COMMENT

RETHINKING EQUAL PROTECTION DOCTRINE IN THE WAKE OF *McCLESKEY v. KEMP*

I. INTRODUCTION

In 1976, the Supreme Court declared that evidence of intent to discriminate is necessary to make out a prima facie case of race discrimination under the fourteenth amendment equal protection clause.[1] On that day, the Court created a threshold standard for judicial action termed the "discriminatory purpose" doctrine. The "discriminatory purpose" doctrine has come under heavy criticism from leading constitutional scholars since its birth, twelve years ago. The bulk of criticism falls on the doctrine's cornerstone, an inquiry into the motivation behind governmental action. The primary objections to a motive centered standard are: (1) it erects an insurmountable evidentiary barrier for victims of race discrimination; (2) it allows the malevolent government actor to disguise his racist intentions with facially neutral language and; (3) a victim's suffering is not alleviated or diminished by the defendant's assertion that the result was unintended.

The urgency of these concerns has prompted constitutional scholars to rethink equal protection doctrine in terms of the disadvantages visited on minorities and the phenomenon of unconscious racism.

This Comment reevaluates equal protection doctrine in the aftermath of *McCleskey vs. Kemp*,[2] a recent Supreme Court case in which stark racial disparities in the administration of a state capital sentencing scheme were challenged as an equal protection violation. *McCleskey* demonstrates the parade of horrible consequences that flow from the discriminatory purpose doctrine. Those consequences can only be rectified if the judiciary first recognizes that a motive centered standard for review is dysfunctional and second, develops an equal protection doctrine which reflects an understanding of the complexity of race discrimination.

This Comment argues that the anti-discrimination principle used by the Court should be replaced with an anti-subjugation principle which is deeply rooted in the historic meaning of the equal protection clause. Further, the anti-subjugation model can accommodate the development of contemporary equal protection doctrine. Finally, this Comment offers a new test designed to eliminate systemic discrimination.

II. DISCRIMINATORY PURPOSE DOCTRINE: FLAW IN THE EQUAL PROTECTION BLUEPRINT

The equal protection clause of the fourteenth amendment is notoriously vague. It states: "No State shall . . . deny to any person . . . the equal protec-

1. Washington v. Davis, 426 U.S. 229, 239-40 (1976).
2. 481 U.S. 279 (1987).

tion of the laws."[3] The clause has been interpreted to embody the anti-discrimination principle. The underlying theory of this principle is that constitutional race discrimination law should only prohibit intentional discrimination. Thus, an equal protection violation will arise from a facially discriminatory law, or a law purposely designed to disadvantage minorities.

The theory that only intentional acts of discrimination violate the equal protection clause is the underpinning of the discriminatory purpose doctrine. This doctrine was created by the Supreme Court in *Washington v. Davis.*[4] In *Davis,* a verbal skills communication test was used to screen applicants for the Washington, D.C. police training program. The test had a failure rate four times higher for Blacks than Whites. Unsuccessful applicants challenged the department's screening practice as a violation of the equal protection clause.

The Supreme Court majority announced that a law challenged on grounds of race discrimination is only indivious if the discriminatory impact can be traced to a discriminatory purpose.[5] The police department's test was facially neutral with regard to race. Thus, because the unsuccessful Black applicants failed to prove that the test was chosen to exclude Blacks from the police force, the Court held that no equal protection violation existed.[6]

The Court reaffirmed the primacy of intent in *Village of Arlington Heights v. Metropolitan Housing Development.*[7] In *Arlington Heights,* a non-profit real estate developer contracted to purchase a tract of land in a White suburban community to build racially integrated low-income housing. The local zoning authorities refused to change the tract from a single family to multi-family zone classification. The developer sued the local authorities, alleging that the refusal to re-zone discriminated against Blacks in violation of the equal protection clause.

