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Substantive Equal Protection Analysis Under State V. Russell, And The Potential Impact On The Criminal Justice System

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SUBSTANTIVE EQUAL PROTECTION ANALYSIS UNDER *STATE V. RUSSELL*, AND THE POTENTIAL IMPACT ON THE CRIMINAL JUSTICE SYSTEM

> There comes a time when we cannot and must not close our eyes when presented with evidence that certain laws, regardless of the purpose for which they were enacted, discriminate unfairly on the basis of race. . . .[1]

In *State v. Russell*,[2] the Minnesota Supreme Court invalidated a law that it considered to discriminate unfairly on the basis of race.[3] The court reasoned that stiffer sentences for crimes involving cocaine base (crack cocaine) compared to sentences for crimes involving powder cocaine had a disproportionate impact on African-Americans.[4] In *Russell*, the court determined that statistical proof of discriminatory impact alone was sufficient to establish an equal protection challenge under the state constitution.[5] The court in *Russell*, therefore, subjected a facially neutral sentencing statute to what the court called a "stricter standard of rational basis review."[6]

In applying this standard, the Minnesota court implicitly renounced the United States Supreme Court's ruling in *Washington v. Davis*[7] that proof of racially discriminatory impact alone was insufficient to establish an equal protection claim under the United States Constitution.[8] In *Davis*, the Court determined that an intent or purpose to discriminate must accompany the resulting disproportionate impact before the Court applies strict scrutiny review of the government action.[9] Absent proof of intentional discrimina-

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1. State v. Russell, 477 N.W.2d 886, 888 n.2 (Minn. 1991).

2. 477 N.W.2d 886 (Minn. 1991).

3. State v. Russell, 477 N.W.2d 886, 888 (Minn. 1991); *see infra* notes 135-221 and accompanying text (providing detailed discussion of *Russell* decision).

4. *Russell*, 477 N.W.2d at 888 n.2.

5. *Id.* at 889; MINN. CONST. art. I, § 2. Article I, § 2 of the Minnesota Constitution provides that "[n]o member of this State shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." The Minnesota Supreme Court has interpreted article I section 2 to be the state Equal Protection Clause. *See infra* notes 107-93 and accompanying text (discussing development of independent Minnesota equal protection standard based on article I, § 2).

6. *Russell*, 477 N.W.2d at 889.

7. 426 U.S. 229 (1976).)

8. *Russell*, 477 N.W.2d at 888 n.2. U.S. CONST. amend. XIV § 1. Section one of the Fourteenth Amendment provides the basis for federal equal protection challenges contesting the validity of state policies. Section one reads in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

9. *See* Washington v. Davis, 426 U.S. 229, 239-42 (1976) (holding that discriminatory purpose must accompany disparate impact before federal courts will invoke strict scrutiny). In *Davis*, the Court considered an equal protection challenge to an examination the District of Columbia Metropolitan Police Department administered to job applicants. *Id.* at 232. The

tion, the Court subjects the challenged government policy to rational basis review.[10]

The federal requirement of proof of invidious intent forecloses many equal protection claims challenging facially neutral government policies that disparately impact racial minorities.[11] The purposeful discrimination requirement especially inhibits equal protection challenges in the criminal procedure context.[12] Commentators,[13] judges,[14] and attorneys[15] argue that statistics

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plaintiffs argued that the test resulted in a disparately large impact in screening out black candidates. *Id.* at 235. According to the *Davis* Court, the Supreme Court had never accepted the idea that a law was unconstitutional solely because it resulted in a racially disparate impact. *Id.* at 239. Rather, the Court rejected the contention that statistically disproportionate racial impacts would invalidate otherwise permissible enactments. *Id* at 240-41. The Court therefore concluded that the invidious quality of a law ultimately depended upon whether or not the government acted with a discriminatory purpose. *Id.* at 240. The *Davis* Court then held that disproportionate impact, without proof of discriminatory intent, would not trigger strict scrutiny review. *Id.* at 242.

10. *Id.* at 246.

11. *See* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 270 (1977) (holding that developer in housing development controversy failed to satisfy burden of proving discriminatory purpose); *Davis*, 426 U.S. at 246 (requiring proof of invidious intent before invoking strict scrutiny); *see also* Gayle Binion, *"Intent" and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397, 397-98 (arguing that intent requirement creates formidable barrier to equal protection challenges); Donald E. Lively & Stephen Plann, *Equal Protection and the Rehnquist Court: Compounding a Legacy of Constitutional Vagrancy*, 22 U. TOL. L. REV. 717, 719-20 (1991) (claiming that Supreme Court uses intent requirement to avoid realities of discrimination); Robert Nelson, Note, *To Infer or Not to Infer a Discriminatory Purpose: Rethinking Equal Protection Doctrine*, 61 N.Y.U. L. REV. 334, 336 (1986) (stating that intent requirement prevents invalidation of laws that have discriminatory impact); Veronica Patton, Comment, *Rethinking Equal Protection Doctrine in the Wake of* McCleskey v. Kemp, 11 NAT'L BLACK L.J. 348, 348 (1990) (noting that many commentators object to intent requirement because it creates insurmountable evidentiary burden for person bringing equal protection challenge).

12. *See* McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (holding that statistical proof of disparate impact in administration of death penalty without evidence of invidious intent is insufficient to warrant strict scrutiny); Wayte v. United States, 470 U.S. 598, 610 (1985) (ruling that defendant must prove racially discriminatory intent influenced selective prosecution in his case); Nelson, *supra* note 10, at 336-37 (noting difficulties in bringing equal protection challenges under intent requirement and citing specific exceptions to intent requirement in criminal context).

13. *See, e.g., Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988) [hereinafter *Developments*] (tracing racial discrimination throughout criminal justice system); Norval Morris, *Race and Crime: What Evidence Is There That Race Influences Results in the Criminal Justice System?*, 72 JUDICATURE 111, 113 (1988) (arguing that racial discrimination pervades criminal justice system); John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 559 (1991) (maintaining that war on drugs disparately impacts minority communities); Dan Baum, *The Drug War on Civil Liberties*, THE NATION, June 29, 1992, at 886 (asserting that drug war is actually war against minorities).

14. *See* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 165 (1991) (arguing that sentencing guidelines have not sufficiently decreased sentencing disparities between races). Gerald Heaney is a Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit. *Id.* at 161. In a footnote, Judge

indicate that the criminal justice system unfairly discriminates against racial minorities.[16] The discrimination, they claim, can occur at almost any stage of the judicial process from arrest through sentencing.[17] Most of the potential discrimination results not from intentionally discriminatory laws but instead from facially neutral policies with racially disproportionate impacts.[18] Therefore, under federal equal protection analysis, most criminal procedure equal protection challenges fail under rational basis review.[19]

If other state courts, under their state constitutions, decide to apply the *Russell* approach to other aspects of the criminal justice system that are arguably discriminatory,[20] the results could be far-reaching.[21] Innovative defense attorneys could raise equal protection challenges based solely on statistical evidence of discrimination at nearly every stage of the criminal process.[22] The Minnesota "stricter standard of rational basis review" could

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Heaney thanked Chief Judge G. Thomas Eisele of the United States District Court for the Eastern District of Arkansas for his contributions and comments on the sentencing guidelines. *Id.* at 161 n.*; Lois G. Forer, *Justice by the Numbers: Mandatory Sentencing Drove Me from the Bench*, 24 WASH. MONTHLY, Apr. 1992, at 12 (maintaining that racial disparities in sentencing still exist despite Sentencing Guidelines).

15. *See* Mark Curriden, *Racism Mars Justice in U.S., Panel Reports*, ATLANTA J. & CONST., Aug. 11, 1991, at D1 (citing attorneys who believe criminal justice system is biased against African-Americans); David G. Savage, *One in Four Young Blacks in Jail or in Court Control, Study Says*, L.A. TIMES, Feb. 27, 1990, at A1 (quoting attorneys who believe discrimination pervades entire criminal justice system).

16. *But see* WILLIAM WILBANKS, THE MYTH OF A RACIST CRIMINAL JUSTICE SYSTEM 6-7 (1987) (concluding that criminal justice system is not discriminatory against African-Americans); Theresa W. Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 407 (1991) (concluding on basis of sentencing guidelines study that unwarranted sentencing disparities have decreased); Stephen Klein et al., *Race and Imprisonment Decisions in California*, 247 SCI. 812, 816 (1990) (finding no evidence of racial discrimination in California courts' sentencing decisions); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 835-47 (1992) (finding methodological flaws in Judge Heaney's study that indicated greater disparity under Sentencing Guidelines).

17. *See supra* notes 12-14 and *infra* notes 236-317 and accompanying text (discussing possibility that racial discrimination exists from arrest through sentencing procedures).

18. *See* Morris, *supra* note 12, at 113 (pointing out that criminal justice system is discriminatory in operation, not plan or intent).

19. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1451 (2d ed. 1988) (recounting how Supreme Court almost always invalidates challenged action under strict scrutiny); Joseph M. Sellers, *The Impact of Intent on Equal Protection Jurisprudence*, 84 DICK. L. REV. 363, 376 (1980) (noting that determination of which level of scrutiny applies generally determines whether Court will find equal protection violation).

20. *See supra* note 15 (citing sources that indicate racial discrimination is not systemic or significant). This note uses the phrase "arguably discriminatory" to indicate that experts disagree over whether racial discrimination exists in the criminal justice system.

21. *See infra* notes 236-317 and accompanying text (providing analysis regarding potential application of *Russell* approach).

22. *See infra* notes 236-317 and accompanying text (discussing possible challenges based on discriminatory impact). Although this Note primarily intends to criticize the Minnesota Supreme Court's substantive equal protection approach, defense attorneys may find helpful some of the arguments presented as hypothetical reasons why a court may invalidate certain procedures under the *Russell* approach.

result in the judicial invalidation under state constitutions of many criminal procedures.[23]

The Minnesota Supreme Court's approach in *Russell*, however, amounts to nothing more than substantive equal protection analysis reminiscent of the long since discredited *Lochner v. New York*[24] substantive due process approach.[25] Put simply, the court in *Russell* acted as a super-legislature with veto power over the enactment of a statutory provision that a majority of the court found unwise.[26] Although the Minnesota Supreme Court's goal of eliminating racial disparities in the criminal justice system is commendable, its approach is dubious.[27] The legislature, not the judiciary, is the proper forum for eliminating the facially neutral aspects of the criminal justice system that are discriminatory in impact.[28] A brief comparison of the federal and the Minnesota Supreme Court's equal protection tests along with a demonstration of how the Minnesota test might apply in other criminal justice contexts illustrates the far-reaching implications of the Minnesota approach and demonstrates that the legislature is best suited to address criminal justice policies that disparately impact minorities.

