

Unequal Justice Under the Law— Racial Inequities in the Justice System

by Clarence M. Dunnaville, Jr.

The unequal treatment of minorities in the criminal justice system is one of the most serious problems facing America in the new millennium.

The statistical evidence that this is true is overwhelming, and many Americans, black and white, firmly accept that this is so.

In early 1999, nearly 2,000 citizens were asked to express their opinions about the courts in a survey conducted by the National Center For State Courts.¹ The survey revealed that only 23% of the people surveyed have a “great deal” of trust in the courts of their communities and an additional 52% have only “some” trust. Further, the survey revealed dissatisfaction with our judicial system—in access to justice, timeliness, independence, accountability, equality, and fairness. The level of African American dissatisfaction was higher in every category. Sixty-eight percent of African Americans felt they were treated worse than white people and almost 45% of the white people surveyed agreed with this perception. In short, the majority of African Americans surveyed, and nearly half of the white people surveyed by the National Center for State Courts believed the justice system is racially skewed.

A recent report by the Leadership Conference on Civil Rights entitled, “Justice on Trial: Racial Disparities in the American Criminal Justice System,”² shows that racial disparities may have increased rather than subsided over the past few years. The report concludes that, while in the past half century the United States has made significant overall progress toward the objective of ensuring equal treatment under the law for all citizens, in the critical area of criminal justice, racial inequality appears to be growing, not receding, and our criminal laws, while facially neutral, are enforced in a manner that is massively and pervasively biased.

This report reveals serious findings of systematic unequal treatment of African American and Hispanic Americans and other

minorities, as compared to their similarly situated white counterparts within the criminal justice system. Disparate treatment of minorities begins at the very first stage of the criminal justice system: the investigation of suspected criminal activity by law enforcement officials. Innocent minority citizens are detained by the police on the street and in their cars far more than whites. Those stops involve inconvenience, humiliation and a loss of privacy that is heightened when the rationale for the police action is the color of a motorist’s skin or a pedestrian’s accent. Furthermore, during some investigations and interrogations, the police employ tactics that shock the conscience.³ The disparate implementation of justice continues through the trial, jury deliberation and sentencing. According to the report:

“Unequal treatment of minorities characterizes every stage of the process. Black and Hispanic Americans, and other minority groups as well, are victimized by disproportionate targeting and unfair treatment by police and other frontline law enforcement officials; by racially skewed charging and plea bargaining decisions of prosecutors; by discriminatory sentencing practices; and by failure of judges, elected officials and other criminal justice policy makers to redress the inequities that become more glaring every day.”⁴

The manifestation of a criminal justice system that *de facto* distributes separate, unequal standards of justice for whites and African Americans and other minorities has created a mushrooming prison population that is overwhelmingly black and Hispanic. Three out of every ten African American males born in the

United States will serve time in prison. Nationally, 1.4 million black men have lost the right to vote as a result of felony convictions; approximately two million Americans—two-thirds of them black or Hispanic—are in prison or a jail cell.⁵

The exploding prison population is leading to the decay of communities that will have given up an entire generation of young men to prison. Furthermore, it is leading to a widely-held belief among black and Hispanic Americans that the criminal justice system is deserving neither of trust nor support. Unfortunately, many politicians and policy makers have the perception that lawlessness is a “colored” problem, and that the disproportionate treatment of blacks and Hispanics within the criminal justice system is a rational response to a statistical imperative.

Disparate treatment within the criminal justice system is not rational. It is well established that the majority of crimes are not committed by minorities, and most minorities are not criminals—indeed, less than 10 percent of all black Americans are even arrested in a given year. Yet the unequal targeting and treatment of minorities at every stage of the criminal justice process—from arrest to sentencing—reinforces the perception that drives the inequality in the first place, with the unfairness at every successive stage of the process compounding the effects of earlier injustices. The result is a vicious cycle that has evolved into a self-fulfilling prophecy. More minority arrests and convictions perpetuate the belief that minorities commit more crimes, which in turn leads to racial profiling and more minority arrests.⁶

The Leadership Conference on Civil Rights report is corroborated by a number of other reliable sources. In a 1999 study by the American Bar Association, 50% of the total persons polled stated they thought law enforcement treats minorities different from white people, and 47% thought the courts do not treat all racial and ethnic groups the same.⁷ These recent opinion surveys show beyond peradventure that public trust in our judicial system is being undermined by racial inequities.