In conformity with its decision in *Davis,* the Court announced that proof of racially discriminatory purpose is required to trigger strict scrutiny review. The housing authority easily avoided strict scrutiny by offering a neutral explanation for its refusal to re-zone the tract of land. It simply explained that it sought to maintain a commitment to single family dwellings.[8] The Court accepted this explanation and held that without evidence of discriminatory intent, the respondent failed to carry its burden of proof.[9]

Although the Court's reasoning in Arlington Heights conformed to that in *Davis,* the Court attempted to reconcile the intent requirement with discriminatory impact. Specifically, the Court stated, "sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."[10] However, the Court in *Arlington Heights* declared that a pattern of discrimination must be stark in order to support an equal protection violation. The Court cited *Gomillion v Lightfoot* [11] as an example of facts necessary to sup-

3. U.S. CONST. amend. XIV, § 1.
4. 426 U.S. 229 (1976).
5. *Id.* at 239-42.
6. *Id.* at 250.
7. 429 U.S. 252 (1977).
8. *Id.* at 270.
9. *Id.*
10. *Id.* at 266.
11. 364 U.S. 339 (1960).

port an equal protection violation. In *Gomillion*, the Court found an Alabama state statute unconstitutional. The statute changed the shape of Tuskeegee from a square to a strangely irregular twenty eight sided figure thereby removing from the city all but a handful of Blacks, but not one White.[12] In *Arlington Heights* the Court found that such a pattern of discrimination was not evident and held that no equal protection violation existed.

The legacy of *Davis* and *Arlington Heights* indicates a judicial fixation on the motivation of actors in governmental processes. In this vein, the discriminatory purpose doctrine is at odds with the most basic tenets of justice primarily because its parent, the anti-discrimination principle, is fatally flawed.

According to Professor Lawrence Tribe, the anti-discrimination principle harbors a fundamental gap because it recognizes only one mechanism of subjugation: the purposeful use of rules to disadvantage minorities.[13] Tribe observes that the anti-discrimination principle may be useful in combating the denial of equal protection in isolated instances of impropriety. However, the oppression of Blacks and women in society is not the sum total of isolated instances of discrimination. The burdens placed on minorities are the restrictive devices employed by a regime of subordination.[14]

When the operation of the discriminatory purpose doctrine is examined closely, its use as a restrictive device is clearly exposed. The extreme difficulty of proving that governmental officials acted with racial animus completely debilitated the victim's case in *Arlington Heights*.[15] Similarly, in *Davis*, the discriminatory purpose doctrine made it constitutionally permissible to screen Black applicants out of employment opportunities.

The requirement of proving intent makes it virtually impossible to eliminate unconscious racism through the equal protection clause. In addition, the consequences of unconscious race discrimination are often more severe than those of intentional discrimination. Because the screening test was upheld in *Davis*, Blacks who otherwise possessed the potential to become competent police officers were locked out of any important economic opportunity, simply because they did not exhibit the verbal skills characteristic of a White middle class upbringing. In retrospect, *Davis* demonstrates that by limiting the scope of equal protection violation to intentional discrimination, Blacks can become permanently entrenched in the lower economic strata of society.

The regime of subordination pacifies society by propagating the myth of individual discrimination. Discriminatory purpose rationale plays an important role in the propagation of this myth. Racism is a very ugly label. Racists are thought to be backward, less than humane individuals. Thus, the intent requirement placates the majority by conveying the idea that society consists primarily of unbiased, fair, rational individuals, with only a few bad apples who may aptly be called racists. However, this does not reflect the true state of racism in America. Race prejudice is an American psychological phenomenon that pervades the entire society, leaving very few untouched. The result is that racism is not an aberration or the result of deviant behavior; racism is an American cultural condition.

12. *Id.* at 340.
13. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1518 (2d ed. 1988).
14. *Id.* at 1520.
15. *Id.* at 1504-05.