I. FEDERAL EQUAL PROTECTION ANALYSIS

Federal equal protection analysis differs significantly from the Minnesota model.[29] The United States Supreme Court, when faced with an equal protection challenge, generally chooses among three different standards of review: rational basis, intermediate scrutiny, or strict scrutiny.[30] The least

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23. *See infra* notes 236-317 and accompanying text (discussing possible invalidation of criminal procedures under *State v. Russell* analysis).

24. 198 U.S. 45 (1905); *see infra* note 213 (discussing *Lochner* decision in greater detail).

25. *See* Deborah K. McKnight, *Minnesota Rational Relation Test: The* Lochner *Monster in the 10,000 Lakes*, 10 WM. MITCHELL L. REV. 709, 711 (1984) (contending that Minnesota rational basis test in cases prior to *Russell* employed substantive review standard similar to *Lochner*); *infra* notes 213-17 and accompanying text (discussing *Lochner* and Supreme Court's rejection of substantative review analysis).

26. *See infra* notes 161-86 and accompanying text (reviewing Minnesota Supreme Court's independent evaluation of legislative testimony).

27. *See infra* notes 327-33 and accompanying text (discussing desirability of legislative decisionmaking).

28. *See infra* notes 94-100, 320-22 and accompanying text (discussing inherent problems with judicial reliance on statistical evidence as proof of discrimination as trigger for substantive review).

29. State v. Russell, 477 N.W.2d 886, 887-88 (1991); *see* McKnight, *supra* note 24, at 711-14 (1984) (distinguishing Minnesota rational basis test from federal standard); Judith A. Zollar, Note, *Discriminatory Impact Analysis: A State Constitutional Approach:* State v. Russell, *477 N.W.2d 886 (Minn. 1991)*, 15 HAMLINE L. REV. 497, 505-07 (1992) (explaining elements of Minnesota rational basis test and federal heightened scrutiny analysis).

30. *See* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.3, at 12-41 (2d ed. 1992) (describing three federal standards of review in equal protection cases); TRIBE, *supra* note 19, § 16-2, at 1439-40, § 16-6, at 1451 (analyzing federal equal protection review standards).

scrutinizing, most deferential standard of review is the rational basis test.[31] Under the rational basis test, also known as the conceivable basis test,[32] the Court upholds the challenged classification so long as the Court recognizes some set of facts that could constitute a basis for the classification.[33] The federal rational basis tests requires that (1) the challenged legislation has a legitimate purpose, and (2) that it was reasonable for the lawmakers to believe that the use of the challenged classification would promote that purpose.[34] In other words, the classification must not be arbitrary and must bear a reasonable relationship to the purpose of the legislation.[35]

Although not as deferential as the rational basis test, the second tier of review, the intermediate scrutiny test, is less demanding than strict scrutiny review.[36] Intermediate scrutiny requires that the classification bear a substantial relationship to an important government interest.[37] Intermediate scrutiny differs from the rational basis test in that the Court will not hypothesize an arguable relationship between the legislation's purpose and the classification.[38] The Court formally has adopted the intermediate standard of review only in cases involving gender and illegitimacy discrimination.[39]

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31. *See* ROTUNDA & NOWAK, *supra* note 30, at 14 (describing rational basis review); TRIBE, *supra* note 19, at 1440 (same).

32. *See* TRIBE, *supra* note 19, at 1443. For the purposes of this Note, "rational basis," "rational relationship," "minimum rationality," and "conceivable basis" will all refer to the minimum level of scrutiny used by the Court.

33. *See* Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671-72 (1980) (upholding California's retaliatory insurance tax because it was reasonable for lawmakers to believe classification would promote law's purpose); Allied Stores Inc. v. Bowers, 358 U.S. 522, 528-29 (1958) (upholding statute because legislature may have conceivably adopted that law for legitimate purpose); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 563 (1946) (sustaining classification because it may provide boost to morale and *esprit de corps* among river pilots).

34. *Western*, 451 U.S. at 668.

35. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (upholding state statute that placed ban on retail sale of plastic, nonreturnable, nonrefillable milk containers, but permitted retail sale of nonreturnable, nonrefillable, paperboard milk containers). The Court in *Clover Leaf* reviewed the challenged classification under the rational basis test and concluded that there was evidence before the legislature that reasonably supported the classification. *Id.* at 461. The Court then determined that whether the classification was rationally related to the statute's purpose was debatable. *Id.* at 464. Therefore, the Court upheld the classification. *Id.* at 470.

36. *See* ROTUNDA & NOWAK, *supra* note 30, § 18.3, at 16-17 (describing requirements of intermediate scrutiny); James A. Kushner, *Substantive Equal Protection: The Rehnquist Court and the Fourth Tier of Judicial Review*, 53 MO. L. REV. 423, 454-55 (1988) (characterizing requirements of middle level scrutiny test).

37. *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979) (explaining that classifications based on gender must bear "close and substantial" relationship to important governmental objectives).

38. *Id.*; *see* ROTUNDA & NOWAK, *supra* note 30, § 18.3, at 22 (describing intermediate scrutiny review).

39. *See* ROTUNDA & NOWAK, *supra* note 30, § 18.3, at 17 (explaining when Supreme Court applies intermediate scrutiny); Kushner, *supra* note 36, at 455 (describing applicability of intermediate scrutiny).

The third and least deferential standard of review is strict scrutiny review.[40] Under strict scrutiny review, the Supreme Court independently determines whether the classification bears a sufficiently close relationship to a compelling or overriding governmental purpose.[41] The strict scrutiny test requires a compelling or overriding governmental interest and a close relationship between the classification and the state interest.[42] As with intermediate scrutiny cases, under strict scrutiny the Court will not hypothesize a reasonable explanation for the classification.[43]

Generally, whether a challenged classification will be invalidated depends upon which level of scrutiny the Court employs in reviewing the government action.[44] Strict scrutiny review, for example, nearly always results in the invalidation of the challenged classification.[45] The Court applies strict scrutiny review, however, only in limited circumstances: when a classification involves a suspect class,[46] such as the members of a particular race or religion, or in cases involving discriminatory intent or purpose.[47] Consequently, the goal of the individual contesting a classification is to convince the Court to invoke strict scrutiny review.[48]

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40. *See* ROTUNDA & NOWAK, *supra* note 30, § 18.3, at 15 (defining requirements of strict scrutiny); TRIBE, *supra* note 19, at 1451-52 (describing significance of strict scrutiny in determining validity of classifications); Kushner, *supra* note 36, at 455-56 (describing requirements of strict scrutiny); Sellers, *supra* note 19, at 376 (explaining that success of equal protection challenge depends on whether Supreme Court applies strict scrutiny).

41. *See* Korematsu v. United States, 323 U.S. 214, 218 (1944) (holding that racially restrictive curfew bore sufficiently close relationship to governmental interests).

42. *See* Sue Davis, *Justice Rehnquist's Equal Protection Clause: An Interim Analysis*, 63 NEB. L. REV. 288, 291 (1984) (explaining that strict scrutiny requires that classification be only means of achieving compelling state interest); Melanie E. Meyers, Note, *Impermissible Purposes and the Equal Protection Clause*, 86 COLUM. L. REV. 1184, 1185-86 (1986) (describing how strict scrutiny requires narrowly tailored classification that serves compelling state interest).

43. ROTUNDA & NOWAK, *supra* note 30, at 15.

44. *See infra* notes 45-48 and accompanying text (expressing importance of invocation of strict scrutiny in order to facilitate invalidation of challenged classification).

45. *See* TRIBE, *supra* note 19, § 16-6, at 1451 (describing strict scrutiny review as "'strict' in theory and usually 'fatal' in fact"). Tribe's analysis is especially poignant with regard to strict scrutiny of racial classifications. *Id.* at 1451-52. Only in *Korematsu*, 323 U.S. at 218, has the Supreme Court upheld an explicitly racially discriminatory government action under strict scrutiny. TRIBE, supra note 19, § 16-6, at 1452.

46. *See* Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (applying strict scrutiny review to racial classification); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (applying strict scrutiny review to strike down criminal statute which distinguished on the basis of race); Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying strict scrutiny to racial classification).

47. *See* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-66 (1977) (stating that when discriminatory intent is not present, Court will not apply heightened scrutiny); Washington v. Davis, 426 U.S. 229, 243 (1976) (holding that in absence of discriminatory intent, court will not invoke strict scrutiny).

48. *See* Edward L. Barrett, *The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications*, 68 KY. L.J. 845, 860 (1979-1980) (arguing that claimants cannot expect to succeed in equal protection challenges unless they persuade court to invoke heightened scrutiny).

Government classifications arise under three different circumstances.[49] First, a legislative enactment may create a classification on its face.[50] In other words, the law specifically classifies persons for different treatment.[51] Second, the government may create a classification through the application of a facially neutral law.[52] For example, the government might enforce a facially neutral law against only one racial group.[53] Third, a facially neutral law that is not discriminatory in application may nevertheless be discriminatory in effect.[54] For instance, a rule that requires all prospective employees to take an exam may result in the disqualification of more minorities than caucasians.[55]

The Supreme Court will not apply strict scrutiny review to a facially neutral enactment unless the law discriminates both in effect and purpose.[56] As a prerequisite to strict scrutiny review, the Court requires proof that the government chose a course of action because of, and not merely in spite of, the discriminatory impact.[57] Under the purposeful discrimination re-

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49. *See* ROTUNDA & NOWAK, *supra* note 30, § 18.2, at 9 (listing ways in which government actions classify).

50. *See id.* § 18.4 at 42 (describing how law can classify "on its face"); TRIBE, *supra* note 19, § 16-14, at 1466 (explaining facially invidious classifications).

51. ROTUNDA & NOWAK, *supra* note 30, § 18.4 at 42. For example, the statute in Strauder v. West Virginia, 100 U.S. 303 (1879), permitted only white males over the age of 21 to serve as jurors. *Id.* at 305. When a black defendant challenged the statutory classification, the Supreme Court ruled that the statute impermissibly created a classification in violation of the Fourteenth Amendment. *Id.* at 308.

