J. RAWLS, supra note 134, at 274-76.
which include a greater number of disadvantaged people might be less likely to hurriedly convict an indigent defendant where the evidence is in doubt.

Inequalities inimical to the interests of the poor, as noted earlier, exist both in criminal and civil justice as well as in the area of judicial activism. The dependence of the poor on public defenders and assigned counsel appears to render them especially vulnerable to the bureaucratic processes and injustices of the criminal courts. The pretrial detention which occurs because of the bail system certainly operates to deny liberty to countless indigent defendants awaiting disposition of their cases. It is suggested that more jurisdictions give serious consideration to serious reform in bail procedures. Unequal treatment of white-collar crime and street crime also seems contrary to the interests of the poor. Harsher penalties for white-collar crimes would act as a deterrent and would reduce the sense of injustice felt by many of the poor. Then too, the fact that victims of street crimes are disproportionately disadvantaged suggests a need for more adequately financed victim compensation programs. On the civil side, the preservation of the Legal Services Corporation seems essential to providing representation for the poor. It might well lead to reforms in the substance and procedures of civil justice. Finally, a judicial activism which more willingly invokes the guarantees of the equal protection clause to protect the rights of the poor would produce a redistribution of national resources in the direction of the disadvantaged. A number of benefits would then be regarded as constitutionally guaranteed to the poor, including better financed schools and improved living environments.

At the same time, it is not clear that the poor would really benefit from a more demographically representative bar. To begin with, a more representative bar would be unlikely to reorient the bar from its preoccupation with the property-related problems of the affluent. As a result, many of the legal needs of the poor would continue to be ignored. Additionally, it is possible that increasing the number of lawyers with disadvantaged backgrounds might simply create a large class of lower-status lawyers. Here, two facts are relevant: (1) the existing bar in metropolitan areas already is highly stratified; and (2) lower-status lawyers tend to come from working-class or small-merchant backgrounds. A more demographically representative bar might very well mean less effective legal services for the disadvantaged. In a highly competitive market, the large underclass of lawyers servicing the poor would have greater temptations to be unethical and would have less of an opportunity to engage in specialized practice.

In view of the complex nature of the issues involved, it is possible that implementing a wholesale process of equalization may be less beneficial than some commentators have predicted. Therefore, it is imperative that policy analysts and public officials think carefully about the conse-
quences of proposed reforms. The purpose of social policy must not be to satisfy the reformist inclinations of "do-gooders" to "do something." It is submitted that reformers should advocate effective social policies which achieve their intended goals without producing serious and unexpected negative effects. Nevertheless, there is clearly a need for fundamental reform throughout the legal system in order to ensure the full participation of the poor.