In an extremely astute article, Professor Charles Lawrence characterizes the phenomena of racism as a public health problem. Lawrence asserts that race prejudice is irrational to the extent that people are not fully aware of the meanings they attach to race or why they have made race significant.[16] Race prejudice is "also dysfunctional to the extent that its irrationality prevents the optimal use of human resources."[17] Unlike other forms of irrational and dysfunctional behavior which we think of as deviant or abnormal, racism is "normal". "[Racism] is a malady that we all share, because we have all been scarred by a common history."[18]

Lawrence and Tribe view the equal protection clause as providing Blacks and other minorities the substantive right to be free from racial subordination. The core value of [Tribe's anti-subjugation] principle is that all people have equal worth. When the legal order that both shapes and mirrors our society treats some people as outsiders or as though they were worth less than others, these people have been denied the equal protection of the law.[19] Under this principle, the inquiry relevant to an equal protection case is whether "the particular conditions complained of, examined in their social and historical context are the manifestation of a legacy of oppression."[20]

Professor Lawrence proposes a test fundamentally similar to the anti-subjugation principle called called the cultural meaning test. Under Lawrence's formulation, the Court would look to the cultural meaning of all alleged racially discriminatory acts as evidence of the collective unconscious we cannot observe directly.[21] If the Court determined by a preponderance of the evidence that a significant percentage of society would think of the government action in racial terms, then it would presume unconscious racial attitudes influenced the decision and apply heightened scrutiny.[22]

Both the anti-subjugation principle and cultural meaning test have their historical roots in the civil war amendments that freed the African-American slave, bestowed on him all the rights and privileges of citizenship, and sought to protect those rights from infringement.[23] The anti-subordination concept of equal protection espoused by Tribe and Lawrence was well settled in the earliest interpretation of the equal protection clause. *Strauder v. West Virginia,*[24] the first post-bellum Supreme Court race discrimination decision, described the equal protection clause as "exemption from legal discriminations implying inferiority . . . " that "steps towards reducing [Blacks] to the condition of a subject race." [25] Thus even as early as 1880, the Supreme Court recognized that race discrimination was systemic.

With this as a backdrop, the notion that the equal protection clause prohibits only intentional discrimination is unsupported by the language of the clause and actually contradicts, if not subordinates, the initial Supreme Court

16. Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987).
17. *Id.* at 330.
18. *Id.*
19. L. TRIBE, *supra* note 13, at 1515 (footnote omitted).
20. *Id.* at 1516.
21. Lawrence, *supra* note 16, at 356.
22. *Id.*
23. U.S. CONST. amends. XIII, XIV, and XV.
24. 100 U.S. 303 (1879).
25. *Id.* at 308.

interpretation. Discriminatory purpose doctrine is the brainchild of political expedience. It serves not the Constitution, but judicial economy and the racial stratification of society.

III. ELIMINATING SYSTEMIC DISCRIMINATION

A. *Lessons from the Jury Cases*

Even though the discriminatory purpose doctrine has hindered the development of a systemic discrimination theory, the Supreme Court has recognized that the right to a fair trial prohibits systematic exclusion of jurors on the basis of race and gender.

The Court's longstanding commitment to eliminating systematic exclusion of women from venires is exemplified in *Taylor v. Louisiana.*[26] In *Taylor,* a man was convicted of kidnapping by a petit jury selected from a venire on which no women were seated.[27] The Louisiana legislature had enacted a statute which stipulated that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service. The petitioner alleged that women were systematically excluded from the venire, and therefore he was denied his sixth amendment right to a jury drawn from a fair cross section of the community.[28]

The State Supreme Court affirmed the conviction, but the United States Supreme Court reversed. It held that the requirement that a jury be selected from a representative cross section of the community, which is fundamental to the right to a jury trial, is violated by the systematic exclusion for women from jury panels.[29]

Ultimately, the Court's conclusion that the Louisiana jury selection scheme systematically excluded women was based on statistical evidence of a gross disproportion between the number of women eligible for jury (which was 53% of the eligible citizens in the judicial district), the meager 10% who appeared in the jury wheel from which the venire was selected, and the complete absence of any women on petitioner's particular jury.[30] Furthermore, without articulating whether such gender discrimination would be subject to a heightened level of judicial scrutiny, the Court held that the state's justification for excluding women from juries was insufficient. Louisiana argued that as a class, women served a distinct function in society and that mandatory jury service would substantially interfere with that function. Thus, argued the State, the volunteer-only scheme was rational and justified.[31]