Justice Sandra Day O'Connor, in a May 1999 statement reported in *The Washington Post*, commented on the ABA survey that most blacks believe they receive worse treatment in the courts than do other people. Justice O'Connor noted that an ABA survey also found that a significant percentage of whites also believe that African Americans are not equally treated in the justice system. “Clearly this is a problem that has to be addressed,” Justice O'Connor said. “Concrete action must be taken” to erase racial bias.⁸

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Justice O'Connor also appealed for better legal representation for minorities, poor people and others who flounder in the justice system. This is critical and must be given the highest priority in Virginia.

In addition to emphasizing a need for racial equality in our justice system and better legal representation, she also called for

improvements in family and juvenile courts and better jury conditions and selection.

The racial disparities that exist in the criminal justice system deeply affect juveniles and cause African American and other minority youth to be over-represented at every stage of the juvenile justice system. The *Leadership Conference Report* correctly points out that racially skewed juvenile justice outcomes have dire implications, because the whole point of the juvenile justice system is to head off adult criminality. The report observes that the segregation of children from adult prisoners is an important aspect of the juvenile justice system and that placing more black and Hispanic teenagers in adult prisons where they will come into contact with career criminals serves to incubate another generation of black and Hispanic criminals.⁹

As Justice O'Connor urged, improvements in family and juvenile courts is essential. Racially disparate treatment of juveniles within the justice system necessitates that legislators and members of the legal profession make drastic improvements of the juvenile justice system and eliminate racial inequities on a priority basis. We cannot expect that young people who are treated unfairly and disparately solely because of their race or ethnicity will have a respect for the judicial system.

Statistics on racial disparities in the Virginia Criminal Justice System appear to be even greater than in her sister states. The *Richmond Times-Dispatch* reported on June 8, 2000, that black males in Virginia were imprisoned for drug offenses in 1996 at a rate 21 times higher than that for white males and at a rate 13 times higher than white males nationally. The *Richmond Times-Dispatch* reported on September 13, 2000, that a recent Justice Department report found that 80% of the defendants sentenced to death in the federal courts were minorities, and the largest number of death cases was from Virginia.

Equally distressing is the fact that the Court of Appeals for the Fourth Circuit is the only circuit within the nation that does not include a single African American judge. Although President

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Clinton has nominated several African Americans, including Roger Gregory of Richmond, the Chief Judge has repeatedly stated he does not need any more judges, although there are five vacancies.

In April of this year the Virginia Advisory Committee to the United States Commission on Civil Rights issued its report entitled,

*Unequal Justice: African Americans in the Virginia Justice System.*¹⁰ The report states that during two days of fact finding meetings and community comment sessions, the committee heard statements from civil rights activists, concerned citizens, law professors, students, local law enforcement and elected officials and representatives of Virginia criminal justice agencies. Charging that the administration of justice in Virginia is affected by racial

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—John A. C. Keith

discrimination, critics of the criminal justice system attending the hearing gave testimony of racial bias in the administration of justice in the Commonwealth, and pointed to the reams of statistics reflecting the disproportionate concentration of African Americans in Virginia prisons alleged to be the result of police and prosecutors aggressive and unequal pursuance of blacks. The Civil Rights Leadership Conference report discussed states that black adult and juvenile males are over-represented in the criminal justice system, and that black women are imprisoned at a rate seven times greater than white women. The report indicates there has been an increase in their incarceration rate in excess of 400% in recent years. Further, three-fourths of the women, according to the report, were mothers, and two-thirds had children under 18. These alarming statistics must be of grave concern to the bar. The Virginia Advisory Committee to the United States Commission on Civil Rights does not focus on the plight of African American women in the Virginia Criminal Justice System. However, this is also a subject that needs prompt and urgent attention, especially in view of shocking reported abuses of inmates at some of our correctional facilities.¹¹

