The proudest boast of American lawyers is that all men stand equal before the law. The boast is a noble and useful one even if it isn’t quite borne out by the facts. Too much of that equality is of the kind described by Anatole France when he said that the laws of his country were fair: They forbade both rich men and poor men from sleeping under bridges on rainy nights. Recent events in the South have brought the realization that all men aren’t equal before the law in some southern courtrooms and have occasioned soul searching to find out whether persons of differing economic circumstances are always equal before the law.

Senator Robert F. Kennedy, former Attorney General, insists that the “poor man looks upon the law as an enemy . . . . For him the law is always taking something away.” Nicholas deB. Katzenbach, present Attorney General, puts it that, “To us, laws and regulations are protections and guides, established for our benefit, and for us to use. But to the poor, they are a hostile maze, established as harassment, at all costs to be avoided.”

Racial identity, particularly for Negroes, has always been as troublesome a factor as poverty in the quest for equality before the law. Most Negroes, the overwhelming majority, are poor. The poor Negro has trouble on his hands when he seeks to surmount the twin obstacles of race and poverty and attain that equality guaranteed alike by federal and state constitutions and ingrained in American hopes.

One of the biggest obstacles to a frank national confrontation of this problem is the general American reluctance to admit that the original Constitution condoned and permitted discrimination against Negroes and that there was a great leeway for racial discrimination under late nineteenth- and early twentieth-century construction of the Civil War amendments. Racial inequality before the law affects all Negroes, no matter what their economic status or station in life. Jim Crow laws catch the affluent as well as the impoverished Negro in their nets. To complicate the matter, few persons believe that the Negro is entitled to full equality. Working class suburban cities and towns voted against a 1964 Fair Housing law in Los Angeles County, California in about the same proportion as middle-class and upper middle-class suburbs. An analysis of a
vote in Berkeley, California, showed a majority of white citizens with college degrees or better education opposed that city's fair housing ordinance. Large law firms have always drawn the same color lines against ambitious young Negro lawyers as have other employers.

I

HISTORICAL PERSPECTIVES

Most persons would deny vigorously that they entertain racial prejudices in any degree. Their denials are not contrived fictions; they are believed by those who utter them. Americans simply have a double standard of judgment as to rights of white persons as contrasted to those of Negroes. To them, white persons are born vested with that vast array of rights and privileges vaguely thought of as natural rights. Negroes, on the other hand, are regarded as entitled to such rights as the white majority grants them. It is commonly said that Negroes must "earn" the rights they would enjoy. That attitude is deeply rooted in our history.

Heeding the admonition of James Madison that it would be "wrong to admit, in the constitution, that there could be property in man," the Constitution makers fashioned a document that makes no mention of slaves, slavery, or race. Yet that great instrument protected slavery in the states where the institution existed, provided for the return of escaped slaves to their masters, devised a formula for counting slaves in the apportionment of members of Congress, prohibited Congress from taxing slavery out of existence, and preserved the African slave trade for twenty years. The slave trade and taxing clauses could not even be amended before 1808. The Founding Fathers heeded Madison's advice so well that the layman cannot identify the articles dealing with slavery without the aid of an historian. In fact, few lawyers can turn the trick.

Every Fourth of July and every Bill of Rights Week, orators shout

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4 An unpublished survey taken in 1962 by California Research Associates showed that of a sampling of 368 Berkeley voters, 201 opposed a fair housing ordinance and 167 favored it. About 58% of white college graduates opposed the measure.

5 A casual check will show no Negro lawyers in any of California's top law firms. These firms deny discrimination, of course. All nonemployers of Negroes also deny discrimination. All give the same reason for the nonemployment of Negroes: Merit alone is the only test used!

6 LIVERMORE, NEGROES AS CITIZENS, AS SLAVES AND AS SOLDIERS 65 (1862).

7 U.S. Const. art. IV, § 2, cl. 3.

8 U.S. Const. art. I, § 2, cl. 3.

9 U.S. Const. art. I, § 9, cl. 4.

10 U.S. Const. art. I, § 9, cl. 1.

11 U.S. Const. art. V.

themselves hoarse and teachers exhaust themselves telling Americans, adults and children, that the original Constitution and the Bill of Rights protected the rights and liberties of all Americans. This bit of pleasant folklore is arrived at by taking all the language of the Constitution at face value. In truth, the equalitarian guarantees explicit and implicit in the Constitution and amplified in the Bill of Rights offered absolutely no protection to the approximately 700,000 persons held in slavery at the birth of the nation and, as the Supreme Court was to hold later, little more protection for the some 60,000 free Negroes of the North and South. The Constitution, Chief Justice Roger B. Taney said in the Dred Scott case, decided in 1857, was made by and for white men.\footnote{Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).} Negroes, he elaborated, “were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.”\footnote{Id. at 404.} He went further to say that free Negroes were “not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union.”\footnote{Id. at 411-12.} Citizenship extended to Negroes by some states, he said, did not and could not confer national citizenship on them. Distinguishing state citizenship from national citizenship, the Court held that the states were in entire control of civil rights,\footnote{See id. at 405.} and that the citizen of a state must look to the state for protection of those rights.