In what was ostensibly an instinctive reaction to a frivolous, backward yet "rational" argument, the Court stated that the "right to a proper jury cannot be overcome on mere rational grounds. There must be weightier reasons if a distinctive class representing 53% of the eligible jurors is for all practical purposes to be excluded from jury service. No such basis has been

26. 419 U.S. 522 (1975).
27. *Id.* at 524.
28. *Id.* at 524-25.
29. *Id.* at 531.
30. *Id.* at 524.
31. *Id.* at 534.

tendered here."[32]

In *Castaneda v. Partida,* [33] a Texas State court convicted Partida, a Mexican-American, of burglary with intent to rape. Partida subsequently filed a habeas corpus petition in federal district court. The suit alleged a denial of due process and equal protection under the fourteenth amendment on the grounds that he was indicted by a grand jury from which Mexican-Americans were grossly under-represented.[34]

The State of Texas employed a "key man" system for selecting grand juries. Under this system, jury commissioners were appointed by a state district judge to select prospective jurors from different portions of the county, after which the district judge tested their qualifications.[35] In order to be eligible for grand jury service, a citizen of the state must have been of sound mind, good moral character, literate, without prior felony convictions, and under no pending indictment or other accusation.[36]

The Federal District Court concluded that Partida had made out a prima facie case of intentional discrimination, but because Mexican-Americans constituted a "governing majority" in that county, the court dismissed the petition concluding that the state has successfully rebutted the prima facie case.[37]

After the case was reversed by the Court of Appeals, the State of Texas appealed to the United States Supreme Court. The Court held that based on all facts bearing on the grand jury discrimination issue (such as statistical disparities, the method of selection, and relevant testimony about procedural implementation), the proof offered by respondent was sufficient to demonstrate a prima facie case of intentional discrimination.[38] Finally, the Court found nothing in the record to rebut respondent's prima facie case.[39] The Court stated that even though the population of the county was 79.1% Mexican-American, over an eleven year period, the percentage of Spanish surnamed grand jurors was only 39%.[40]

On the list from which the respondent's grand jury was selected, 50% were Spanish surnamed, but no Mexican-Americans were selected to serve on his grand jury. Moreover, the Court found the method of grand juror selection highly subjective and considered its susceptibility to abuse persuasive evidence of intentional discrimination. Accordingly, it shifted the burden of proof to the state.[41]

Ultimately, the State of Texas produced virtually no evidence to rebut the inference of intentional discrimination. Essentially, except for its contention that the governing majority was Mexican-American and therefore could not discriminate against their own kind, the state could not give a neutral explanation for the statistical discrepancies. Consequently, the governing majority

32. *Id.* (footnote omitted).
33. 430 U.S. 482 (1977).
34. *Id.* at 490.
35. *Id.* at 484-85.
36. *Id.*
37. *Id.* at 491-92.
38. *Id.* at 496.
39. *Id.* at 499.
40. *Id.* at 495.
41. *Id.* at 497-98.

theory was dismissed as inadequate to fill the evidentiary gap.[42]

In *Duren v. Missouri*, [43] the petitioner was convicted of first degree murder and first degree robbery in a county court before an all male jury. The petitioner appealed his conviction, alleging a violation of his sixth amendment right to a jury selected from a fair cross section of the comunity, because the state jury selection scheme systematically excluded women.