52. *See* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (holding that enforcement of San Francisco ordinance banning hand laundries in wooden buildings violated equal protection guarantees of aliens). In *Yick Wo*, the Court considered whether the enforcement of a facially neutral ordinance banning wooden laundries violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 366. The petitioner was a native of China who ran a laundry in a wooden building in San Francisco. *Id.* at 358. San Francisco enacted an ordinance that prohibited laundries in wooden buildings. *Id.* Petitioner challenged the ordinance on the grounds that the city officials enforced the law in a discriminatory manner based on race. *Id.* at 359. The Court first defined the equal protection guarantee as being the right to equal treatment for all under like circumstances. *Id.* at 367. The Court then determined that because San Francisco officials applied the law in a discriminatory manner against Chinese launderers, the application of the law was unconstitutional. *Id.* at 373-74; *see also* ROTUNDA & NOWAK, *supra* note 30, § 18.4, at 42 (describing equal protection claim based on discriminatory application of facially neutral law).

53. *See Yick Wo*, 118 U.S. at 373-74 (determining city officials unfairly discriminated against Chinese launderers by enforcing ordinance against Chinese launderers and not Caucasians).

54. *See* Hunter v. Underwood, 471 U.S. 222, 233 (1985) (invalidating statute because Court found proof of disparate racial impact combined with invidious intent).

55. *See* Washington v. Davis, 426 U.S. 229, 235 (1976) (noting that police examination at issue screens out more African-Americans than Caucasians).

56. *See Davis*, 426 U.S. at 242 (holding that discriminatory impact alone fails to trigger strict scrutiny); Jefferson v. Hackney, 406 U.S. 535, 546-49 (1972) (refusing to invoke strict scrutiny without proof of invidious intent).

57. *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (holding that discriminatory purpose "implies more than intent as volition or intent as awareness of consequences").

quirement, statistical evidence of disparate impact alone is insufficient to warrant invocation of strict scrutiny in federal equal protection analysis.[58] Rather, proof of statistically disproportionate impact may be relevant in proving discriminatory intent, but such proof rarely is dispositive.[59]

The requirement that discriminatory intent accompany disproportionate impact is a major hurdle to discriminatory impact equal protection challenges.[60] In discriminatory impact challenges, the Court places the burden to prove the existence of discriminatory purpose on the individual challenging the classification.[61] Although the Court in *Palmer v. Thompson*[62] acknowledged the futility of judicial review of motivations that lie behind legislative enactments,[63] five years later, in *Washington v. Davis*, the Court decided that despite the difficulties of ascertaining governmental motivation, such an inquiry was not only possible but also necessary for equal protection analysis.[64] In *Davis*, the Court announced that the totality of relevant facts, including the disparate statistical impact, would be pertinent in equal protection challenges.[65]

The next year, in *Arlington Heights v. Metropolitan Housing Development Corp.*,[66] the Court clarified what proof would satisfy the invidious intent requirement. In *Arlington Heights*, the Court declared that a plaintiff need not prove that the challenged action arose from a discriminatory

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58. McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (requiring defendant to prove purposeful discrimination in his case); *Feeney*, 442 U.S. at 274 (holding that purposeful discrimination is key element in equal protection claim); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977) (maintaining that although disparate impact is not irrelevant, invidious intent is determinative factor in equal protection challenge); *Davis*, 426 U.S. at 239 (rejecting equal protection claim based solely on disparate racial impact); *Hackney*, 406 U.S. at 548 (rejecting equal protection claim grounded solely on statistical disparate impact).

59. McCleskey v. Kemp, 481 U.S. 279, 293, 298 (1987).

60. *See* Binion, *supra* note 11, at 397 (explaining that intent requirement is formidable barrier to invalidation of government actions challenged on equal protection grounds); Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1402 (1988) (noting that "no defendant in state or federal court has ever successfully challenged his punishment on grounds of racial discrimination in sentencing"); Lively & Plann, *supra* note 11, at 720 (arguing that intent requirement in equal protection analysis avoids realities of laws which result in disparate racial impacts by creating unmanageable burden of proof); Nelson, *supra* note 11, at 334-35 (describing how equal protection claims fail for lack of proof of discriminatory purpose).

61. *See McCleskey*, 481 U.S. at 292 (requiring defendant to prove decisionmakers acted with discriminatory purpose in his case); Wayte v. United States, 470 U.S. 598, 610 (1985) (requiring petitioner to prove Government prosecuted him with intent to discriminate).

62. 403 U.S. 217 (1971).

63. Palmer v. Thompson, 403 U.S. 217, 224-25 (1971) (describing futility of trying to ascertain motivation behind enactment).

64. Washington v. Davis, 426 U.S. 229, 242 (1976); *see supra* note 8 (discussing *Davis* in detail).

65. *Davis*, 426 U.S. at 242.

66. 429 U.S. 252 (1977).

motive.[67] Rather, after again acknowledging that single or even dominant motivations[68] are rarely the basis of legislative and administrative actions, the Court in *Arlington Heights* announced the specific types of circumstantial evidence that would support a claim of purposeful discrimination.[69] The Court stated that the historical background of the decision,[70] the specific events leading to the challenged action, and any departures from normal procedure would be instructive in the search for discriminatory intent.[71]

In 1986, the Court extended the intentional discrimination requirement to capital sentencing in *McCleskey v. Kemp*.[72] In *McCleskey*, a jury of eleven Caucasian jurors and one African-American juror[73] convicted Warren McCleskey, an African-American, of two counts of armed robbery and one count of murder.[74] At a later sentencing hearing, the jury sentenced McCleskey to death for the murder of a Caucasian police officer.[75] After McCleskey's state appeals failed, McCleskey sought federal habeas corpus relief on the ground that the Georgia capital sentencing process had a statistically disproportionate impact on African-Americans and therefore

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67. Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (holding that developer in housing development controversy failed to satisfy burden of proving discriminatory purpose). In *Arlington Heights*, the Court addressed whether the Village of Arlington Heights' refusal to rezone a 15-acre parcel of land from a single-family to multiple-family classification violated the Equal Protection Clause. *Id.* at 263. The Metropolitan Housing Development Corporation applied to Arlington Heights for the rezoning of the land. *Id.* at 254. The Village denied the request and then the plaintiffs filed suit alleging that the Village's decision would result in a racially disparate impact. *Id.* at 263. The Court reaffirmed the *Washington v. Davis* requirement that the person bringing the equal protection challenge show discriminatory intent in order to support a disparate impact equal protection challenge. *Id.* at 264-65. The Court then explained what circumstantial evidence would help support a claim of invidious discrimination. *Id.* at 266.

68. *Id.* at 265.

69. *Id.* at 266-68.

70. *Id.* at 267; *see also* Hunter v. Underwood, 471 U.S. 222, 223 (1984) (holding 1901 voting restriction in Alabama unconstitutional because state legislature originally enacted law as part of white supremacy movement).

71. *Arlington Heights*, 429 U.S. at 267; *see* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1112 (1989) (listing factors which Court would accept as circumstantial evidence of invidious intent).

72. McCleskey v. Kemp, 481 U.S. 279 (1987).

73. McCleskey v. Zant, 580 F. Supp. 338, 377 n.15 (N.D. Ga. 1984).

74. McCleskey v. Kemp, 481 U.S. at 283.

75. *Id.* at 284. At the time of McCleskey's conviction, Georgia used a bifurcated trial and sentencing process. GA. CODE ANN. § 17-10-2(c) (1982). The Georgia Code provided that when a jury convicted a defendant of murder, the court should "resume the trial and conduct a presentence hearing before the jury." GA. CODE ANN. § 17-10-2(c) (1982); *McCleskey*, 481 U.S. at 284 n.2. At the sentencing phase, the Georgia Code required the jury to find, beyond a reasonable doubt, that at least one aggravating circumstance to the murder existed before the jury could impose the death penalty. GA. CODE ANN. § 17-10-30(c) (1982); *McCleskey*, 481 U.S. at 284. The jury in McCleskey's case found two aggravating circumstances: McCleskey committed the murder during the commission of an armed robbery, and McCleskey murdered a police officer engaged in the performance of his duty. *McCleskey*, 481 U.S. at 284-85. McCleskey presented no mitigating evidence at the hearing. *Id.* at 285.

violated the Equal Protection Clause.[76] McCleskey based his appeal on a study[77] that concluded that defendants charged with killing Caucasian victims were 4.3 times more likely to receive the death penalty than defendants who killed African-American victims.[78] The study also found that prosecutors sought the death penalty most often when the victim was Caucasian and the defendant was African-American.[79]

Despite the evidence of the disproportionate impact in capital sentencing cases in Georgia, the Supreme Court narrowly rejected McCleskey's equal protection challenge.[80] In reaching its decision, the Court relied in part on *Wayte v. United States*.[81] In *Wayte*, the Court decided that in a selective prosecution equal protection challenge, the defendant must prove that the purposeful discrimination had a direct effect on his prosecution.[82] Transferring that requirement to capital sentencing, the *McCleskey* court concluded that McCleskey had to prove that the decisionmakers in his case acted with discriminatory purpose.[83] The *McCleskey* Court summarily rejected McCleskey's argument that the Court should extend its acceptance of statistical disparities as proof of an equal protection violation beyond the jury venire cases.[84] In the jury venire cases, the Court accepts statistical disparities as proof of an equal protection violation, and then the burden shifts to the state to rebut the presumption of a violation.[85] In *McCleskey*,

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76. *McCleskey*, 481 U.S. at 286.

77. *Id.* at 286. Professors David C. Baldus, Charles Pulaski and George Woodworth performed the study of the administration of the death penalty in Georgia. *See* David C. Baldus et. al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133 (1986) [hereinafter the Baldus study] (providing detailed account of study's findings).

78. *McCleskey*, 481 U.S. at 287.

79. *Id.* at 287.

80. *Id.* at 297.

81. 470 U.S. 598 (1985).