Of course, the Chief Justice’s construction of the Constitution ran directly counter to that contended for by anti-slavery lawyers and theoreticians, but his was the practical construction put upon the document prior to and at the time of the decision. A portion of the hue and cry raised against the majority opinion in the Dred Scott case was the normal reaction of men who wince and cry out in pain, real or simulated, when their deeds are described in apposite language. The interpretation of the Constitution advocated by Chief Justice Taney as regards the rights of Negroes, free and slave, prior to the Civil War has had enormous consequences for the nation.

The most important principles that suffused the Constitution and undergirded stability for the political institutions created by it were the dignity of the individual and the inviolability of the rights and privileges recognized in that instrument and protected against governmental in-
fringement. Those principles demanded that every man be treated as, and function as, an individual, as a *person*, in constitutional language. By such reckoning no person had group identity in the eyes of the law; he was neither Jew nor Gentile, Catholic nor Protestant, rich nor poor. He was a person, and as such he could claim the rights, privileges, and protections of the Constitution and the Bill of Rights.

The Constitution vindicated those principles for white Americans, but recognition and protection of slavery inflicted a mortal wound as far as the Negro was concerned. For the word slave was for all practical intents and purposes synonymous with the appellation Negro. The Constitution as construed and as applied imposed legal disabilities on the slave; he was stripped of his individual dignity simply because of his race and stood not as a *person* but as a slave before the law of the land. The slave existed beyond the pale of the protections of the original Constitution and the Bill of Rights. He was a stranger in a strange land; his status as a Negro was itself an invidious classification.

Nor did the freeborn or emancipated Negro escape the disabilities laid on his slave kinsman. The existence of Negro slavery was an ever present reminder that every free Negro was a *freedman*, not a *free man*, to whom rights or privileges might be extended or denied at will. Again, such an attitude ran counter to the beliefs and theories of anti-slavery lawyers and theorists; again, it was the practical construction upon which northern and southern states acted as they enacted laws barring free Negroes from schools, places of public accommodation, the ballot box, and other facilities open to white Americans.

In spite of theory, and from the earliest days, there were classifications of white men based on economic distinctions which impaired equality before the law assumed to be the birthright of free men. The right to vote or hold office often depended upon property qualifications;\(^{17}\) the debtor could be imprisoned; the appellant in a criminal trial might be denied a transcript of his hearing unless he could pay for it;\(^{18}\) a poor defendant could be forced to trial without a lawyer;\(^{19}\) a litigant desirous of a jury trial in a civil matter might be required to deposit costs.\(^{20}\) The vagabond, the roamer, the idle, the beggar might be denominated a

\(^{17}\) See Emerson & Haber, Political & Civil Rights in the United States 138-41 (2d ed. 1958).


vagrant and penalized because of his status—indeed, he still faces that possibility in many states.\textsuperscript{21}

It is only in these latter days—very latter days—that some Americans have come to see that economic classification of a citizen may be disabling even where it is not specifically condemned by the Constitution. Most Americans are still blinded to a full realization of the importance of that fact by the belief that has so long sustained the nation that ours is an equilitarian society in which only the lack of ambition, thrift, and desire keep some in poverty. Deep in their hearts, a majority of Americans believe that any man can find a job if he has a mind to do so, that with a job he can save money, buy a home, and ultimately become a middle-class member of the affluent society. Within that context they nurse the belief that an economic classification is temporary and hence permissible—they hope that the penalties poverty exacts may even spur ambition. By that same token, they are uncomfortable over the fact that the individual cannot shed his race or vanquish his color as he can his poverty, and they are happy to say, and hear their judges say, that racial classification is suspect.\textsuperscript{22}

In a constitutional sense, racial classification as a device to impose disabilities is worse than suspect: It is forbidden by the Civil War amendments, or at least it was forbidden until the Supreme Court revised the meanings of those amendments. The precise purpose of the amendments was to abolish all invidious racial distinctions tolerated by the original Constitution, as interpreted by the Supreme Court, and to provide a new constitutional basis for congressional action to establish equality whenever states or individuals were laggard or insisted on imposing racial disabilities.\textsuperscript{23}

After the ratification of the thirteenth amendment in 1865, Congress enacted the first Civil Rights Act of 1866\textsuperscript{24} in response to the threats of the Black Codes\textsuperscript{25} to reduce Negroes to semi-slavery. Congress codified the sweeping legislative command for equality as contained in the 1866

\textsuperscript{21}See Hicks v. Dist. of Columbia, 383 U.S. 252 (1966) (dissenting opinion). Vagrancy laws in some Southern States are fashioned to penalize what are believed to be shortcomings of Negroes, and were formerly used to further peonage. See Stephenson, Race Distinctions in American Law 58, 275 (1910).

\textsuperscript{22}See Bolling v. Sharpe, 347 U.S. 497 (1954); see also Korematsu v. United States, 323 U.S. 214, 216 (1944).

\textsuperscript{23}See generally Harris, The Quest for Equality, ch. 2 (1960); ten Broek, Equal Under Law (rev. ed. 1965).

\textsuperscript{24}Ch. 31, 14 Stat. 27 (1866).

