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November 8, 2019

Via email to Assistant Kirby Connell: [kirby.connell@iowa.gov](mailto:kirby.connell@iowa.gov)

Honorable Kim Reynolds  
Governor – State of Iowa  
State Capitol  
1007 East Grand Avenue  
Des Moines, Iowa 50319

Honorable Adam Gregg  
Lieutenant Governor  
State Capitol  
1007 East Grand Avenue  
Des Moines, Iowa 50319

RE: Criminal Justice Reform Committee

Dear Governor Reynolds and Lieutenant Governor Gregg:

I applaud your efforts in establishing a Criminal Justice Reform Committee to assist in removing racial bias from the Iowa Criminal Justice System. You have selected an incredibly talented group of Iowans to serve on this committee. I look forward to the final report.

Thank you for giving the needed attention to this complex and difficult problem. Iowa's tradition of addressing issues of inequality is well served by establishing this important committee.

Sincerely,

PARRISH KRUIDENIER DUNN BOLES GRIBBLE  
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BY:

  
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AP:ly

Enclosure: Drake Law Review Article

# DRAKE LAW REVIEW

*CLARK V. BOARD OF SCHOOL DIRECTORS:  
REFLECTIONS AFTER 150 YEARS*

*Earl "Marty" Martin, Russell E. Lovell, II,  
Robert G. Allbee, David S. Walker, Mark S. Cady,  
Brent Appel, Edward Mansfield, Alfredo Parrish  
& Johnny C. Taylor, Jr.*

VOLUME 67

FIRST QUARTER 2019

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## RACIAL DISPARITY IN IOWA'S CRIMINAL JUSTICE SYSTEM 150 YEARS AFTER *CLARK*

*Alfredo Parrish\**

*Southern trees bear a strange fruit  
Blood on the leaves and blood at the root  
Black bodies swinging in the southern breeze  
Strange fruit hanging from the poplar trees<sup>1</sup>*

“Strange Fruit” was sung by Billie Holiday 71 years after the Iowa Supreme Court ruled in *Clark v. Board of School Directors* that a young African American could attend an all-white school in Muscatine, Iowa.<sup>2</sup> Dubbed at the time “a declaration of war . . . [and] the beginning of the civil rights movement,”<sup>3</sup> Billie Holiday’s epic resonates today as Iowa confronts gross racial disparity in sentencing by its courts.<sup>4</sup> That disparity represents an ugly blight in Iowa’s otherwise historical leadership among states in upholding equal rights for African Americans<sup>5</sup> and demands our immediate attention. It is a problem that, if we are to assuage Billie Holiday, requires the concerted efforts of all branches of government and a significant commitment of community resources.

Iowa’s history can be broken into four broad periods.<sup>6</sup> The first period, during which discrimination against Blacks was accepted, includes the

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\* Alfredo Parrish is a graduate of the University of Iowa Law School and the founder of the Parrish Kruidenier Law Firm.

1. BILLIE HOLIDAY, *STRANGE FRUIT* (Commodore Records 1939).

2. *Id.*; *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 274 (1868).

3. DAVID MAGOLICK, *STRANGE FRUIT: BILLIE HOLIDAY, CAFÉ SOCIETY, AND AN EARLY CRY FOR CIVIL RIGHTS* 17 (2000).

4. See, e.g., Charly Haley, *Iowa Still near Top for Locking Up Blacks, Study Says*, DES MOINES REG. (June 15, 2016), <https://www.desmoinesregister.com/story/news/crime-and-courts/2016/06/15/iowa-still-near-top-locking-up-blacks-study-says/85936006/>.

5. See, e.g., *Coger v. Nw. Union Packet Co.*, 37 Iowa 145 (1873); *Clark*, 24 Iowa at 266; *In re Ralph, Morris* 1 (Iowa 1839).