82. *See* Wayte v. United States, 470 U.S. 598, 610 (1985) (holding that defendant must prove that racially discriminatory intent influenced selective prosecution in his case). In *Wayte*, the Court considered whether a passive enforcement policy which led to the prosecution of only those men who reported that they would not obey the law violated equal protection guarantees. *Id.* at 600. The government in *Wayte* prosecuted the defendant for failure to register for Selective Service. *Id.* at 603. The government prosecuted only those individuals who either advised government officials that they would not register or those whom other people reported as having not registered. *Id.* at 601. The defendant alleged that such a system of prosecution violated his First and Fifth Amendment rights. *Id.* at 600. The *Wayte* Court began its analysis by describing the broad discretion afforded to prosecutors in their selection of whom to prosecute. *Id.* at 607. The decision to prosecute, the Court determined, could not be based on arbitrary classifications, but the Court also decided to apply ordinary equal protection standards to selective prosecution claims. *Id.* at 608. The Court then concluded that the defendant must demonstrate that the government chose to prosecute him "because of" and not merely "in spite of" the adverse effects upon an identifiable group. *Id.* at 610. The Court rejected Wayte's claim because he failed to satisfy the intent requirement. *Id.*

83. McCleskey v. Kemp, 481 U.S. 279, 298 (1987).

84. *Id.* at 293-97.

85. *See* Castaneda v. Partida, 430 U.S. 482, 494 (1977) (establishing three-prong test for equal protection analysis in grand jury selection case).

though, the Court distinguished capital sentencing from the jury cases and determined that extending the impact-inference standard to sentencing cases would be inappropriate.[86] The Court then held that the statistical evidence was insufficient to support an inference of discriminatory intent in McCleskey's case.[87]

The requirement that plaintiffs demonstrate invidious intent is highly controversial because the purposeful discrimination requirement serves as a nearly insurmountable barrier for many disparate impact equal protection challenges.[88] The Court's use of the purposeful discrimination requirement could result from the Court's reluctance to question legislative decisions.[89] From this perspective, invidious intent facilitates the Court's recognition of the importance of separation of powers.[90] The Court will scrutinize only those enactments that are arbitrary.[91] If the Court finds that the government acted rationally, then the Court will decline to inquire into the wisdom of the state policies.[92]

Moreover, the Court may be reluctant to rely on purely statistical evidence out of a belief that the legislature is better suited to evaluate the significance and validity of such evidence.[93] The Court may not want to rely on disparate impact statistics because the statistics may not be com-

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86. *McCleskey*, 481 U.S. at 294. According to the *McCleskey* Court, the unique nature of the capital sentencing decision and the innumerable factors on which the decision rested precluded the effective use of statistics to establish an equal protection violation in that context. *Id.* The Court also rejected McCleskey's argument because in jury venire selection cases the state decisionmaker has an opportunity to rebut the inference of discrimination, but in capital sentencing cases, the Court determined that the state would not have such an opportunity. *Id.* at 296.

87. *Id.* at 297.

88. *See id.* (rejecting statistical proof of significant disparate impact in absence of proof of discriminatory intent in defendant's case); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 261 (1977) (rejecting developers' claim of disproportionate racial impact where they provided no proof of discriminatory purpose to support equal protection claim); Washington v. Davis, 426 U.S. 229, 242 (1976) (refusing to invalidate pre-employment test in absence of invidious intent proof).

89. *See* Plyler v. Doe, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting) (arguing that Court's business is not to set policy by invalidating policies that majority finds unwise); Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 670 (1980) (stating that judiciary's role is not to review wisdom of state policies); Jefferson v. Hackney, 406 U.S. 535, 551 (1971) (quoting Dandridge v. Williams, 397 U.S. 471, 487 (1970), for proposition that Court does not decide wisdom of state laws).

90. *See* Kushner, *supra* note 36, at 426 (arguing that rational basis standard allows legislature considerable freedom to serve needs of public).

91. *See* Allied Stores v. Bowers, 358 U.S. 522, 527 (1959) (stating that classification must not be palpably arbitrary).

92. *See Western*, 451 U.S. at 670 (limiting review of state policies to legitimacy of law's purpose and not second-guessing wisdom of state policies); *Jefferson*, 406 U.S. at 551 (quoting Dandridge v. Williams, 397 U.S. 471, 487 (1970)).

93. *See* David G. Savage, *Justices' Use of Statistics Baffles Experts*, L.A. TIMES, Apr. 24, 1987, at 19 (noting reasons for judicial reluctance to rely on statistical evidence).

pletely accurate.[94] In *McCleskey*, for example, although the Court assumed the accuracy of the statistics for the purpose of evaluating McCleskey's claim,[95] it nevertheless implied the study was not satisfactorily accurate in reaching its conclusions.[96] Additionally, the Court may be reluctant to base its decisions on statistical evidence because studies often produce conflicting results.[97] The Court therefore may wish to defer to the legislature's evaluation of the conflicting results.[98] Finally, the Court may not want to rely on statistics because it would prefer to base its decisions on the facts of the instant case, not on general statistical evidence.[99] Hence, the Court requires defendants to prove discrimination in their own cases.[100]

Another explanation asserts that the Court uses the intent requirement because the Court fears the potentially far-reaching implications of a different approach.[101] In *Davis*, for instance, the Court noted its concern that without proof of discriminatory intent, a rule invalidating facially neutral statutes that disproportionately burden one race would raise serious questions and possibly invalidate welfare, tax, and licensing statutes.[102] Similarly, in *McCleskey* the Court acknowledged its fear that if the Court accepted McCleskey's claim, then the Court could soon have to face similar claims involving other types of penalties.[103]

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94. *See* WILBANKS, *supra* note 16, at 40 (listing several problems with statistical evidence indicating that criminal justice system is racially discriminatory); Schulhofer, *supra* note 16, at 838-41 (demonstrating methodological flaws in Judge Heaney's study of disparity in Federal Sentencing Guidelines); David Tuller, *Prison Term Study Finds No Race Link*, S.F. CHRON., Feb. 16, 1990, at A2 (indicating that studies may be of little value when they fail to address every aspect of criminal justice system). Wilbanks lists seven separate underlying difficulties with studies showing racism in the criminal justice system. WILBANKS, *supra*, note 16, at 40. The two main problems Wilbanks lists are researcher bias and the nature of direct proof. *Id.* at 40-43. Wilbanks concludes that because of the problems associated with proof of racial disparities in the criminal justice system, it is not possible to prove the system is either discriminatory or nondiscriminatory. *Id.* at 53.

95. McCleskey v. Kemp, 481 U.S. 279, 291 n.7 (1987).

96. *See id.* at 297 (determining that Baldus study was insufficient to prove discrimination in instant case).

97. *See* JOAN PETERSILIA, RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 89 (1983) (acknowledging that for every study that determines criminal justice system is discriminatory, another study reaches contrary conclusion).

98. *See McCleskey*, 481 U.S. at 319 (arguing that legislature, not judiciary, should evaluate the validity of statistical evidence); Savage, *supra* note 15, at 19 (indicating popular belief that legislature rather than judiciary should determine validity of death penalty).

99. *See* Savage, *supra* note 14, at 19 (maintaining that Supreme Court prefers to evaluate specifics of instant case rather than general statistical data).

100. *See* McCleskey v. Kemp, 481 U.S. 279, 297 (1987) (requiring defendant to prove decisionmakers acted with discriminatory purpose); Wayte v. United States, 470 U.S. 598, 610 (1985) (same).

101. *See* TRIBE, *supra* note 18, § 16-20, at 1510 (arguing that intent requirement exemplifies Court's trepidation about embracing possible far-reaching judicial remedies without intent requirement); Binion, *supra* note 11, at 403 (listing reasons for supporting intent rule).

102. *See* Washington v. Davis, 426 U.S. 229, 248 (1976) (arguing that adoption of disparate impact only rule would have far-reaching implications).

103. *See McCleskey*, 481 U.S. at 314-19 (arguing that McCleskey's equal protection claim

Still another explanation for the Court's use of the intent requirement is that the Court applies the intent rule because the Court is preoccupied with process-based theories of democracy.[104] This explanation asserts that the Court is concerned only with the cleanliness of the decisionmaking process and not with the outcomes of the decisions.[105] Under the process-based explanation, the Court views the Equal Protection Clause as prohibiting only deliberate use of discriminatory intent in the decisionmaking process.[106]

II. MINNESOTA EQUAL PROTECTION ANALYSIS

Regardless of the United States Supreme Court's reason for applying the intent requirement in federal equal protection analysis, the Court's use of the rule forecloses equal protection challenges based on disproportionate impact on minorities unless the plaintiff can somehow demonstrate discriminatory purpose.[107] The Court could, however, adopt the Minnesota Supreme Court's approach to state equal protection challenges in the federal context.[108] In 1979, the Minnesota Supreme Court embarked on a rocky twelve year battle over whether Minnesota equal protection analysis was synonymous with federal equal protection.[109] Prior to 1979, the court had construed

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would raise serious questions about the principles that underlie our criminal justice system). Justice Powell expressed his concern that if the Court allowed McCleskey's claim, other defendants would raise similar claims about other types of sentences. *Id.* at 315.

104. *See* Binion, *supra* note 11, at 403-04 (observing that Supreme Court uses intent requirement because it is only concerned with the "cleanliness" of decisionmaking process); Laurence Tribe, *The Puzzling Persistence of Process-based Constitutional Theories*, 89 YALE L.J. 1063, 1063-64 (1980) (explaining Supreme Court's reliance on process-based theories of judicial review).

105. *See* Binion, *supra* note 11, at 403-04 (explaining the preoccupation with process-based theories).

106. *Id.* at 404.

107. *See supra* notes 56-87 and accompanying text (discussing how equal protection challenges fail despite evidence of discriminatory impact when proof of invidious intent is lacking).

108. *See infra* notes 236-317 and accompanying text (discussing possible implications of *Russell* approach applied to other aspects of criminal justice system).

109. *See In re* Estate of Turner, 391 N.W.2d 767, 771 (Minn. 1986) (Wahl, J., concurring) (tracing "battle of footnotes" in Minnesota Supreme Court equal protection rational basis cases). Justice Wahl notes the Minnesota Supreme Court's inconsistency in determining whether Minnesota applied a rational basis test different from the federal test. *Id.* Justice Wahl first recounts that in 1982 in Wegan v. Village of Lexington, 309 N.W.2d 273, 281 n.14 (Minn. 1981), the court announced that the state rational basis test differed from the federal standard. *Turner*, 391 N.W.2d at 771. Wahl then demonstrates that two years later in AFSCME Councils 6, 14, 65 & 96 v. Sundquist, 338 N.W.2d 560, 570 n.12 (Minn. 1983), the court stated that the two standards were "coextensive." *Turner*, 391 N.W.2d at 771. Then, by 1984, in McGuire v. C & I Restaurant, Inc., 346 N.W.2d 605, 613 n.10 (Minn. 1984), the Minnesota Supreme Court decided the standards were indeed different. *McGuire*, 346 N.W.2d at 613 n.10. But, two years after *McGuire* in *Turner*, Wahl notes, the court again announced that Minnesota rational basis was the same was the federal standard and that only the exact wording of the tests differed. *Turner*, 391 N.W.2d at 771 n.2. Justice Wahl concluded that the court should

the standards of the Fourteenth Amendment's Equal Protection Clause to be coextensive with the standards of equal protection under the Minnesota Constitution.[110]

Beginning in 1979 with the Minnesota Supreme Court's decision in *Clover Leaf Creamery Co. v. State*,[111] Minnesota developed its own version of the rational basis standard.[112] In invalidating the distinction between plastic, nonrefillable, nonreturnable milk containers and all other milk containers,[113] the court determined that the distinction was not rationally

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freely acknowledge the difference between the state and federal rational basis tests and stop trying to justify the state standard by comparing to the federal test. *Id.* at 772.