Under the Missouri jury selection scheme, women were allowed to claim exemption from jury service before the jury wheel was filled. Prior to the appearance of jurors for service, women were given one last opportunity to opt out of duty by returning the summons or failing to report for service.[44]

Petitioner produced statistics demonstrating that eight to ten months prior, 54% of the adults in the forum county were women. At his trial, only 26.7% of those summoned were women.[45] In particular, during the months petitioner's jury was selected, the venires averaged 15.5% women, and the panel from which petitioner's jury was drawn contained 53 jurors, only 5 of whom were women.[46]

The Missouri Supreme Court held that the under representation of women on jury venires did not violate the fair cross section requirement within the meaning of *Taylor*.[47] In order to establish a prima facie violation of the fair cross section requirement, the petitioner had to show that: (1) the group alleged to be excluded is a "distinctive" group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this under representation is due to systematic exclusion of the group in the jury-selection process.[48]

The State Supreme Court concluded that petitioner's case did not fall under the scope of *Taylor* because the census figures were inadequate, and because petitioner had not demonstrated the extent to which the low percentage of women appearing for jury service was due to the automatic exemptions for women rather than other neutral exceptions.[49]

The United States Supreme Court granted certiorari, finding that the Missouri Supreme Court misconceived the nature of the fair cross section inquiry under *Taylor*. In *Taylor*, the Court had held that "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."[50]

The Court expressed no doubt that "women 'are sufficiently numerous and distinct from men' that 'if they are systematically eliminated from jury panels, the sixth amendment's fair cross section requirement cannot be satisfied.' "[51] The second element was satisfied by petitioner's statistical represen-

42. *Id.* at 500.
43. 439 U.S. 357 (1979).
44. *Id.* at 362.
45. *Id.*
46. *Id.* at 362-63.
47. *Id.* at 363.
48. *Id.* at 364.
49. *Id.* at 363.
50. *Id.* at 363-64 (quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975)) (footnote omitted).
51. *Id.* at 364 (quoting Taylor v. Louisiana, 419 U.S. 522, 531 (1975)).

tation of the disparity between the percentage of women in the community eligible for jury service and those who reached the venire. According to petitioner, a census measurement showed that the community was comprised of 54% women; yet, less than 27% of those summoned were females. At the venire stage, only 14.5% of the average weekly venire was made up of women.[52]

The third element for establishing a prima facie case required showing that under representation of a particular group was due to systematic exclusion from the jury selection process. The Court held that petitioner satisfied this requirement by demonstrating that a large discrepancy occurred not just occasionally, but weekly for nearly a year. It therefore concluded that the under representation was inherent in the particular jury selection system utilized.[53] Moreover, the Court found petitioner's allegation that women were systematically excluded compelling, in part because he was able to show the point in the process at which the systematic exclusion took place. There was no evidence that under representation of women occurred at the first stage of the jury selection, which was the process of questionnaire canvassing people randomly selected from voter registration lists. The first sign of systematic exclusion appeared at the second stage, where the jury wheel was constructed. The paltry 26.7% of women in the jury wheel convinced the Court that women were claiming either ineligibility or exemption from service. In addition, at the summons stage, women were given an additional opportunity to claim exemption. Finally, if they failed to answer the summons, women were presumed to have exercised a de facto exemption.

In sum, the Court found that the disproportionate and consistent exclusion of women from the jury wheel and at the venire stage "was quite obviously due to the way in which jurors were selected." [54] Since the underrepresentation of women from the jury pool was due to operation of a state exemption, women were systematically excluded within the meaning of *Taylor*. [55]

Taylor, Castaneda, and *Duren* are prime illustrations of how the Court has embraced the concept that systemic discrimination is illegal. Although the decisions in *Taylor* and *Duren* are based on the sixth amendment right to fair trial and not the equal protection clause, both are discrimination cases decided pursuant to the anti-subjugation principle. In both cases, the Court sought to eliminate biases from the jury selection system which subjugated women to the status of second class citizens. By considering only whether the discriminatory effects were designed by the legislators who created the jury selection system, the Court only inquired into whether the exclusion of women was systematic.

The Court is not compelled to follow the reasoning of sixth amendment cases when deciding an equal protection case. However, the Court appears to have applied the *Taylor* reasoning to *Castaneda*, an equal protection case involving systemic race discrimination within a jury selection scheme. The Court was careful to stay within the bounds of equal protection doctrine by

52. *Id.* at 362.
53. *Id.* at 366.
54. *Id.* at 367.
55. *Id.*

ultimately finding discriminatory intent. Yet the Court reached its conclusion on the same basis the sixth amendment cases were decided, strong evidence of disproportionate impact itself indicated a violation of the Constitution. Ostensibly, the Court followed the anti-subjugation rationale in eliminating the race intent requirement of the equal protection clause. Because it cannot simply ignore the fact that in the absence of any other explanation, systematic exclusion was an affirmative indication of intentional discrimination.