6. See Richard, Lord Acton & Patricia Nassif Acton, *A Legal History of African-Americans*, in *OUTSIDE IN: AFRICAN-AMERICAN HISTORY IN IOWA 1838–2000*, at 60, 60 (Bill Silag ed., 2001).

founding of the territory and continues up to the Civil War.<sup>7</sup> In 1851, free Blacks were prohibited from coming into the state, yet during this period the Iowa Supreme Court allowed two former slaves to be granted freedom after petitioning the court.<sup>8</sup> The second period encompasses the beginning of the Civil War through 1880.<sup>9</sup> During this time, Iowa began the dismantling of discriminatory provisions in Iowa's constitution and statutes.<sup>10</sup> This influential period included the pivotal decision in *Clark* as well as *Coger v. Northwestern Union Packet Co.*, in which the Iowa Supreme Court affirmed that a Black woman was "entitled to the same rights and privileges while upon [the] defendant's [steamboat] . . . which were possessed and exercised by white passengers."<sup>11</sup> The third historical period encompassed 1884 to 1960.<sup>12</sup> This was the era of the enforcement of civil rights by enactment of criminal sanctions and civil damages.<sup>13</sup> An important case marking the period is *State v. Katz*,<sup>14</sup> which involved a drug store owner named Maurice Katz who refused to serve three African American customers in 1948.<sup>15</sup> The trial court's decision found Katz guilty of violating Iowa civil rights law and was upheld by the Iowa Supreme Court.<sup>16</sup> The aftermath of the *Katz* decision ushered in the fourth period of Iowa's history, beginning with the passage of the 1965 Civil Rights Act.<sup>17</sup> This act created the Iowa Civil Rights Commission, diverting many of Iowa's civil rights cases out of the realm of the court and into the realm of an administrative agency.<sup>18</sup> Each historic period has been marked by different challenges and decisions, but the singular focus throughout has been that "equal protection shall be secured to all regardless of color or nationality."<sup>19</sup>

Today, in what I envision as Iowa's fifth historical period, Iowa's standing as a leader in civil rights is threatened through its complacency in the face of unequivocal and rapidly mounting evidence of racial bias in the

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7. *Id.* at 61-69.

8. *See id.* at 67-68; *In re Ralph, Morris* at 7.

9. *See Acton & Acton, supra* note 6, at 69-72.

10. *See id.*

11. *Coger v. Nw. Union Packet Co.*, 37 Iowa 145, 153 (1873).

12. *See Acton & Acton, supra* note 6, at 74-78.

13. *See id.*

14. *Id.* at 76-78; *State v. Katz*, 40 N.W.2d 41, 41 (Iowa 1949).

15. *Katz*, 40 N.W.2d at 43.

16. *Id.* at 45.

17. *See Acton & Acton, supra* note 6, at 79.

18. *Id.* at 80.

19. *Coger v. Nw. Union Packet Co.*, 37 Iowa 145, 158 (1873).

sentencing of its minority citizens. African Americans currently make up 25.8 percent of the prison population in Iowa<sup>20</sup> but represent only 3.8 percent of the general population.<sup>21</sup> At least 35 percent of individuals serving mandatory minimum sentences in Iowa are African American, and across crimes, African Americans serve longer sentences than whites for the same charges.<sup>22</sup> These disparate outcomes are rooted in conditions and biases that exist at every level of our criminal justice system.<sup>23</sup> African Americans walk a path uniquely wrought with peril, where one bad choice—forgiven in others—can spiral in ways non-minorities are much less likely to experience.<sup>24</sup> The racial disparities in sentencing that ultimately result from these “pipeline” hazards are in fact unjustified losses of liberty and should *alarm* our sense of justice as other such losses have throughout Iowa’s history.<sup>25</sup> Sentencing bias has myriad roots and reform must be broad, but Iowa’s courts must take the lead.

Implicit bias within the criminal justice system is one of the leading culprits of racial disparities.<sup>26</sup> It is bias resulting from “systems and institutions that produce racially disparate outcomes, regardless of the intentions of the people who work within them.”<sup>27</sup> The standard utilized by Iowa’s correctional system to classify defendants’ risks—the “Level of

20. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

21. *QuickFacts Iowa*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/ia> (last visited Jan. 22, 2019).

22. See Kathy A. Bolten, *Blacks Hit Hard by Iowa's Mandatory Sentences*, DES MOINES REG. (Apr. 4, 2016), <https://desmoinesregister.com/story/news/crim-and-courts/2016/04/03/mandatory-minimum-sentences-robbery/81832336>.