The court in 1991 in *Russell* again used a footnote to compare the state and federal standards. State v. Russell, 477 N.W.2d 886, 889 n.3 (Minn. 1991). Justice Wahl writing for the majority claims that Minnesota's constitution "embodies principles of equal protection synonymous to the equal protection clause of the Fourteenth Amendment to the United States Constitution." *Id.* In support of that contention, Wahl cites State v. Forge, 262 N.W.2d 341, 347 n.23 (Minn. 1977), a case that predates the Minnesota court's 1981 decision in *Wegan*. *Russell*, 477 N.W.2d at 889 n.3. Even more curious is the language of the footnote in *Forge* which Wahl cites. *Id.* The footnote in *Forge* states that the "standards of the equal protection clause of the Fourteenth Amendment are synonymous with the standards of equality" under the Minnesota constitution. *Forge*, 262 N.W.2d at 347 n.23. Although Wahl uses the word "principles," because he cites *Forge* which states the "standards" are the same, Wahl himself contributes to the confusion and the ongoing "battle of the footnotes." *Russell*, 477 N.W.2d at 889 n.3. A possible explanation is that since the court in *Russell* actually engaged in substantive review, Wahl may have been attempting to pacify judges, attorneys and commentators who would find such an activist approach highly offensive. *See also* Mcknight, *supra* note 24, at 722-32 (tracing development of Minnesota rational basis test through 1983).

110. *See* State v. Forge, 262 N.W.2d 341, 347 n.23 (Minn. 1977) (equating Minnesota standard with federal standard); Seamer v. Great N. Ry. Co., 172 N.W. 765, 768-69 (Minn. 1919) (turning to United States Supreme Court Fourteenth Amendment cases to support conclusion classification need only be fair and reasonable and result in substantial equality); *see also* McKnight, *supra* note 24, at 725 (arguing that adoption of less deferential rational basis standard was abrupt departure from past Minnesota Supreme Court decisions).

111. 289 N.W.2d 79 (Minn. 1979), *rev'd*, 449 U.S. 456 (1981).

112. Clover Leaf Creamery v. State, 289 N.W.2d 79 (Minn. 1979), *rev'd*, 449 U.S. 456 (1981) (invalidating distinction between plastic and paperboard nonreturnable milk containers as being irrational and arbitrary). In *Clover Leaf*, the court considered the validity of a statute which banned the use of nonreturnable, nonrefillable plastic milk containers but did not ban other plastic nonrefillable containers or paperboard nonrefillable milk containers. *Id.* at 81. The Minnesota legislature enacted the ban on plastic nonreturnable, nonrefillable milk containers in an effort to encourage the reuse and recycling of materials and reduce the solid waste management problem for the state. *Id.* at 81-82. The *Clover Leaf* court engaged in an independent review of documentary evidence and concluded that the distinction between plastic containers and paper containers was not rationally related to the statute's purpose. *Id.* at 82. The court independently weighed the evidence before the trial court in reaching its conclusion on the irrationality of the statute. *Id.* at 82-84. The court, however, invalidated the statute on the ground that the statute violated the Fourteenth Amendment's equal protection guarantees and not on the state Equal Protection Clause. *Id.* at 81.

113. *Id.* at 80-81. The *Clover Leaf* court noted that the statute banned only plastic milk containers and not plastic nonreturnable, nonrefillable containers of other liquids. *Id.* at 81. The court also noted that the ban affected only plastic milk containers and not nonreturnable, nonrefillable paper milk containers. *Id.*

related to the state interests in conservation or solid waste management.[114] The court reached its conclusion based on the trial court's evaluation of conflicting evidence and its own independent evaluation of the testimony, rather than on the evidence presented to the legislature.[115] Because the case arose under the Fourteenth Amendment, the United States Supreme Court had jurisdiction over the matter and reversed the Minnesota court's decision on appeal.[116]

Two years later, in 1981, the Minnesota Supreme Court in *Wegan v. Village of Lexington*[117] rejected federal equal protection analysis under the state Equal Protection Clause.[118] The court in *Wegan* announced a three-

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114. *Id.* at 82, 86-87.

115. *Id.* at 82. The *Clover Leaf* court claimed that the classification would not achieve the statute's purpose. *Id.* But, the court based its decision entirely on evidence not presented to the legislature. *Id.* at 81-82. Therefore, the court was not even evaluating the rationality of the legislature's decision in enacting the ban. *Id.* at 87. Moreover, as Justice Wahl demonstrated in his dissent, although the ban may not have covered all possible containers which the legislature could have banned, the decision to adopt a piecemeal solution to an economic or environmental problem lies within the proper ambit of legislative authority. *Id.* Wahl also noted that in traditional rational basis review, the United States Supreme Court has declared that the step-by-step approach in economic regulation is a permissible exercise of legislative power. *Id.* at 88 (citing New Orleans v. Dukes, 427 U.S. 297 (1976)). Nevertheless, the *Clover Leaf* court disregarded Wahl's admonition to follow traditional equal protection review and invalidated that statute based on the majority's opinion regarding the evidence presented to the trial court. *Id.* at 82.

116. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469 (1980) (holding that Minnesota Supreme Court erred by substituting its judgment for that of legislature). The Supreme Court in overruling the Minnesota court's invalidation of the statute noted that the State presented four different justifications for the classification. *Id.* at 465. The Court found that the legislature could have rationally believed that the classification would promote the statute's purpose. *Id.* at 466-70. Therefore, the classification was valid under traditional rational basis review. *Id.* at 470. After concluding that the legislature acted rationally, the Court assailed the Minnesota Supreme Court's mode of analysis. *Id.* at 470. According to the Court, the Minnesota court had in effect held that the state legislature "misunderstood the facts." *Id.* at 469. The United States Supreme Court, however, flatly rejected the Minnesota court's review standard stating that "it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature." *Id.* at 470.

117. 309 N.W.2d 273 (Minn. 1981).

118. *See* Wegan v. Village of Lexington, 309 N.W.2d 273, 281 (Minn. 1981) (invalidating classifications between individuals injured by unlawfully intoxicating liquor sales and unlawful nonintoxicating liquor sales). In *Wegan*, the court considered whether commencement-of-suit and notice-of-claim provisions in a state statute which distinguished intoxicating from nonintoxicating liquors violated the Equal Protection Clauses of both the United States Constitution and the Minnesota Constitution. *Id.* at 277. The statute in *Wegan*, MINN. STAT. § 340.951 (1974), required claimants filing suit against an intoxicating liquor dealer to file a notice of claim with the dealer and bring suit within one year. *Id.* at 278. However, claimants suing a nonintoxicating liquor retailer did not have to file a notice of claim with the retailer and had six years to bring the action. *Id.* The court began its analysis by determining that the statute essentially created two distinct classes: individuals injured by illegal intoxicating liquor sales and individuals injured by illegal nonintoxicating liquor sales. *Id.* The court then determined that although the statute attempted to achieve legitimate government purposes, the classifications were not genuine or substantial and were historical anachronisms. *Id.* at 280. Therefore

prong rational basis test for equal protection challenges arising under the state constitution.[119] First, to satisfy the Minnesota rational basis test, the distinction separating those within the classification from those outside the classification must not be manifestly arbitrary or fanciful.[120] The distinction must be genuine and substantial, thereby providing a reasonable basis for the purpose of the law.[121] Second, the classification must be relevant to the purpose of the law.[122] Third, the purpose of the law must be legitimate.[123] The Minnesota rational basis test, therefore, requires inquiry into the actual effect of the challenged governmental action and not just a hypothetical inquiry.[124] By basing its decision on state constitutional grounds, the Minnesota court effectively removed its decision from the ambit of the United States Supreme Court's appellate jurisdiction.[125]

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the distinction was invalid under the Fourteenth Amendment of the United States Constitution and under the Minnesota Constitution, article one, § 2. *Id.* at 281. In a footnote, however, the court stated that even if the classifications would satisfy the federal equal protection standard, they would still violate the state equal protection guarantee. *Id.* at 281 n.14.

By announcing that the statutory classifications would be invalid under the state constitution regardless of their validity under the Fourteenth Amendment, the court prevented the United States Supreme Court from overruling its decision. *See* McKnight, *supra* note 25, at 736 (acknowledging that United States Supreme Court lacks jurisdiction over state court decisions resting on independent state grounds). Moreover, by stating that the classification might still pass muster under federal standards but not state analysis, the court acknowledged for the first time that the state and federal equal protection standards were different. *Wegan*, 309 N.W.2d at 281 n.14.

119. *Wegan*, 309 N.W.2d at 280. The court borrowed the three-part rational basis test enunciated in Guilliams v. Commissioner of Revenue, 299 N.W.2d 138, 142 (Minn. 1980). *Guilliams* was a state uniformity clause decision. The Uniformity Clause of the Minnesota Constitution, article X, § 1 (1857, amended 1974) provides in pertinent part that "[t]axes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes. . . ."

The test in *Guilliams* requires that:

> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

Guilliams, 299 N.W.2d at 142 (*citing* Miller Brewing Co. v. State, 284 N.W.2d 353, 356 (Minn. 1979)).

120. *Wegan*, 309 N.W.2d at 280.