\textsuperscript{25}E.g., Miss. Laws 1865, ch. 4, § 1 (restrictions on free Negroes’ right to purchase and inherit real property); see Supplemental Brief for the United States as amicus curiae, pp. 45–48, Griffin v. Maryland, 378 U.S. 130 (1964); McPherson, Political History of the United States During the Period of Reconstruction 29–44 (1871).
Civil Rights Act in the constitutional shorthand of the fourteenth amendment, ratified in 1868. In 1870 it proposed and secured ratification of the fifteenth amendment. Each of the amendments provides that Congress shall have power to enforce the provisions by appropriate legislation. Congress exercised its newly established power in the sweeping and searching Reconstruction legislation that culminated in the Civil Rights Act of 1875.26 "[H]ereafter," said Charles Sumner, "there shall be no such word as 'black' or 'white,' but that we shall speak only of citizens and men.27

Then the Supreme Court took over. In The Slaughter-house Cases,28 it restored the Dred Scott doctrine that there are two categories of citizenship, national and state, and gutted the privileges and immunities clause of the fourteenth amendment of all meaning. In United States v. Cruikshank,29 it restored control of civil rights to the states. In United States v. Reese,30 it severely restricted the scope and reach of the fifteenth amendment. In the Civil Rights Cases,31 it further cabined the meaning of the fourteenth amendment with its ruling that Congress could not proscribe an individual's discriminatory conduct. In Virginia v. Rives,32 it validated the indictments and verdicts of all-white juries in the absence of specific objections and proof by a Negro defendant of systematic and purposeful racial exclusion, and thus it set up a rule which allowed extensive discrimination in jury selection. In Williams v. Mississippi,33 and later in Giles v. Harris34 and Giles v. Teasley,35 it gave its blessing to state constitutional and statutory provisions deliberately and professedly designed to circumscribe the franchise. In Plessy v. Ferguson,36 it approved a state's racial classification, undertaken to establish the separate-but-equal rule in the use of state facilities or public utilities. In Berea College v. Kentucky,37 it approved state statutes proscribing interracial association for innocent purposes. In Gong Lum v. Rice,38 it approved separate schools.


27 2 Cong. Rec. 948 (1874).

28 83 U.S. (16 Wall.) 36 (1873).

29 92 U.S. 542 (1875).

30 92 U.S. 214 (1875).

31 109 U.S. 3 (1883).

32 100 U.S. 313 (1879).

33 170 U.S. 213 (1898).

34 189 U.S. 475 (1903).

35 193 U.S. 146 (1904).

36 163 U.S. 537 (1896).

37 211 U.S. 45 (1908) (education at an integrated school).

38 275 U.S. 78 (1927).
Corrigan v. Buckley, it validated racial restrictive covenants and by indirection approved judicial enforcement of such agreements. In Grovey v. Townsend, it decided that state political parties could exclude Negroes from primary elections.

It is important to realize that prior to the Civil War amendments, the degradation of the Negro as tolerated by the Court after the addition of those amendments was consistent with constitutional theory and practice. The long list of disabilities just recited would have excited no opposition from pre-Civil War lawyers except from anti-slavery theorists. Chief Justice Taney’s statement in the Dred Scott case that a Negro had no “rights which the white man was bound to respect” was a trifle too sweeping, but it is literally true that a Negro had no civil rights except those conferred on him by white men. The obvious and often expressed aim of the framers of the Civil War amendments was to confer those rights on Negroes through the Constitution and to obviate the power of white Americans to dole out such rights as they chose. Their view of the way to achieve that end was to vest the same rights in Negroes as were vested in white persons.

Those rights were conceived of as the natural rights of man as a member of the body politic. The Negro was made a citizen and hence vested with the same rights as a free born white man. His rights were a part of his birthright. None could take them from him because he was now a free man. None could detract from them. Among free born men vested with natural rights, race and skin color were to be an irrelevance. If any state trenched on these rights, there was a remedy, but, as Senator Oliver P. Morton of Indiana pointed out, that “remedy... was expressly not left to the courts. The remedy was legislative because in each case the amendment itself provided that it shall be enforced by legislation on the part of Congress. The Supreme Court, however, had its own notions as to its power. It ignored the congressional fiat and interpreted the amended Constitution in the light of precedents that were based on the implicit concept of its original interpretation of the Constitution that the Negro, free or slave, lacked the full attributes of citizenship.

The net result of the Court’s post Civil War decisions was to return Negroes to a modified second class citizenship of the kind that obtained

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30 271 U.S. 323 (1926).
41 See Harris, op. cit. supra note 23; Miller, op. cit. supra note 12, at 85-101; Tenbroek, op. cit. supra note 23.
42 Miller, op. cit. supra note 12, at 97, 438 n.20.
prior to the Civil War and to resurrect the dictum of the *Dred Scott* case that "the unhappy black race were separated from the white by indelible marks . . . ." This separatism was said to be based upon racial instinct as the Court noted in the *Plessy* case: It intoned that "legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences . . . ." Social Darwinism had been assimilated to the amended Constitution; the William Graham Sumner dogma that law-ways cannot change folkways had become constitutional doctrine. Fortunately, the Court has repudiated most of the holdings that have just been cited, but they were the law of the land during the critical and formative years from the early 1870's to the middle 1930's, and during that sixty-year period were among the prime factors in institutionalizing racial segregation and discrimination.