Castaneda stands for the proposition that in criminal cases, a significant risk of bias in the process, unexplainable on any grounds other than race, violates the equal protection clause. It is not clear, however, why the reasoning of *Castaneda* has been limited to cases involving jury selection. The following reevaluation of a recent equal protection decision shines a bright light on the Court's conspicuous underdevelopment of systemic discrimination doctrine.

B. *The High Cost of Eliminating Systemic Discrimination*

McCleskey v. Kemp[56] is a 1987 Supreme Court case that questions whether racial disparities in death sentencing constitute an equal protection violation. In *McCleskey*, a Black man was convicted of murdering a White police officer during the course of a robbery. To impose the death penalty, the jury was required to find that the murder was accompanied by one of the statutorily prescribed aggravating circumstances. The list of aggravating circumstances includes committing murder during an armed robbery and killing a police officer.[57] The jury recommended the death penalty and the trial judge complied with the recommendation and sentenced Warren McCleskey to death. McCleskey appealed his conviction, claiming the Georgia capital sentencing process was administered in a racially discriminatory manner in violation of the equal protection clause, and the eighth amendment prohibition of cruel and unusual punishment.

In support of his equal protection claim, McCleskey produced the highly sophisticated Baldus study. The Baldus study concluded that in Georgia, a defendant charged with killing a White victim is 4.3 times more likely to receive the death penalty than a defendant charged with filling a Black victim. The Baldus study looked at the frequency with which prosecutors asked for the death penalty and found that it occurred in 70% of the cases involving Black defendants and White victims; 32% of the cases involving White victims and White defendants; 19% of the cases involving Black victims and White defendants; and 15% of the cases involving Black victims and Black defendants.

Finally, the Baldus study controlled for 230 variables which could have explained the disparities on grounds other than race. Even after taking such an extraordinary number of factors into account, Baldus' bottom line conclusion — that defendants charged with killing Whites are four times more likely to get the death penalty than those charged with Blacks — held up. The Court assumed the validity of the Baldus study but found "[a]t the most, the study indicated a discrepancy that appears to correlate with race."[58] In order to close the door to the rule of exclusion , the Court "decline[d] to assume that

56. 481 U.S. 279 (1987).
57. *Id.* at 284-85.
58. *Id.* at 312.

what is unexplained is invidious".[59] "The discrepancy indicated by the Baldus study is a far cry from the major systemic defects identified in *Furman*.' "[60]

The Supreme Court ultimately concluded that in light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trials in our criminal justice system, the benefits discretion provides to criminal defendants, and the fear of widespread challenges to sentencing decisions, the Baldus study did not demonstrate a constitutionally significant risk of bias affecting the capital sentencing process.[61]

The petitioner in McCleskey presented a virtual mirror image of the elements of an equal protection violation proved in *Castaneda*.[62] In *Castaneda*, the Court held that the petitioner made out a prima facie case of race discrimination by demonstrating that:

1. Mexican-Americans were a distinct group;
2. a gross statistical disparity between Mexican-Americans in the community and those appearing on grand juries over a period of time;
3. the discretionary nature of the jury selection system was susceptible to abuse; and
4. the disparity was unexplainable on grounds other than race.

First, it is indisputable that Blacks are a distinct group. Second, the Baldus study demonstrated that over a ten year period, the Georgia capital sentencing process produced death sentences four times more often for Blacks than Whites. This statistic represents a stark gross disproportion, not a "mere discrepancy". Third, the capital sentencing scheme's extreme susceptibility to abuse is unmasked by petitioner's showing that when given complete discretion to ask the jury to consider the death penalty, the prosecutor asked for the death penalty in a startling 70% of the cases involving Black defendants and White victims. The pattern of racial disparity in deciding whether to ask for the death penalty is so stark it is almost frightening. The racial disparity present in *Castaneda* looks pale in comparison.