121. *Id.*

122. *Id.*

123. *Id.*

124. *See* McKnight, *supra* note 24, at 726 (discussing how *Wegan* court examined actual effect of statute not just conceivable or possible bases for law). McKnight argues that the court's analysis in *Wegan* was a sharp break from traditional rational basis analysis. *Id.* Previously, the Minnesota Supreme Court traditionally determined whether facts existed upon which the legislature could arguably have based its decision in creating a classification. *Id.* In *Wegan*, though, the court refused to hypothesize possible explanations but evaluated the actual effects instead. *Id.*

125. *See Developments in the Law—The Interpretation of State Constitutional Rights*, 95

Later in 1981, the Minnesota court decided another case on state equal protection grounds similar to the analysis used in *Wegan*.[126] In *Nelson v. Peterson*[127] the court invalidated a statute that prohibited state-employed attorneys who represented petitioners in workers' compensation cases from being workers' compensation judges.[128] The court in *Nelson* applied the same three-prong rational basis test that it had used in *Wegan*.[129] Under the three-prong analysis the court determined that the statutory classification between state-employed attorneys who represent petitioners and state-employed attorneys who represent defendants was not genuine or relevant to the purposes[130] of the statute.[131] The court reached its conclusion by rejecting all of the state's arguments supporting the classification.[132] Before rejecting

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HARV. L. REV. 1324, 1332-34 (1982) [hereinafter *State Rights*] (describing limitations on United States Supreme Court's jurisdiction over decisions resting on independent state grounds); McKnight, *supra* note 25, at 736 (stating that United States Supreme Court lacks jurisdiction over cases that state courts decide on state grounds); Zollar, *supra* note 29, at 509-10 (stating that United States Supreme Court lacks jurisdiction to review state interpretations resting on independent grounds).

126. McKnight, *supra* note 24, at 728.

127. 313 N.W.2d 580 (Minn. 1981).

128. Nelson v. Peterson, 313 N.W.2d 580, 583 (Minn. 1981) (holding statute that prohibited state-employed attorneys from serving as workers' compensation judges to be violative of state equal protection). In *Nelson*, the court considered a statute that excluded state-employed attorneys who represented petitioners in workers' compensation cases from becoming compensation judges until two years after the attorney last represented a petitioner but placed no similar restriction on state-employed defense attorneys. *Id.* at 580-81. In *Nelson*, state-employed attorneys brought suit to have the statutory provision restricting them from serving as compensation judges declared unconstitutional under both state and federal equal protection guarantees. *Id.* at 580. The court first determined that the appropriate standard for review was the *Guilliams* three-part rational basis test. *Id.* at 581. After determining that the statute's purpose was legitimate, thereby satisfying the third requirement of the *Guilliams* test, the court declared that the means chosen to achieve the statute's purposes were irrational. *Id.* at 582. The State presented three possible arguments to establish a conceivable basis for the distinction in the statute, but the court rejected all three. *Id.* at 582-83. One of the arguments was that the legislature intended to broaden the backgrounds and experiences of compensation judges because currently every compensation judge had worked as petitioners attorneys in compensation cases. *Id.* at 581-82. The court invalidated the statute by reviewing the actual effect of the statute and not any hypothetical explanations for the classifications. *Id.* at 583.

129. *Id.* at 581.

130. *Id.* at 582. The state offered two reasons for the classification. First, the state claimed that the classification helped to eliminate any appearance that compensation judges were biased in favor of employees. *Id.* Second, the state argued that the prohibition on state-employed petitioners' attorneys from serving as compensation judges would broaden the experiences and backgrounds of compensation judges. *Id.* The court agreed that both justifications for the statute were legitimate purposes, and therefore the classification satisfied the third prong of the three-prong rational basis test. *Id.*

131. *Id.*

132. *Id.* at 582-83. The state first argued that the legislature reasonably could have believed that the excluded attorneys were more likely than the exempted attorneys to be biased. *Id.* at 582. The state next argued that the legislature may have thought the statute would increase public confidence in the workers' compensation system. *Id.* at 583. Finally, the state claimed that the legislature enacted the statute to increase the diversity of experience and backgrounds the workers' compensation judges in the state. *Id.*

the state's possible justifications for the classification, the court closely examined the actual effect of the statute and required that the classification actually achieve the legislative purpose.[133] The court's analysis, therefore, more closely resembled an independent evaluation of legislative determinations rather than rational basis review.[134]

The Minnesota Supreme Court expanded its independent evaluation of legislative decisions in state equal protection challenges to the criminal context in *State v. Russell*.[135] The court decided *Russell* by using the substantive rational basis approach from *Wegan*.[136] In *Russell*, the government charged five African-American defendants under Minnesota Statutes section 152.023(2)(1)[137] with possession of three or more grams of crack cocaine.[138] The defendants moved to dismiss the charges on the ground that the statute had a discriminatory impact on African-Americans and violated both state and federal equal protection guarantees.[139] At the time of the defendants' arrests, the Minnesota Sentencing Guidelines provided for a maximum sentence of twenty years in prison for possession of three grams of crack cocaine, although possession of the same amount of powder cocaine carried a maximum penalty of only five years.[140] Moreover, the statute required that a person possess ten grams of powder cocaine to be guilty of the same offense level as a person possessing three grams of crack cocaine.[141]

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133. *See* McKnight, *supra* note 25, at 729 (arguing that court in *Nelson* applied standard of review different from traditional rational basis test and stricter than federal standard).

134. Nelson v. Peterson, 313 N.W.2d 580, 583 (Minn. 1981) (Sheran, C.J., dissenting). Chief Justice Sheran, joined by Justice Peterson, dissented on the grounds that the court substituted its evaluation of a legislative decision for the legislature's. *Id.* Sheran asserted that deference to the legislature was particularly appropriate in a case such as *Nelson* in which the law was a product of compromise and agreement in the legislature. *Id.* Sheran also noted that the legislature had proper authority to determine the reasonable qualifications of compensation judges. *Id.* Finally, the Chief Justice concluded that the legislature acted reasonably in seeking to diversify the backgrounds of compensation judges. *Id.* Therefore, Sheran claimed that the court should have deferred to the legislature and not imposed its own evaluation of the classification upon the legislature. *Id.*

135. 477 N.W.2d 886, 889 (Minn. 1991).

136. State v. Russell, 477 N.W.2d 886, 888 (Minn. 1991) (quoting Guilliams v. Commissioner of Revenue, 299 N.W.2d 138, 142 (1980)).

137. MINN. STAT. ANN. § 152.023, subd. 2(1) (West 1989). Subdivision 2(1) provided: "A person is guilty of controlled substance crime in the third degree if [the person] unlawfully possesses one or more mixtures of a total weight of three grams or more containing cocaine base."

138. *Russell*, 477 N.W.2d at 887.

139. *Id.* at 887.

140. MINN. STAT. ANN. § 152.023 subd. 3(a) (West 1989). Subdivision 3(a) provided: "A person convicted under subdivision 1 or 2 [of the statute] may be sentenced to imprisonment for not more than twenty years or to payment of a fine of not more than $250,000, or both." Under the Sentencing Guidelines, the presumptive sentence for possession of three grams of crack was an executed 48 months in prison while the presumptive sentence for an equal amount of powder was a stayed 12 month sentence. *Russell*, 477 N.W.2d at 887.

141. MINN. STAT. ANN. § 152.023 subd. 2(2) (West 1989). Subdivision 2(2) provided that a person was guilty of a controlled substance crime in the third degree if "the person unlawfully

The defendants argued that under the sentencing scheme a far greater percentage of African-Americans received more severe sentences than their Caucasian counterparts.[142] The trial court found that based on arrest records, African-Americans comprised 96.6% of the persons charged with possession of crack cocaine while Caucasians comprised 79.6% of all persons charged with possession of powder cocaine.[143] Based on those records, the trial court determined that the sentencing distinction resulted in a discriminatory impact on African-Americans.[144] The trial court then concluded that no rational basis existed to support the distinction between crack cocaine and powder cocaine for sentencing purposes.[145] The trial court also decided that the statute violated both federal and state equal protection guarantees and therefore granted the defendants' motion to dismiss.[146] The trial court then certified the issue to the Minnesota Court of Appeals.[147] Subsequently, the Minnesota Supreme Court granted a joint petition for accelerated review of the constitutionality of the classification.[148]

The Minnesota Supreme Court began its analysis by declaring that the statute failed to satisfy state equal protection guarantees.[149] However, the court did not address whether the classification would pass muster under the federal Constitution.[150] Although the court acknowledged its past inconsistency in applying the state rational basis standard,[151] it maintained that it had been consistent in its refusal to adopt a "hypothetical" approach to its rational basis test.[152] The court claimed that in state equal protection analysis it had required a reasonable connection between the actual, and not just the theoretical, effects of the classification and the statute's purpose.[153] Based on this analysis, the court invalidated the statute under

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possesses one or more mixtures of a total weight of ten grams or more containing a narcotic drug."

Although subdivision 2(2) did not refer specifically to cocaine powder, the definition of "narcotic drug" included cocaine powder. MINN. STAT. ANN. § 152.01, subd. 10(1) (1989).

142. State v. Russell, 477 N.W.2d 886, 887 (1991). The defendants based their argument on the determination that African-Americans were the predominant users of crack cocaine while Caucasians primarily used powder. *Id.* Therefore, more African-Americans received longer sentences for cocaine possession. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* The Minnesota Supreme Court did not, however, detail the trial court's reasoning in holding that the classification was not rationally related to the statute's purpose. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 888.

150. *Id.*

151. *Id.* at 889.

152. *Id.*

153. *Id.* The *Russell* court's contention that it has been unwilling to hypothesize possible rational bases for classifications applies only since 1979 when the court refused to hypothesize about a possible rational relationship in *Clover Leaf*. *Id.* Prior to 1979, the court had engaged in traditional equal protection analysis. *See supra* note 110 and accompanying text (citing pre-1979 cases following traditional rational basis test).

Minnesota's heightened rational basis standard, although it also asserted that the statistically disparate impact could support an inference of invidious discrimination that would trigger strict scrutiny.[154]

After declaring that no barriers prevented the court from adopting a more stringent rational basis standard[155] than that employed by the federal courts, the court determined that when a classification imposed a substantially disproportionate burden on the class that inspired the principles of equal protection, the court should apply the more stringent rational basis test.[156] The court invalidated the statute under Minnesota's three-part heightened rational basis test.[157] In striking down the statute, the court independently evaluated the legislative testimony that had encouraged the legislature to create the distinction between crack and powder cocaine for sentencing purposes.[158]

The court found that the classification failed the first prong of the Minnesota rational basis standard. The first prong requires that the distinction which separates those within the classification from those outside not be manifestly arbitrary or fanciful, but instead be genuine and substantial and provide a reasonable basis to justify legislation adopted to address peculiar conditions and needs.[159] According to the *Russell* majority, the distinction failed for lack of a genuine and substantial distinction between those within the class and those outside the class.[160]

In deciding *Russell*, the Minnesota Supreme Court declared that the state must provide more than anecdotal support for the distinction in order

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154. State v. Russell, 477 N.W. 2d 886, 888 n.2 (1991). The court stated that it could have inferred purposeful discrimination from the gross disparity thereby triggering strict scrutiny. *Id.* However, the court refused to adopt that approach, but opted instead to apply the rational basis test in which the court substituted its judgment for that of the legislature. *Id.*

155. *See id.* at 889 (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461 n.6 (1980)). In *Clover Leaf*, the United States Supreme Court acknowledged that state courts may apply more stringent equal protection review standards under state equal protection clauses if they wished to do so. *Clover Leaf*, 449 U.S. at 461 n.6; *see also* Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1222-24 (1985) (arguing that state courts should develop equal protection standards under state constitutions independent of federal standards).