As the first Justice John Marshall Harlan observed in his dissent in the *Civil Rights Cases*, the majority opinion in that case postulated a basis for establishing a color caste system with one "class of human beings in practical subjection to another class with power in the latter to dole out to the former just such privileges as they may choose to grant." That, of course, is precisely what happened, with white Americans doling out to Negroes "just such privileges as they [chose] . . . to grant." Or as he put it in the *Plessy* case, "we have yet, in some of the States, a dominant race—a superior class of citizens, which assumes to regulate the enjoyment of civil rights . . . upon the basis of race." The belief that whites retain the "power . . . to dole out" to Negroes "just such privileges as they may choose to grant" flourishes in contemporary society; it finds expression in the vulgar judgment that "Negroes are moving too fast" or "asking too much" in their demand for civil rights; in a Supreme Court decision postponing the enjoyment of an admittedly vested and, therefore, personal and present constitutional right until recalcitrant schoolboards bestow it on its possessors with "all deliberate speed"; and in the enactment of a California constitutional provision protecting the right of white persons to discriminate in the sale or rental of real property. Because few white Americans subscribe to the proposition that Negroes are born with the same rights which they believe inhere in white Americans, most of them, even persons of goodwill, accept the popular judgment that it is quite proper for the majority to "regulate the enjoyment of civil rights . . . upon the basis of race."

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45 *Sumner, Folkways passim* (1906).
until that mythical day when the "hearts and minds of men," even the most backward, have changed and all racial prejudices have disappeared.

These historical facts with their intrusions into current thinking must be borne in mind and assessed if a discussion of race, poverty, and the law is to be invested with substance and realism. It must also be borne in mind that racial classification has rarely been benign in purpose or intent in American law. Rather, it has been a means of enforcing restrictions or restraints.48

Despite the restrictive interpretations put upon them, the Civil War amendments have always been construed to prohibit discriminatory racial legislation by the states or their political subdivisions and to interdict imposition or support of racial disabilities by the executive and judicial branches49 of state government. Even separate but equal legislation or administrative practices made elaborate bows in the direction of equality by proscribing white use of "Negro" facilities as well as Negro use of "white" facilities50 with the courts finally arriving at the curious conclusion that where interracial association was proscribed, the equal protection clause of the fourteenth amendment was served by imposing the same penalty on both the white and Negro offender.61 Troublesome questions often arose as to the equality of separate facilities, but the courts assuaged the constitutional conscience of the nation with the doctrine of substantial equality in which, for example, a one-room ungraded school for Negroes was said to be "substantially equal" to a ten-room graded school for whites,62 or a wooden railway car with no running water or air conditioning was said to be "substantially equal" to Pullman accommodations.63 The command for equality, the courts said, did not require the furnishing of identical facilities.

Where the separate but equal concept could not be applied but the desire to restrict Negro participation was present, every effort was made to posit desired restrictions on permissible classifications which would encompass as many Negroes as possible while netting a small number

50 See, e.g., the elaborate racial zoning laws invalidated in Buchanan v. Warley, 245 U.S. 60 (1917).
63 See practices averred to in Mitchell v. United States, 313 U.S. 80, 96 (1940); McCabe v. Atchison, T. & S.F. Ry., 186 F. 966, 970 (8th Cir. 1911), aff'd on other grounds, 235 U.S. 151 (1914).
of white persons. Because poverty has always been one of the hallmarks of Negro life in the United States, economic classification has proved very useful. Thus Negro voting was circumscribed by requiring a poll tax payment as a prerequisite for voting. Property qualifications were imposed as a condition of jury service in some Southern States. When Mississippi led the southern revolt that disfranchised Negroes in the late nineteenth century, it "swept the circle of expedients" by classifying as ineligible persons convicted of such crimes as vagrancy, assault, and like offenses of the poor. Finally, the Southern States hit upon classification of illiterates and those lacking ability to read, understand, and explain state and federal constitutions as persons unfit to exercise the suffrage—the illiterate and the lacking in understanding were, of course, the poor. These fair-on-their-face laws were enforced in such a discriminatory manner as to disfranchise almost the entire southern Negro population—a practice that gained nation-wide acquiescence and drew approval from the Great Commoner, William Jennings Bryan.

II
POVERTY AND RACE

Any economic classification that affects the poor as a group will include a disproportionate number of Negroes simply because a disproportionate number of Negroes live below the poverty line in American life. If disabilities attend economic classification, Negroes will be disadvantaged, no matter how nondiscriminatory the legislation may appear to be. Fair-on-their-face statutes, such as a levy of a poll tax as a condition of voting, will not vary that result. Uniform bail schedules lay a heavier burden on the poor than on the well-to-do and inevitably leave a dispro-

54 Guinn v. United States, 238 U.S. 347 (1915) (all persons eligible to vote prior to January 1, 1866, and their descendants, entitled to vote; all others must pass literacy test); Williams v. Mississippi, 170 U.S. 213 (1898) (literacy tests for voting and jury duty).
55 It is no secret that welfare payments in most Southern States are kept low out of a desire not to "coddle" or "spoil" Negroes.
57 Property qualifications as to the right to vote were almost universal at the time of the adoption of the Constitution.
58 Brief for American Civil Liberties Union, amicus curiae, p. 70, United States v. Mississippi, 380 U.S. 128 (1965) (citing Ratcliff v. Beale, 74 Miss. 297, 20 So. 865 (1896)).
59 Id. at 77. Miss. Const. § 244 (1890).
60 "The white man in the South has disfranchised the Negro in self-protection, and there is not a white man in the North who would not have done the same under the same circumstances." Speech by William Jennings Bryan, Cooper Union, N.Y., 1908.
61 Address by President Lyndon B. Johnson, Howard University, June 4, 1965.
portionate number of Negroes in custody. The same hardship results from use of a uniform fine schedule for traffic violations and other misdemeanors. Laws which penalize owners who are unable to secure and maintain public liability and property damage insurance on their automobiles hit the poor hard and fall with a heavy hand on proportionately more Negroes than whites. There are many situations in which classification does not seem to rest on poverty but in which economics intrudes. Thus it has been said that the application of juvenile delinquency statutes is “heavily weighted against the poor family.” There, again, the disproportionate amount of poverty in the Negro ghettos operates to disadvantage the Negro youngster. Of course, the same observation may be made of the application of criminal statutes to the adult.