23. See *id.*

24. See, e.g., Jamil Smith, *Where Can We Be Black? From Starbucks to Coachella to the Pulitzers, White America Needs to Get Used to Having Us Here*, ROLLING STONE (Apr. 19, 2018), <https://www.rollingstone.com/politics/politics-features/where-can-we-be-black-629584/>.

25. See, e.g., Abiodun Raufu, *School-To-Prison Pipeline: Impact of School Discipline on African American Students*, J. EDUC. & SOC. POL'Y, Mar. 2017, at 47, 51.

26. See Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 152 (2010).

27. Radley Balko, Opinion, *There's Overwhelming Evidence that the Criminal-Justice System Is Racist. Here's the Proof*, WASH. POST (Sept. 18, 2018), [https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/?noredirect=on&utm\\_term=.2c73a172c8d6](https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/?noredirect=on&utm_term=.2c73a172c8d6).

Service Inventory-Revised" (LSI-R)<sup>28</sup>—is a significant contributing factor to disparate sentencing outcomes.<sup>29</sup> LSI-R considers the following factors to determine a defendant's risks: whether the defendant had employment prior to incarceration, whether there was an official record of a violent crime, and whether the defendant associated with any other people who had been involved with crime prior to the current charge.<sup>30</sup> Using LSI-R, African Americans are classified as higher risk than whites due to criteria that discriminate against low socioeconomic status and race.<sup>31</sup> The LSI-R is one example of a system that leads to disparate outcomes for African Americans in Iowa based on criteria supported by implicit bias. Implicit bias in risk assessment should be identified and removed.

The Iowa Supreme Court has recognized the racial disparity present in Iowa's criminal justice system.<sup>32</sup> Consistent with its history of extending rights to marginalized groups ahead of the United States Supreme Court,<sup>33</sup> the Iowa Supreme Court is preparing to confront racial disparity in sentencing with the same emboldened approach. In *State v. Plain*, Justice David Wiggins, in his concurring opinion, stated:

I feel compelled to write separately on the issue of implicit bias and racial disparity in Iowa.

....

Due to the disgraceful disparity in the punishment and incarceration between blacks and whites, we should not wait for further research and study on the issue of implicit bias and racial disparity. The demand for justice to our black citizens does not allow for further stalling.<sup>34</sup>

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28. See IAN WATKINS, THE UTILITY OF LEVEL OF SERVICE INVENTORY-REVISED (LSI-R) ASSESSMENTS WITHIN NSW CORRECTIONAL ENVIRONMENTS 1 (2011).

29. See Kevin W. Whiteacre, *Testing the Level of Service Inventory-Revised (LSI-R) for Racial/Ethnic Bias*, 17 CRIM. JUST. POL'Y REV. 330, 338 (2006).

30. WATKINS, *supra* note 28, at 2.

31. See Whiteacre, *supra* note 29, at 331.

32. See, e.g., *Griffin v. Pate*, 884 N.W.2d 182, 203 (Iowa 2016).

33. See *Varnum v. Brien*, 763 N.W.2d 862, 883–84 (Iowa 2009) (holding same-sex couples are similarly situated as opposite-sex couples with respect to the subject and purposes of state's marriage laws); *Coger v. Nw. Union Packet Co.*, 37 Iowa 145, 153 (1873); *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 277 (1868); *In re Ralph, Morris* 1, 7 (Iowa 1839) (granting a former slave's petition for freedom).

34. *State v. Plain*, 898 N.W.2d 801, 830 (Iowa 2017) (Wiggins, J., concurring specially).