156. *Russell*, 477 N.W.2d at 889. The majority was referring to the fact that African-Americans inspired the adoption of the Fourteenth Amendment. *Id.*

157. *Id.*

158. *Id.* at 889-91.

159. *Id.* at 889.

160. *Id.* The court's use of the terms "genuine" and "substantial" are particularly troublesome. Since the court began using the *Guilliams* three-part analysis, the court has never defined what "genuine" or "substantial" mean. *See supra* notes 120-34 and accompanying text (discussing Minnesota Supreme Court's application of the *Guilliams* test). Rather, the court's use of those terms rather than the traditional rational basis terms indicates that the court engages in independent assessments of evidence irrespective of legislative determinations. *Id.*; *see also* Craig v. Boren, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting) (arguing that Supreme Court's use of phrase "substantially related" in intermediate scrutiny is too diaphanous and elastic and will permit judiciary to substitute its judgment for legislature's).

to satisfy the genuine and substantial requirement.[161] The state asserted the classification's purpose was to help facilitate the prosecution of street level drug dealers.[162] According to evidence before the legislature, mere drug users rarely ever possess more than three grams of crack.[163] Therefore, the state argued that the legislature enacted the three grams of crack and ten grams of powder classification to deter street level drug dealing rather than mere possession.[164]

The *Russell* court concluded that the primary evidence before the legislature was purely anecdotal and not substantial and genuine.[165] Mr. James Kamin from the Hennepin County Attorney's Office provided the primary testimony to support the state's claim.[166] The court decided that the testimony of one expert witness was insufficient to support a sentencing distinction that resulted in a statistically disparate racial impact.[167]

The court in *Russell* then rejected the state's second basis for the distinction.[168] The state argued that crack was more addictive and dangerous than powder.[169] The court again independently reviewed the testimony presented to the state legislature and concluded that the evidence supporting crack's greater addictiveness and dangerousness[170] failed to establish a genuine and substantial distinction between those within the class and those outside the class.[171]

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161. State v. Russell, 477 N.W.2d 886, 889 (1991). The court failed to define what would constitute more than "anecdotal" evidence. *Id.* For example, the court rejected the testimony which supported the State's assertion that the statute was designed to curb street level drug dealing because only one expert witness presented the testimony to the legislature. *Id.* at 890. The court did not indicate how many experts or what type of evidence would have sufficed to satisfy the "anecdotal" requirement. *Id.* at 889-90.

162. *Id.* at 889.

163. *Id.* at 899 n.8 (Coyne, J., dissenting). Indeed, the legislative testimony also indicated that street level drug dealers rarely ever carried more than three grams of crack. *Id.* Instead, police usually found amounts exceeding three grams in raids of dealers at crack houses. *Id.*

164. *Id.* at 889.

165. *Id.* at 889-90.

166. *Id.* at 889. The court did not provide Mr. Kamin's qualifications. *Id.*

167. *Id.* According to the court, Mr. Kamin's only support for his assertion that the legislature chose the three gram amount to target street level drug dealers came from his conversations with police officers, informants and persons convicted of drug offenses. *Id.* The court determined that such testimony, unsupported by a study, was insufficient to satisfy the "more than anecdotal" requirement. *Id.* Whether one expert's testimony supported by one study would have satisfied the court is still debatable. Moreover, the court failed to elaborate on whether there were other experts who testified before the legislature. *Id.* at 889-90.

168. *Id.* at 890.

169. *Id.*

170. *Id.* at 897 (Coyne, J., dissenting). Justice Coyne pointed out that the evidence Dawn Speier presented to the legislature indicated that crack delivers a concentrated dose of cocaine to the brain, at least three times that of snorting powder. *Id.* Coyne also pointed to other evidence which similarly indicated that crack is both more addictive and more dangerous than powder. *Id.* at 897 n.4. The point of Coyne's argument was not that the testimony conclusively demonstrated the government's contention, but merely that the evidence provided a rational basis for the legislature's decision, even if the majority thought the legislature misunderstood the weight of the evidence. *Id.* at 902.

171. *Id.* at 890.

On the issue of crack's more addictive and dangerous quality, the court noted that the primary testimony before the legislature was from one police officer.[172] Such evidence did not rise to the level of genuine and substantial. Similarly, the court reviewed the trial court testimony of a chemist, Dawn Speier.[173] Speier testified that the differences in effect resulted from the mode of ingestion. Moreover, Speier testified that cocaine is the mood altering ingredient in both crack and powder.[174] Finally, she testified that powder cocaine can be dissolved in water and taken intravenously resulting in effects similar to smoking crack.[175] Based on that admission, the Minnesota Supreme Court concluded that Speier's testimony was merely anecdotal and did not support the distinction.[176]

The court also rejected the state's contention that more violence is associated with the use of crack cocaine than with the use of powder.[177] According to the court, other factors such as gang warfare could explain the increased violence, rather than the pharmacological effects of crack.[178] The court then admitted that under traditional rational basis review, it could not second-guess the legislature's determinations of fact.[179] Under the

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172. *Id.* The court criticized the police officer's testimony because he did not profess to be a trained scientist. *Id.* Whether the court's evaluation of his testimony would have been different if he had been a scientist, however, is highly unlikely based on the courts rejection of a chemist's similar testimony.

173. *Id.* at 890. After reviewing Speier's scientific testimony, the court acknowledged that "under the more deferential rational basis test we may not second guess the scientific accuracy of legislative determinations of fact absent overwhelming contrary evidence." *Id.* Nevertheless, under the Minnesota test, the court second-guessed the legislature's judgment even though the contrary evidence was not overwhelming. *Id.* The court, however, in a footnote recognized that the legislature had recently decided to reinvestigate the crack-powder distinction. *Id.* at 890 n.6. Rather than await a legislative re-evaluation, the court weighed the evidence itself and reached a decision for the legislature.

174. *Id.* at 890.

175. *Id.* Although the court rejected much of Speier's testimony, the court accepted her testimony that different methods of ingesting powder cocaine can be as dangerous as crack cocaine. *Id.* The court also accepted Speier's assertion that nine grams of 90% pure powder cocaine converts into a little over eight grams of crack. *Id.* at 891 n.7.

176. *Id.* at 890.

177. *Id.*

178. *Id.* The court failed to articulate why the government's explanation for the increased association of violence with crack use was irrelevant to the creation of the crack-powder distinction. *Id.* A logical response to the court's assertion would be that if more violence is associated with crack use, the exact cause of the violence should be unimportant. Instead, the important fact would be that, for whatever reason, crack use is associated with increased violence. Therefore, because crack use is associated with more violence than is the use of powder, the greater association itself would seem to provide a reasonable basis for the distinction and therefore satisfy the first prong of the Minnesota rational basis test. *See "Crack" Cocaine: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Gov't Affairs*, 99th Cong., 2d Sess. 20 (1986) (statement of Sen. Sam Nunn) (arguing that crack cocaine is unprecedented threat to United States); *id.* (statement of Sen. Lawton Chiles) (claiming that crack use leaves more carnage in its wake than use of any other drug).

179. State v. Russell, 477 N.W.2d 886, 890 (Minn. 1991).

Minnesota test, however, the court concluded that the legislative evidence indicating that more violence is associated with crack use was insufficient to establish a genuine and substantial distinction between crack and powder cocaine.[180]

The *Russell* court also concluded that the crack-powder distinction failed the second requirement of the Minnesota test.[181] Under the second prong of the Minnesota rational basis test, the classification must be genuine or relevant to the purpose of the law.[182] In other words, an evident connection between the distinctive needs peculiar to the class and the prescribed remedy must exist.[183] In *Russell*, the court decided that the evidence did not support the classification.[184] The court based its decision primarily on what it considered a dearth of evidence to support the state's claim that street level drug dealing generally took place when an individual possessed ten grams of powder or three grams of crack.[185] Additionally, the court determined that the distinction was arbitrary because one expert witness testified that ten grams of powder could be converted into more than three grams of crack.[186]

Finally, the majority found that the state-employed means were illegitimate and violative of the third prong of the state equal protection test.[187] Under the third prong of the Minnesota test, the purpose of the statute must be one the state legitimately could attempt to achieve.[188] According to the court, the statute created an impermissible presumption of intent to sell once the individual possessed either three grams of crack or ten grams of powder.[189] The sentencing scheme punished an individual for possession with intent to sell without the prosecution's proving that the individual intended to distribute crack or powder.[190] Instead, the prosecution need prove only that the individual possessed the requisite amount of cocaine, thereby creating an irrebuttable presumption of intent to distribute.[191] The

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180. *Id.*

181. *Id.* at 891.

182. *Id.* at 888 (quoting Guilliams v. Commissioner, 299 N.W.2d 138, 142 (Minn. 1980)).

183. *Id.*

184. *Id.* at 891.

185. *Id.*

186. *Id.* Dawn Speier was the expert who claimed that removal of the hydrochloride from nine grams of 90% pure powder cocaine could produce eight grams of crack. *Id.* at 891 n.7.

187. *Id.* at 891.

188. *Id.* at 888.

189. *Id.* at 891.

190. *Id.* According to the State, the statute's purpose was to punish drug dealers more severely than mere possessors. *Id.* at 888. However, intent to distribute was not an element of the offense as defined by the legislature. *See* Philip Leavenworth, Note, *Illegal Drugs, New Laws, and Justice: An Examination of Five Recently Enacted Minnesota Statutes*, 16 WM. MITCHELL L. REV. 499, 521-27 (1990) (describing elements of Minnesota's controlled substance statutory provisions). Therefore, individuals convicted under this provision received sentences designed to deter drug dealing whether or not the individual ever dealt drugs. State v. Russell, 477 N.W.2d 886, 891 (Minn. 1991).