Among the concerns addressed by the Virginia Advisory Committee were racial profiling, extremely low fees paid to court-appointed attorneys, and restoration of civil rights to ex-felons. The report cites 1997 statistics of the state police which showed that African Americans constituted 51% of arrests for the most serious felonies and 40% of all other arrests although African Americans are only approximately 20% of Virginia’s population. Moreover, African Americans were arrested for 70% of all murder charges and nearly 75% of all robbery charges.¹²

The Virginia Advisory Committee found a serious breach of trust between African Americans and the justice system. The report stated:

The promise of equal protection under the law dims gradually from sight as the cumulative effect of police strategies in connection with the war on drugs, the zeal of elected prosecutors (Commonwealth Attorneys) and lifetime voting rights deprivation weighs heavily on African-American aspirations . . . The difficulties involved in resolving this problem requires the utmost dedication and work.¹³

It is clear that there is ample evidence that our Virginia criminal justice system needs to be seriously and promptly examined, and changes need to be made to alleviate racial inequities. We, the members of the bar, have a responsibility to begin the process of dealing with this crisis on a priority basis. Article I, Section 15, of the Virginia Constitution states in relevant part that no free government, nor the blessings of liberty, can be reserved for any people, but by a firm adherence to justice, . . . and by the recognition by all citizens that they have duties as well as rights, and that such rights cannot be enjoyed, save in a society where law is respected and due process is observed.¹⁴

We, as lawyers, may be considered as the fiduciaries of our justice system. As fiduciaries, we must fulfill our responsibilities to the public, and we must, as good stewards, seek to initiate changes in the system needed to ensure fairness and the appearance of fairness to all members of our diverse society.

Former Virginia State Bar President John A. C. Keith, in the June/July 1999 edition of the *Virginia Lawyer*,¹⁵ asked and answered the following critical question: “Is it really important for the public to trust the justice system? Of course, it is important and worth the trouble, especially to those who are actively engaged in the legal system. We have the responsibility to be faithful stewards of this critical element of our democratic structure.”

Mr. Keith reported that in May 1999, he attended the National Conference on Public Trust and Confidence in the Justice System sponsored by the Conference of State Court Administrators, the Conference of Chief Justices, the ABA, the League of Women Voters and the National Center for State Courts. One of the critical areas addressed at the conference was the hypothesis that “our system still does not treat all people equally, regardless of race, ethnicity or gender.”

Mr. Keith relates that “the organizers of the conference bombarded [the conferees] with examples and statistics that highlighted numerous areas where our system of justice needs fixing.”

In his article in the *Virginia Lawyer*, he said, “I am convinced there are some real, basic structural problems with our system, and that fixing, or at least addressing, these problems is the only sure way to boost the public’s confidence. . . . We must first listen carefully to the public and then begin or continue the incremental process of change.”

Mr. Keith further stated:

“Before solutions can be figured out, the problems have to be identified. That is pretty basic, but when it comes to identifying this set of problems, people fall into the camps. Those who think the system is not broken, but just misunderstood, and those who think the system needs fundamental change I am persuaded we need to keep a very open mind to the possibility that our justice system could be greatly improved by some radical changes.¹⁶

I believe the entire membership of the Virginia State Bar should be open to the possibility that our justice system needs fundamental change, and be willing, on a priority basis, to examine and consider what changes are required. I believe this is critical in light of the alarming statistics.