Finally, the Baldus study controlled for 230 non-racial variables that could have affected the sentencing disparities. The study searched for every conceivable factor which could be attributed to the gross disproportion, but the conclusion held up. Thus, the disparities were unexplainable on grounds other than race within the meaning of *Gomillion v. Lightfoot*[63] and *Castaneda*. In *Castaneda,* the Court applied the rule of exclusion when the state could not offer an acceptable neutral explanation other than the governing majority theory. In *McCleskey*, the Court ignored this ruling and declared that the unexplained cannot be assumed invidious.

In a further attempt to distinguish *Castaneda* factually, the Court explained that the essential elements involved in evaluating a challenge to jury selection are fundamentally different than those involved in a challenge to sentencing.[64] The Court noted that fewer variables are related to the chal-

59. *Id.* at 313.
60. *Id.* (quoting Pulley v. Harris, 465 U.S. 37, 54 (1984)).
61. *McCleskey*, 481 U.S. at 313.
62. 430 U.S. 482 (1977).
63. 364 U.S. 339 (1960).
64. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1427 (1988).

lenged decision in the jury selection cases, and that the statistics related to fewer entities.[65] However, there is no legal foundation to support the proposition that a greater than average number of variables extinguishes the applicability of the reasoning in *Castaneda.* The Court's vain attempt to factually distinguish *McCleskey* from *Castaneda* is a desperate measure in light of the fact that the two cannot be legally distinguished. The attempt to distinguish *Castaneda* is a clear signal of the Court's determination that equal protection doctrine will reach systemic discrimination in only the most limited circumstances. The majority's statement, "if we accepted McCleskey's claim that racial bias impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to the other types of penalty,"[66] is a revealing explanation of the true motivation behind the decision. By its own admission, the Court refused to recognize an equal protection violation in *McCleskey* because it feared that such a decision would invite a barrage of race and gender claims based on disproportionate impact. Although this concern is well taken, the floodgate rationale is not a legitimate limiting principle. The majority opinion that produced such a rationale reflects as a whole, a panic-stricken, knee-jerk reaction to a case which has the potential to change the nation's socio-economic structure. In essence, the *McCleskey* decision is institutional racism's last stand in the same way as *Plessy v. Ferguson*[67] was segregation's last stand.

The more tangible consequences of the *McCleskey* decision are that first and foremost, Warren McCleskey will lose his life. Second, deliberate circumvention of *the McCleskey* decision has set up a norm for under enforcement of equal protection claims.

C. *New Strategies to Eliminate Systemic Race Discrimination*

1. *The Impact-Plus Test*

If and when the Court completely embraces the concept that the risk of bias in any system becomes unconstitutional at a certain point, then it must conclude that an equal protection doctrine based primarily on intent is without utility. An inquiry into the motivation of government actors is useless to evaluate the risk of racial bias in a given system. Hence, reckoning with systemic discrimination will require dismantling the discriminatory purpose doctrine.

As previously noted, an intent inquiry is potentially useful as indirect evidence of discrimination to buttress a showing of disparate racial impact. Thus, a demonstration of disparate impact, plus a strong inference of discriminatory intent, would make out a prima facie case of racial discrimination under the equal protection clause. "Impact-plus" is essentially a compromise between a pure intent and pure impact test. The impact-plus test is designed to resolve a *Village of Arlington Heights v. Metropolitan Housing Develpment Corp.*[68] problem, where the singe instance of discrimination resulted from the local zoning authorities' refusal to grant the proper zoning variance to allow

65. *Id.*
66. *McCleskey*, 481 U.S. at 315 (footnote omitted).
67. 163 U.S. 537 (1896).
68. 429 U.S. 252 (1976).

for racially integrated low income housing in order to keep Blacks out of a predominantly white suburb.