The preponderant number of Negroes caught in these legal nets is almost invariably pointed to by the unknowing or by the hostile to “prove” Negro criminality, or irresponsibility, or inferiority. In their proper turn, such attitudes serve to persuade law enforcement administrators that rights and privileges ought to be doled out rather sparingly to Negroes to prevent them from “going too fast” or “demanding too much” in the way of privileges they are believed to be ill-equipped to exercise. The result is a difference in the quality of law enforcement as between white persons and Negroes, particularly as far as the poor are concerned, a difference that is reflected in the almost universal hostility of the poor Negro to law enforcement officials. The poor Negro sees that his friends and neighbors, indeed, members of his own family are more often caught in the toils of the law than the white person, that the burdens of the law’s penalties are more onerous for them, and that law enforcement officials can misuse him at their whim. In his own shorthand, he describes all of these inequities as “police brutality.” And just as the unobservant white person lays the Negro’s shortcomings to race without weighing economic and other factors, so the Negro poor tend to lay all of their ills to what they regard as racial prejudice. It is in this atmosphere that welfare laws operate and are administered.

A. The Negro Poor Under Welfare

Welfare legislation and its administration are critical in Negro life because so many Negroes are affected—again, because a disproportionate number of them fall into those categories of the poor for whom assistance is designed and necessary. Provision for welfare is an almost exclusively legislative function with legislators having almost free rein. There is comparatively little case law on the subject, but there is a welter

of administrative rules and regulations, most of them designed by the administrators to win legislative favor and approbation. The legislature which pays the piper calls the tune.

Welfare legislation in American states traces back to Elizabethan poor laws with overlays of humanitarianism, enlightened flashes of public conscience, weak and wavering realization that a nation as rich as the United States can well afford an adequate standard of living for all of its citizens, and that failure to nurture the young and care for the ill and the aged is costly public policy. Nevertheless, the ill, the handicapped, the aged, the jobless (after unemployment benefits are exhausted), the deserted mother, the fatherless child are often treated as beggars and mendicants at best or as rogues, vagabonds, and vagrants at worst. The welfare administrator who keeps as many applicants as possible out of benefits is in a fair way to win the approbation of his community and of its establishment. All too often, rules are administered to exclude apparently qualified applicants, and every effort to utilize existing regulations in such a manner as to obtain benefits is branded as "fraud." A Los Angeles superior court judge who could find no legal fault in utilization of some of the rules in order to maximize benefits fell back on the charge of "moral fraud" on the part of some beneficiaries. Current mores condone, even honor, the rich taxpayer whose lawyers and accountants find loopholes in the law that enable him to avoid income tax payments, but the welfare recipient who finds a loophole that enables her to increase aid to her children is an object of public wrath. The taxpayer is entitled to whatever savings he can effect; the welfare recipient is not "entitled" to aid provided for him.

Undergirding popular attitudes toward the needy poor is the premise that the poor are the authors of their own woes and ills, and are sponging on the rest of society. The hope is that if sponging can be made as disagreeable as possible, they will do as others have done, and are doing, and earn their keep in the sweat of their own brows. The public insists on maintaining a close watch over them and continually demands more stringent local control so that doles can be kept a shade below local standards.68

Community hostility toward welfare recipients is heightened by administrative sub-classification of these poor on ethnic lines. When such racial classifications are made, it is at once discovered that the Negro ratio is high, considerably higher than the population ratio.64

63 This attitude rests on the belief that by reducing the lot of the welfare recipient to disagreeable poverty, we will force him to find one of the jobs assumed to be available to those who want to work.

64 See e.g., Los Angeles District Attorney, Report to the Governor's Commission on the
The discovery looses a great clamor even though it is well known that Negro unemployment hovers around two to three times that of white workmen and that what is described as employment for Negroes is all too often marginal work that requires supplemental aid or assistance. Given the almost pathological American preoccupation with race and the demand for racial explanations for every social ill involving Negroes, it is not surprising that it is somewhat widely believed that a high percentage of Negroes prefer relief to steady jobs. By way of proof, examples are constantly dredged up of the Negro who prefers drawing seventy-five dollars per week on relief to accepting a dead-end job that would pay him $58.45 weekly.

The current horrific example of supposed racial exploitation of public assistance is the Aid to Families with Dependent Children (AFDC) program. In the classic case, aid was furnished for the children where the father was absent, although now help may be given where the father is unemployed. The father may be absent because of death, desertion, or incarceration, or because there has been no formal marriage. Lack of formal marriage makes the child illegitimate according to old and built-in notions of morality, and illegitimacy is one of the oldest and most disabling of legal classifications, tainting both mother and child. To the everlasting surprise of everybody—and nobody—the slightest inquiry uncovers the fact that illegitimacy is higher among Negroes as such than among the general population, in a nation which has been trying to destroy the Negro family for the past three hundred years.