In his recently published book, *The Debt: What America Owes to Blacks*, Randall Robinson says, in a chapter entitled, “The Cost of Ignoring the Race Problem in America:”

“Solving these problems, the first thing is to see them. That is the hard part. Mustering the will to solve them is difficult but less so. Least difficult is the business of designing the mechanics of solutions. All of us look. Few of us see or want to see, trained lovingly as we are in the more genteel, commonplace, everyday bigotries. The blindness is pretty much universal. We’ve all been acclimated to static expectation and some level of socially acceptable prejudice.”¹⁷

It is an uncomfortable task, for as Randall Robinson states in *The Debt*, few of us see the problem. Many think the system works fine; however, in the words of Mr. Keith, “We must listen carefully to the public and then begin or continue the incremental process of change.”¹⁸

The organized bar within the Commonwealth must be in the forefront of recommending changes needed to make our criminal justice system fair and impartial, and to make the system appear to be fair to all of the citizens of Virginia.

The cost of ignoring the problem is great. Unequal treatment of minorities in the criminal justice system undermines the rule of law. It is up to all of us as lawyers to be a part of the solution and not to be a part of the problem.

Law schools, as makers of our future generation of lawyers, have a special responsibility for developing “citizen lawyers.” Law students are the future stewards of the principles stated in our

our social structure. They should also be taught about the historical and current racial and gender discrimination and inequities of the law. This should be required in all law schools. Although many law professors in law schools within the Commonwealth are mindful of these responsibilities and are already addressing them, much more attention needs to be given to these concerns in law schools.

Professor Blake Morant of the Washington and Lee University School of Law suggests that law schools develop courses specifically on responsibilities of the legal profession and professionalism. Professor Johnathan Stubbs of the University of Richmond T.C. Williams School of Law, in his course on professionalism, addresses the issues of bias in the profession, race, ethnicity, gender and sexual orientation. Many other law professors—on an individual basis—are addressing the issue of professionalism. William G. Broaddus, president of the Richmond Bar Association, in a newsletter¹⁹ related that The College of William and Mary School of Law has designed a seminar to focus on developing “citizen lawyers.” The seminar prods students to broaden the perspective of their opportunities and responsibilities to the profession.

I suggest that, in seeking to make our system fair to all, we should re-examine whether our prosecutors should continue to function solely as prosecutors, or be required to become searchers of truth. In Florida, for example, a prosecutor has the responsibility of a minister of justice and not simply that of an advocate.²⁰ We should also re-examine whether our trial practices and jury system need improvement, and many of our archaic practices and procedures including Rule 1.1 of the Supreme Court Rules that precludes any action in a case more than 21 days after judgment, should be eliminated. We must substantially increase the attorneys’ fees paid for indigent defendants to near market rates to insure competent counsel for all defendants.

Racism cannot be allowed to exist within our system of justice; however, it is extremely difficult to get to the source of this problem. The police, prosecutors, courts, juries, penal administrators, legislators, and members of the executive branches of both federal and state government are all involved in the criminal justice system and each play a key role.

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constitutions. They must ensure in their generation that law is respected, that the system is fair, and that due process is received by all segments of our diverse society. Law students should be taught more about the justice system and its important role in

Furthermore, reforming the justice system is politically perilous. Being labeled as “soft on crime” is political dynamite. No office holder can afford this label.

Irrespective of the difficulty of the challenge, we must accept the responsibility. The National Conference on Public Trust and Confidence in the Justice System developed a number of overarching strategies which I have listed below:²¹

1. Improve external communication.
2. Improve education and training.
3. Make courts more inclusive and outreaching.
4. Improve management and information technology.
5. Make changes in existing laws and rules governing court procedures.
6. Simplify courts to make them more accessible to *pro se* parties.
7. Change the economics of courts and the legal profession.
8. Strengthen and improve the relations of the judiciary with other branches of government and court-related agencies.
9. Enforce court procedures and powers of superintendence.
10. Make the courts [and other organizations making up the judicial system] demographically representative of the communities they serve.

Consideration and application of these strategies on a priority basis, as a minimum, should be addressed. Those accused of violating the law often are innocent and unjustly suffer the most severe forms of inequality of which our society is capable. The recent ordeal of Earl Washington, Jr., who narrowly missed being executed for a murder he did not commit, should be a grim reminder to all of us that even in our system, the person convicted of a crime is sometimes innocent.