During a recent argument before the Iowa Supreme Court in *State v. Brown*, a case involving a pretextual stop (another troubling issue contributing to racial disparity in Iowa), Chief Justice Mark Cady stated, "There seems to be a fear placed in the African-American community regarding policing tactics. Aren't these concerns?"<sup>35</sup> The insights of Chief Justice Cady and Justice Wiggins show an acknowledgement by the Iowa Supreme Court of the problem of racial inequality in Iowa's criminal justice system. The current court, consistent with its historical tradition, has demonstrated its independence in interpreting the Iowa constitution to provide more rights than the United States Supreme Court when interpreting constitutional provisions.<sup>36</sup>

As Iowa's courts grapple with racial disparity in sentencing, which is difficult and complex, I want to share my views as a trial lawyer. I offer these suggestions having had the privilege of trying jury trials across Iowa and having argued numerous appellate cases as well. The following are my suggestions, in no particular order, to decrease the disparity in Iowa's criminal justice system:

- increase quality standards and salaries for public defenders;
- revise, update, and improve risk assessments to reduce racial discrimination against defendants in the criminal justice system;
- establish a rule requiring consideration of the racial impact of all legislation;
- establish a rule requiring all judges to consider racial statistics in sentencing;
- require county attorneys to keep and forward statistics on charging decisions to the court and legislators;
- improve sensitivity training of judges, prosecutors, and all court personnel;
- require courts to review all cooperation agreements for racial disparity;
- establish an appeal procedure for probation revocation hearings;
- increase minority personnel in the court system;

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35. Margery A. Beck, *Iowa High Court Hears Arguments in Police Stop Case*, AP NEWS (Sept. 18, 2018), <https://www.apnews.com/eb9b9542eb1040e6befaa43765f4fc77>.

36. See, e.g., *State v. Ingram*, 914 N.W.2d 794 (Iowa 2018); *Varnum*, 763 N.W.2d at 862; *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1 (Iowa 2004).



- abolish mandatory minimum sentences;
- increase discretion in sentencing;
- establish more diversion programs for utilization by prosecutors (i.e., driving while barred is a poor person's crime);
- require the use of body cameras in all arrests and the use of audio recordings in all statements by suspects in felony cases;
- reduce court fines, allow a reasonable repayment schedule, and shorten time for restoration of civil rights after conviction;
- prohibit employers from using crimes that have been expunged as a basis to deny employment;
- increase the use of home detention;
- increase funding of community correction programs;
- require the consideration of racial impact with every sentence to determine if it will increase racial disparity;
- allow greater reduction in sentences of inmates who complete education while incarcerated;
- grant a tax deduction to businesses that hire people who have been convicted of crimes;
- establish mentoring programs for prospective minority lawyers to assist with passing the bar and gaining employment;
- set up programs to assist the families of inmates released on parole or probation;
- write a children's book about Iowa's rich heritage of equality;
- create more inner-city sports programs;
- coordinate Iowa's prison educational program with community colleges;
- consider increasing age limits of youth offender programs to 24;
- restore civil rights of inmates when their sentence is completed (even when fines and restitution remain);
- stop prosecuting minor marijuana crimes;
- prohibit pretextual traffic stops;

- allow courts to create a diversion sentence program to go along with the deferred sentence and/or deferred judgment; and
- expand shock sentencing to allow the courts to resentence in forcible felony cases.

Bryan Stevenson, in accepting the American Bar Association's highest award in 2018, outlined how the narrative of race in this county must change:

I think we're burdened by a history of racial inequality that is so difficult and so painful that it is creating kind of a smog . . . . We have to be willing to do things that are uncomfortable and inconvenient, because justice does not come when you only do the things that are comfortable and convenient . . . . We advance justice only when we are willing to do things that are uncomfortable.<sup>37</sup>

As Iowa confronts this blight of racial disparity in sentencing, its courts must do the uncomfortable by forging an independent path and, as in the past, go beyond those protections granted to Iowa's citizens by the United States Supreme Court. The ultimate solution to this complex issue can only be found by embracing the vestiges of *Clark*.

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37. Kevin Davis, *Bryan Stevenson Calls on Lawyers to Get Uncomfortable and Deepen Commitment to Justice*, ABA J. (Aug. 4, 2018), [www.abajournal.com/news/article/bryan\\_stevenson\\_calls\\_on\\_lawyers\\_to\\_get\\_uncomfortable\\_and\\_deepen\\_commitment](http://www.abajournal.com/news/article/bryan_stevenson_calls_on_lawyers_to_get_uncomfortable_and_deepen_commitment).