Under slavery there were neither valid marriages nor Negro families; the Negro woman was simply a brood mare used to produce as many valuable slave children as possible. The succeeding plantation and sharecropping systems placed a high value on a large number of children who could help in cropping; the law made no effort to fix responsibility for support on the father or fathers of the woman's children. White men (ordinarily the privileged members of society) who fathered a great many of the illegitimate children of Negro women had no legal re-


Address by President Lyndon B. Johnson, Howard University, June 4, 1965. See also Young, To Be Equal, ch. 3 (1964).


The bastard child is held in low esteem; the mother of the bastard is held up to ridicule and shame. The bastard rarely inherits from the father and is subject to all manner of legal disabilities.

sponsibility whatever. In an increasingly urban society, the Negro woman could, and can, find a job where the Negro male could not, and cannot, and she has thus been assured of family primacy. Until quite recently when aid to the Negro family became a burden on the white taxpayer, urban law enforcement authorities, north or south, made very little effort to compel the putative father to support his children. White fathers are still not compelled to support their illegitimate Negro children in southern or border states.

Public knowledge of the imbalance of Negroes on welfare rolls depends on the keeping and dissemination of racial statistics by welfare administrators. There is, however, no more legal warrant for the keeping and dissemination of these statistics, as such, than there is for compilation and distribution of religious data on recipients of old age assistance or aid to dependent children, and the fact that the figures are kept and so widely distributed is testimony to deeply rooted beliefs that race is a telling factor in human conduct. What has happened is that the social work establishment has created a racial classification within the economic classification required by law to determine eligibility. This is not to say that racial statistics should never be kept by state agencies; there are times when such figures can be justified as an aid to identification. My own view is that the Constitution is color-blind when discrimination is practiced against persons because of their race, but color-conscious when persons have special needs as a result of prior racial discrimination.70 There is, however, no evidence that the color-consciousness exhibited by social work agencies has been utilized to correct the disabilities of Negro recipients that arise as a result of racial discrimination.

Racial statistics are so badly kept that they are useless and meaningless. Illegitimate children of a Negro mother and a white father are classified as Negroes, and illegitimate children of a white mother and a Negro father are likewise denominated as Negroes, in conformity with the blood theories of Nazis and white supremacists. Statistical comparisons are invidious since all Negroes are lumped in together and matched against all white persons—the illegitimacy rate in the Negro slum is, in effect, compared with the illegitimacy rate in the upper-class white suburb. Nobody has tried to make a comparison between such rates among the Negro middle class and its white prototype. Nobody compares the Negro slum with the white slum. Current comparisons are as true and as meaningless as the similarly true and meaningless statement that American Negroes suffer less from beri-beri and leprosy than their remote African cousins.

70 An example of such need is in Sedler, supra note 48.
One of the presumably unintended results of administrative racial classification of welfare recipients has been to arouse legislative hopes that a permissible social classification can be found to reach the constitutionally impermissible end of racial discrimination. Thus the Louisiana legislature enacted a statute lopping off or curtailing assistance to dependent children when the mother had an additional illegitimate child. Legislators were frank in saying that the laws were aimed at Negro families. Of course some whites would have been caught in the net, but the success of Southern States in administering fair-on-their-face statutes in voting and other areas leads to the suspicion that errant white mothers had little to fear. Federal intervention was necessary to scotch some of these schemes.

No such bald attempts at discrimination are apt to occur in Northern States where Negroes have access to the ballot box, but undoubtedly the constant harping on racial imbalance in welfare rolls persuades legislators to keep benefits at a minimum. Nor can there be any doubt that the figures incite white public opinion and help to preserve and create racial stereotypes.

In 1960 at the height of a campaign to disfranchise Negroes, Louisiana denied the vote to persons who had "lived with another in 'common law' marriage," persons who had "given birth to an illegitimate child," and persons who had acknowledged themselves to be the "father of an illegitimate child" within five years preceding the passage of the law. The obvious intent was to deprive Negroes of the vote through penalizing them for social conduct believed to be more common among them than the general population. The belief was that public opinion was so inflamed against illegitimacy among Negroes that such a measure would enlist wide support and ultimately win judicial approbation. The state's long success in administering other apparently fair statutes in such a manner as to include Negroes and exclude white persons doubtless encouraged belief that few white offenders would be affected.

Welfare administrators are intimidated by the very figures they keep and cite. All too many of them adopt the attitude that it is their...

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73 La. Const. art. viii, § 1(c)(4).
74 La. Const. art. viii, § 1(c)(5).
75 La. Const. art. viii, § 1(c)(6).
function to limit the number of recipients by technical interpretation of rules and regulations. Sometimes they achieve their end by making application for and acceptance of welfare benefits as difficult as possible. In Los Angeles prior to the recent riot, Watts residents had to make their applications and apply for welfare adjustments in adjoining lily-white suburbs which were difficult and expensive to reach. In other situations, the very concept of fairness may be made to serve discriminatory ends: Discretionary budget figures may be set in areas of Negro occupancy at exactly the same as those in other areas although transportation, food costs, and rents are higher in the protected sellers market sheltered by the ghetto. Every administrator knows about the hue and cry against excessive numbers of Negroes on welfare rolls, and it is not at all remarkable that not a few foresee advancement if they can reduce that disparity.