Michael Paul Williams, of the *Richmond Times-Dispatch*, in discussing the Washington case, made the following statement in the October 9, 2000, edition of the newspaper:

“Still, you don’t have to be a bleeding heart or capital punishment foe to wonder: Can we trust the state with the lives of its criminal defendants?”

It’s scary to ponder what might have happened if Wilder—in his last full day as governor—hadn’t commuted Washington’s sentence.

A defendant surrenders many civil rights in a criminal case, but the basic rights to receive fair and impartial treatment throughout their ordeal cannot be one of them. It is an assault on the humanity and citizenship of anyone who is discriminated against in the justice system because of their race. Moreover, it is an affront to all Americans. 🙏



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Dunnville served as a voluntary attorney with the Lawyers Committee for Civil Rights Under Law in the Mississippi project in the late 1960s. A former assistant states attorney for the Southern District of New York and corporate counsel for AT&T, where he practiced corporate and international law, he has participated in numerous national and international conferences and seminars on various legal topics. In January 1999, he participated on a panel of lawyers and judges from France, the United States, Cote d’Ivoire and Senegal on constitutional law in Abidjan, Cote d’Ivoire (Ivory Coast) Africa. In October 2000, he served as professional in residence at Washington and Lee School of Law.

Dunnville is a member of the Old Dominion Bar Association, the Bench Bar Committee of the Virginia State Bar, and is treasurer of the board of governors of the Senior Lawyers Section of the Virginia State Bar. He is a member of the Administration of Justice Committee of the Bar Association of the City of Richmond.

Endnotes

- 1 In early 1999, 1,826 citizens were asked to give their opinions regarding the Courts in their communities. This survey, entitled “How the Public Views State Courts,” was conducted by the National Center for State Courts.
- 2 *Justice on Trial: Racial Disparities in the American Criminal Justice System*, Leadership Conference on Civil Rights, May 2000.
- 3 *Id.*, Chapter 1, page 1.
- 4 *Id.*, Executive Summary, p. 2.
- 5 *Id.*, Chapter 6, page 3. The report indicates that 31 percent of all black men in two states are permanently disenfranchised.
- 6 *Id.*, Executive Summary, p. 3.
- 7 The American Bar Association commissioned M/A/R/C Research to conduct a public opinion survey on Perceptions of the U. S. Justice System in early 1999. Only 39 percent of those surveyed believed all racial groups receive equal treatment in the justice system. See report of the National Conference on Public Trust and Confidence in the Justice System: *National Action Plan: A Guide for State and National Organizations*.
- 8 Statement of Justice O’Connor reported in the *Washington Post* on May 16, 1999.
- 9 *Justice on Trial, Id.*, Chapter V, p. 1.
- 10 *Unequal Justice: African-Americans in the Virginia Criminal Justice System*, Report of the Virginia Advisory Committee to the United States Conference on Civil Rights, April 2000.
- 11 *Justice on Trial, Id.*, Chapter VI, p. 3. Amnesty International, in its Report 2000 issued recently to President Clinton includes the inquiry into complaints of widespread sexual abuse of inmates at the Fluvanna Correctional Center for Women.
- 12 *Unequal Justice*, Table 1, p. 5.
- 13 *Id.*, p. 22.
- 14 This provision of the Virginia Constitution recognizes the interrelation between the respect for the law and due process being observed. It is understandable that persons who believe they have not received justice solely because of their race will not have a respect for the rule of law.
- 15 *Virginia Lawyer*, Vol. 48, No. 1, June/July 1999, p. 10.
- 16 *Id.*

- 17 Robinson, Randall. *The Debt: What America Owes to Blacks*, The Penguin Group 2000, p. 163.
- 18 *Virginia Lawyer*, *Id.*
- 19 *The Richmond Bar*, Vol. 13, No. 1, June 2000.
- 20 See Rule 4-38: "Special Responsibilities of a Prosecutor," *The Florida Bar Journal*, September 1999.
- 21 National Conference on Public Trust and Confidence in the Justice System, *National Action Plan: A Guide for State and National Organizations*, Appendix C.

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