First, the impact-plus test inquires about the harm suffered by Blacks. Second, the test looks to historic and current evidence of the unwillingness to rezone in order to stop integration.

The harm present in *Arlington Heights* was two fold; denial of equal access to housing opportunities and the stigma of inferiority placed on Blacks by the concerted effort of Whites to lock them out of the suburbs. With regard to the latter part of the test, no evidence of this sort was presented in the *Arlington Heights* decision because the structure of the discriminatory purpose doctrine allowed the housing authority to give a neutral explanation for its refusal to rezone, and the Court accepted it at face value. However the impact-plus test would allow the victim to show impact and inference of intent to discriminate in order to make out a prima facie case, and then challenge the housing authority to give a compelling reason for refusing to rezone. Under this test, a different result is quite possible. That is not to say the impact plus is outcome-determinative. Requiring a strong inference of discriminatory intent and retaining the compelling state interest safety valve keeps determinacy in balance.

2. *The Systemic Defect Test*

A *McCleskey*-type case that turns on a pattern of systemic race discrimination should be controlled by the systemic defect test. The proposed systemic defect test should be applied when the risk of racial bias entering the legislative or capital sentencing process becomes constitutionally significant and thus makes out a prima facie case of race discrimination when petitioner demonstrates:

1. statistical evidence of gross disproportionate impact;
2. severe harm to the racial group or its members; and
3. evidence identifying at least one point in the system where the bias occurred.

If a petitioner successfully proves these elements, the state can only rebut the prima facie case with proof that the legislation or capital sentencing process can be administered in a non-defective way. This means that the bias producing influence can be eliminated. The formulation combines the reasoning employed in Supreme Court precedents involving systemic race and gender bias.

The first prong of the test reflects the significance of statistical proof in disparate impact cases. The Court's decisions in *Taylor* and *Castaneda* turned on the strength of the statistical evidence of systemic bias. The second prong incorporates the idea that the gravity of the harm suffered by a racial group or its members is a crucial factor in determining whether the risk of bias is unconstitutional. In *Turner v Murray*, [69] the Court made it clear that the harm suffered by Blacks must be reckoned with along these lines . In *Turner*, a Black man was prosecuted for the murder of a White business owner. During voir dire, the state trial judge refused petitioner's request to question the prospective jurors on racial prejudice. The jury convicted petitioner and sentenced him to death. In overturning petitioner's conviction, the Supreme

69. 476 U.S. 28 (1986).

Court majority found that there was an unacceptable risk of racial prejudice infecting the capital sentencing proceeding.[70]

Finally, the systemic defect that incorporates the *Duren* Court's rationale that identification of the point where bias occurred, makes petitioner's case more compelling. Application of the systemic defect test to the *McCleskey* case would have protected the petitioner's right to equal protection, and eliminated institutional racism in the Georgia capital sentencing scheme. First, Warren McCleskey would have been able to prove gross disproportionate impact with the highly sophisticated Baldus study. Second, in a capital case the gravity of harm to be avoided is self-evident. Third, the gross racial disparity in the prosecutor's decision to seek the death penalty marks the spot where the first sign of systemic bias appeared. The state's ability to rebut the prima facie case seems quite low because the state must prove that it can administer the sentencing scheme without gross disproportionate results. As long as complete prosecutorial discretion is maintained, the system will always be susceptible to abuse, and disparities will occur.

An ultimatum such as the systemic defect test puts the entire capital sentencing scheme in jeopardy and forces the state to reform the system or abandon capital sentencing altogether.

IV. CONCLUSION

In sum, the fiasco of *McCleskey v. Kemp* tells a morbid tale of equal protection jurisprudence guided by the antidiscrimination principle; although a caste system can no longer be sustained through overt racism, it can be sustained through reckless indifference to the burdens placed on minorities.

Unless the Supreme Court first comes to terms with the far-reaching implication of its own systemic discrimination decisions and adopts a more integrated equal protection principle, Black Americans and other racial minorities will be forever relegated to second class citizenship.

VERONICA PATTON

70. *Id.* at 36.