The McCone Commission investigating the Los Angeles riots suggested that some California relief recipients may have migrated to the state because relief payments are higher than in other states. The between-the-lines inference was that southern Negroes may leave that section for California to take advantage of the state’s relatively liberal payments to dependent children. Politicians took the cue and converted the suggestion to an accusation with the connotation that there was something reprehensible in such migration. Of course, Europe’s poverty stricken streamed to the United States by the millions in the late nineteenth and early twentieth centuries with the almost certain knowledge that if they failed to find employment they would certainly secure a far higher measure of charity than in their homelands. The prime motivation for the migration of a Mississippi sharecropper to Los Angeles or San Francisco is to find employment which is disappearing in his home state before onrushing mechanical farm implements. The knowledge, if he has it, that California will give him more assistance for his children if he can establish residence and is unable to find a job is certainly no deterrent factor in his decision to migrate. Just why it should be is never made plain. The curious idea that he should remain in Mississippi where he is jobless and where his dependent children must subsist at a starvation level presupposes that he ought to prefer a state which denies him almost every conceivable citizenship right over one where his rights are held in higher esteem. Very few people who urge him to make that judgment would make it themselves—even if it meant some relief for a California taxpayer. Citizenship is national and a citizen has an absolute

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70 Cal. Governor’s Comm’n on the Los Angeles Riots, Violence in the City—End or Beginning 69-71 (1965).
right to move from one state to another. That right cannot be denied or curtailed because he is an indigent person.77

B. The Law and The Poor

Undoubtedly the poor have failed to secure the fullest measure of their legal rights because they have not been able to afford the services of lawyers. The very paucity of judicial precedents and the lack of decisions construing the rights of welfare recipients testify to the fact that their cause has seldom been presented to the courts. Welfare administrators have been left free to interpret the legislative command almost at will. Such appeals as have been taken have generally been decided by lay persons within the concerned agency. It is only in recent years that there has been any attempt to invoke constitutional safeguards against intrusions on the rights of the welfare recipient—indeed, there has been little realization that he has any "rights." He has been regarded as a beggar and, as everybody knows, beggars can't be choosers.

It took almost two decades of Supreme Court litigation to establish the very simple fact that a poor man accused of serious crime is entitled to a lawyer as a matter of right.78 The nation is still pretty well satisfied with a bail system under which a presumptively innocent person may lose his job, his home, and his family while he remains in jail in default of what is thought of as "reasonable bail," even when there is reason to believe that he would appear for trial if released on his own recognizance. At best, uniform bail schedules are uniform for the affluent and the poverty stricken defendant under the pretext that uniformity in application means equal protection of the law. At worst—and circumstances are ordinarily at their worst in misdemeanor courts where the poor appear most often—bail may be set at the caprice of the magistrate who often becomes panic stricken in the face of public sentiment in a crisis.

When arrests mounted in the Los Angeles riot, all bail was increased over the uniform schedule, and for a panic stricken moment there was a serious suggestion that rioters be held without bail even where there was no proof or charge of homicide. The effect of the increase was to burden the poor defendant with an additional bondsman's fee of from one hundred to three hundred dollars or to make sure of incarceration during which he ran the risk of losing his job. Many defendants later released or held on only minor charges did lose their jobs.

Bail may also be used to work direct racial discrimination. Southern courts often hold Negro misdemeanants to high bail in civil rights disturbances and release white offenders on very low bail.

There is a much larger body of precedential law in the area of civil rights of racial minorities than in those areas where poverty lies at the root of conflict with the law. Most civil rights law has been accumulated in the past forty years since the NAACP entered the field in a planned and orderly way. However, only a small portion of present civil rights law pertains to the problems that grow out of the Negro's economic status, as such; emphasis has been on use of public accommodations, attendance at schools, segregation in transportation, and like questions. Indeed, as the Urban League's Whitney Young has suggested, there is some danger that the Negro may wind up with a mouthful of civil rights living in a hovel on an empty belly.

There is a need for an orderly and well conceived program to meet the legal needs of the poor and, of equal importance, to put them on a legal parity with the affluent members of our society. At the same time, care must be exercised to see that today's poor can become tomorrow's affluent and that legal safeguards designed to protect their current status do not hinder or hamper such progress.

Some equalitarian notions are going to have to be re-examined. For example, there has to be a facing up to the fact that the one hundred dollar bail and the one hundred dollar fine of the uniform bail and fine schedules do not fall with equal impact on the ten thousand dollar a year junior executive and the four hundred dollar a month father of a family of five, even if both have violated the same statute in exactly the same manner. The public defender system is an excellent device in the quest for justice for the underprivileged—if the public defender is given staff and funds that will enable him to match skill and wits with the public prosecutor. Welfare recipients need counsel, perhaps as a class, as laws, rules, and regulations become ever more complicated. The social worker can no longer serve as counsel as she did in the days of direct handouts. The slum tenant and the preyed-upon installment buyer need lawyers.

The poor person who bears the burden of unpopular ethnic identification in our society is doubly put upon in all too many situations. He is poor and black in a world attuned to the needs and interests of the affluent and the white. His is not entirely an economic problem; nor is it entirely a racial issue. It is both and it must be dealt with simultaneously

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80 Young, To Be Equal 53-54 (1964).
at both levels. The Negro's classic civil rights problems may be safely left to the civil rights organizations. What needs attention, and badly, is that complex of problems, which becomes one problem, arising out of the Negro's economic status and classification as intertwined with and complicated by racial classification. Americans have lived in a fictional "separate but equal" world so long that they tend to talk and think in racial terms. Social workers and legislators talk about "Negro" illegitimacy, for example. Of course, there is no such thing. There are many factors that affect the rate of births out of wedlock. Poverty is one of those factors. It makes formal divorce too costly for the poor; it makes access to birth control information difficult; moreover, it actually keeps the mother and the unwanted child together and the necessity for securing public assistance makes illegitimacy highly visible and the subject of conversation. My own preliminary studies on the basis of census data indicate that the illegitimate birth rate varies little as between racial groups within the same income range. There is every probability that the same thing is true as respects juvenile delinquency and crime rates.

There are, however, other figures which show wide disparities between Negroes and whites in the same economic groupings. President Johnson cited statistics in June 1965, showing that thirty-five years ago the unemployment rate for white job seekers was about the same as that for Negroes but that the present rate for Negroes is roughly twice that of whites; that the relative income of Negro working men to white workers is on the decline; that the median income for the Negro family as compared to white families has declined some four percent in the past half-dozen years; and that the number of white families living in poverty has declined about twenty-seven per cent since 1947 while the number of Negro families has dropped only about three per cent. There is what he called a widening gulf between the two racial groups. These figures reflect the increasing alienation of the Negro poor from American society and the striking failure of the welfare state to close the gap that has existed between whites and Negroes since the days of slavery.

Legislation which is effective in relieving the burdens of the poor will inevitably assist a disproportionately large number of Negroes for the reason already observed that a proportionately large number of Negroes fall within poverty classifications. That is all to the good in the effort to vanquish poverty on the widest possible scale. But such assistance could well leave untouched the gap that now exists between the

\footnote{Address by President Lyndon B. Johnson, Howard University, June 4, 1965.}
two racial groups. There is a rising demand for compensatory measures to close that gap.

The critical question is whether the color-blind constitution which equalitarians have always demanded will tolerate such compensatory measures. Some assail the very suggestion as a proposal for discrimination in reverse or a new kind of Jim Crow directed against white persons. This is no place to consider the inquiry in exhaustive detail, but the short answer is that the command of the fourteenth amendment is a command for equality. "It is clear," says Jacobus tenBroek in a study of the fourteenth amendment, "that the demand for equal protection cannot be a demand that laws apply universally to all persons. The legislature . . . must impose special burdens upon, or grant special benefits to, special groups or classes of individuals. Classification determines the range of persons to be affected by the special burden or benefit of a law not applicable to all persons." It is plain that the command for equality voiced in the fourteenth amendment can be effective only after corrective measures have been taken to eradicate the inequality resulting from past discrimination. The framers of the fourteenth amendment, who were most insistent that the Constitution as amended was color-blind, had no constitutional qualms about enactment of remedial legislation such as the Freedmen's Bureau Acts, which were designed to assist Negroes and newly freed slaves. It seems then that compensatory legislation designed to benefit Negroes as a class is constitutionally permissible.

In a realistic sense, current poverty legislation is compensatory. The poor are classified as such, and beneficial laws—or what are thought of as beneficial laws—are enacted to enable them to overcome handicaps and facilitate their entrance into the affluent society. Such classification earns no strictures and arouses no constitutional doubts because it is viewed as benign and as compatible with the American thinking that everybody is entitled to an even chance in life—nobody is to be ill-fed, or ill-clothed, or ill-housed. Many persons who boggle at similarly benign racial classification designed to relieve Negroes as Negroes misread the real meaning of the equalitarian dictate of the amended Constitution: The fourteenth amendment was designed to cure the ills of omission as well as commission, and Congress has power to legislate in either sphere. Poverty legislation cannot effectively aid the Negro poor until disparities between the white poor and the Negro poor are erased.

82 But see Young, op. cit. supra note 80, at 32.
83 tenBroek, EQUAL UNDER LAW 21 (rev. ed. 1965).
84 Ch. 135, 15 Stat. 83 (1868) ; ch. 200, 14 Stat. 173 (1866) ; ch. 90, 13 Stat. 507 (1865).
As the President has put it: “You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and say, ‘You are free to compete with all the others,’ and still justly believe that you have been completely fair.” He added that “it is not enough just to open the gates of opportunity. All of our citizens must have the ability to walk through those gates.”

That is true of all the poor who seek equality in the affluent society; it is doubly true for the poor Negro who must surmount two hurdles to find equality in that society.

In historical perspective it is apparent that the Negro’s long attempt to attain what he calls first class citizenship has been, and is, an attempt to be dealt with as an individual, as a person in constitutional terms, when he seeks a job, or tries to buy a home, or votes in a local, state, or federal election, or eats in a restaurant, or reads a book in a public library, or joins the Air Force, or attends school, or even swims in the ocean. The problem of how to make constitutional guarantees meaningful and fruitful is the problem inherent in an inquiry into race, poverty, and the law. There are no sure guidelines; in fact, the issues are not yet clearly defined. What has been said here is only an introduction. The road to solution lies through uncharted constitutional territory.

85 Address by President Lyndon B. Johnson, Howard University, June 4, 1965.