191. MINN. STAT. ANN. § 152.023 (West 1989). The statute defined penalties according to amount of the substance possessed.

Minnesota Supreme Court previously had declared that statutes which create irrebuttable presumptions violated due process and were unconstitutional.[192] The sentencing scheme was, therefore, unconstitutional under the due process guarantees.[193]

Justice Yetka's concurrence adopted a slightly different approach.[194] Justice Yetka would have adopted an implied inference standard rather than the majority's substantive equal protection approach.[195] According to Justice Yetka, because all the parties agreed that African-Americans constituted the largest percentage of crack users, there should exist a presumption that the legislature was aware of the disparate racial impact of the sentencing scheme.[196] Despite the possible presumption of discriminatory purpose, Justice Yetka agreed with the majority's application of the stricter rational basis standard.[197]

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192. *See* State v. Kelly, 15 N.W.2d 554, 557 (Minn. 1944) (invalidating state statute that created irrebuttable presumption that possession of alcohol discovered by means of search warrant was prima facie evidence of intent to sell). In *Kelly*, the court maintained that conclusive presumptions were almost always unconstitutional. *Id.*; *see also* Leavenworth, *supra* note 190, at 527 n.104 (examining Minnesota cases in which Minnesota Supreme Court invalidated irrebuttable presumptions).

193. *Russell*, 477 N.W.2d at 891. The court could have based its decision to invalidate the statute solely on the ground that the enactment created an unconstitutional conclusive presumption. *See* Leavenworth, *supra* note 190, at 527-28 (noting disfavored status of irrebuttable presumptions). Following *Russell*, however, the Minnesota Supreme Court in State v. Clausen, 493 N.W.2d 112, 117 (Minn. 1992), decided that Minnesota Statute 152.023 subd. 2(2) (West 1990) did not contain an unconstitutional irrebuttable presumption. *Clausen*, 493 N.W.2d at 118. Rather, the court concluded that statements in *Russell* which implied that the statute employed an illegitimate means that violated due process were merely dicta. *Id.* Moreover, the court determined that the legislature reasonably defined the statute as a possession crime, and therefore the statute was constitutional. *Id.*

194. *Russell*, 477 N.W.2d at 891-92. Justice Yetka argued that the mode of ingestion for the mood altering ingredient, cocaine, was irrelevant when considering appropriate penalties. *Id.* at 892. According to Yetka, the intoxication was the harm, not how the means of achieving the intoxication or even the level of intoxication. *Id.* To bolster his argument, Yetka compared cocaine to alcohol. *Id.* Although admitting the comparison with alcohol was not completely accurate, Yetka maintained that illegal use of alcohol, such as driving while intoxicated, did not depend on the level or means of intoxication. *Id.* In other words, driving while intoxicated after ingesting wine was just as illegal as driving while intoxicated after consuming beer or hard liquor. *Id.*

The logical response to Yetka's analogy is, however, that if the mind altering substance is irrelevant, then any sentencing scheme which sets different penalties based on the type of substance used would be invalid. *See infra* notes 303-04 and accompanying text (discussing Federal Sentencing Guidelines distinction based on harmful effects of drugs). For example, any distinction between speed and cocaine would be invalid because both drugs are stimulants which have similar effects on the body. *See infra* notes 305-07 (discussing possible invalidation of PCP-LSD distinction and crack-ice distinction under *Russell* analysis).

195. State v. Russell, 477 N.W.2d 886, 892 (Minn. 1991).

196. *Id.*

197. *Id.*

Justice Simonett also concurred with the majority decision in *Russell*,[198] but sought to clarify the majority's reasoning.[199] Justice Simonett feared that the court's opinion could open the door to increased use of substantive due process analysis.[200] To quell that possibility, Justice Simonett proposed that the court limit its use of the three-prong analysis to facially neutral criminal statutes that result in discriminatory racial impact, even when the legislature did not intend the impact.[201] Justice Simonett further proposed that when a facially neutral law produces an inadvertent discriminatory impact based on race, the court should apply the rational basis test with less deference than it generally affords legislative enactments.[202] In *Russell* Justice Simonett concluded that the less deferential standard of review was appropriate and that under that standard, the statute failed to satisfy equal protection guarantees.[203]

Only Justice Coyne dissented in *Russell*.[204] Justice Coyne emphasized that the Minnesota court, in the past, had limited its role in legislative determinations of criminal punishments.[205] The dissent then advocated the use of the more deferential federal rational basis test.[206] Justice Coyne contended that the court should not invoke heightened scrutiny in criminal punishment contexts absent discriminatory intent or purpose.[207] Justice Coyne recounted the evidence underlying the adoption of the federal Anti-Drug Abuse Act of 1986,[208] that preceded the enactment of the Minnesota sentencing scheme.[209] According to Coyne, the evidence presented to Congress resulting in the 100 grams of powder to one gram of crack distinction in the federal sentencing scheme satisfied the federal rational basis test.[210] Therefore, the Minnesota sentencing scheme should pass muster under any rational basis test because the legislature acted rationally.[211]

Justice Coyne's main disagreement with the majority's decision centered on the majority's independent evaluation of the testimony presented to the

198. *Id.* at 893.

199. *Id.* at 894. Justice Simonett was concerned that unless the court established a principled approach, then the court could just substitute its own appraisal of what is rational legislation and disregard legislative decisions. *Id.* Although Justice Simonett did not acknowledge that was what the court in *Russell* actually did, his apprehension indicates he too sensed the court was engaged in substantive equal protection review. *See id.* at 893-95 (Simonett, J., concurring) (expressing reservations about far-reaching implications of majority's ruling).

200. *Id.* at 894.

201. *Id.*

202. *Id.*

203. *Id.* at 895.

204. *Id.*

205. *Id.*; *see also* State v. Osterloh, 275 N.W.2d 578, 580 (Minn. 1978) (holding that where legislature has power to define crimes, legislature has power to define punishments for those crimes).

206. State v. Russell, 477 N.W.2d 886, 902 (Minn. 1991).

207. *Id.* at 896.

208. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570 § 1002, 100 Stat. 3207-12 (1986).

209. *Russell*, 477 N.W.2d at 897 (Coyne, J., dissenting).

210. *Id.*

211. *Id.* at 898.

legislature.[212] Justice Coyne compared the majority's approach with the type of substantive review the United States Supreme Court applied in the long since discredited 1905 *Lochner v. New York* decision.[213] In *Lochner*, the United States Supreme Court invalidated a New York law that limited the number of hours bakery workers could work by independently evaluating the state's proffered justifications for the law.[214] In short, the *Lochner* Court substituted its judgment regarding the wisdom of the law for that of the legislature.[215] In 1937, however, the Supreme Court rejected the *Lochner* substantive due process analysis in *West Coast Hotel v. Parrish*.[216] Since 1937, the Supreme Court has repeatedly rejected *Lochner* analysis and has followed the *Parrish* decision.[217]

Despite the disfavored status of *Lochner* analysis, according to Coyne, the *Russell* majority's approach paralleled *Lochner* analysis.[218] Coyne argued that the majority merely substituted its judgment of the wisdom of the crack-powder distinction for that of the legislature under the auspices of rational basis review.[219] Coyne demonstrated how the majority substituted its assessment of the evidence presented to the legislature by recounting testimony supporting the legislature's decision that the majority simply disregarded without any mention.[220] Coyne ultimately concluded that the

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212. *Id.* at 902.

213. *See* Lochner v. New York, 198 U.S. 45, 64-65 (1905) (invalidating New York law which limited hours bakery workers could work to 60 hours per week as having no rational relation to employee health). In *Lochner*, the Court considered whether a New York law limiting the number of hours bakery workers could work to 60 hours a week was rationally related to the state's purpose of promoting employee health. *Id.* at 52. The petitioner in *Lochner* appealed his conviction for wrongfully permitting an employee to work more than 60 hours a week in his bakery and argued that the statute violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 46, 52-53. The Court began its analysis by acknowledging that the state, in the exercise of its police powers, may adopt measures to protect the health and safety of the public. *Id.* at 53. The Court noted, however, that the Fourteenth Amendment placed a limit on the valid exercise of state police powers. *Id.* According to the majority, the Fourteenth Amendment required that when the state placed affirmative limits on an individual's personal liberty to enter into employment contracts, the limits must be reasonably related to a legitimate state interest. *Id.* at 54. The Court then evaluated the state's proffered justification of the limitation and determined that there was no reasonable ground for the legislation. *Id.* at 57. Although the Court independently reviewed the state's justification for the legislation, the majority denied that it was simply substituting its judgment for that of the legislature. *Id.* at 56-57. Nevertheless, Justice Holmes in dissent argued that the majority was merely imposing its own *laissez faire* economic theory for the regulatory economic judgment of the state legislature. *Id.* at 75. According to Holmes, such a substitution of economic theories by the judiciary was an invalid exercise of judicial review. *Id.* at 76.

214. *Id.* at 64-65.

215. *Id.* at 75 (Holmes, J., dissenting).

216. 300 U.S. 379 (1937).

217. *See* Williamson v. Lee Optical, 348 U.S. 483, 488 (1955) (rejecting *Lochner* substantive review analysis); McKnight, *supra* note 25, at 733 (noting that since 1937 Supreme Court has discredited *Lochner*).

218. State v. Russell, 477 N.W.2d 886, 902 (Minn. 1991) (Coyne, J., dissenting).

219. *Id.* at 902. Justice Coyne commented that "[t]he majority's denigration of the testimony differs little . . . from a reviewing court's setting aside a jury's determination of credibility." *Id.*

220. *Id.* at 897-902.

majority replaced the appropriate rational basis standard of review with no standard whatsoever.[221]

In rejecting the federal rule of requiring proof of discriminatory intent before invoking heightened scrutiny,[222] the majority did not provide any guidance as to the circumstances in which the court would invoke this heightened scrutiny in the future.[223] The court seemed to limit application of its analysis to situations in which the challenged classification imposes a substantially disproportionate impact, but the court failed to clarify what would constitute substantial.[224] Moreover, the court did not limit its potential for review of testimony presented to the legislature and did not explain what evidence might satisfy the more-than-anecdotal hurdle.[225]

Because the court did not provide significant limitations to its equal protection approach, the possibility remains that the court might apply its heightened rational basis scrutiny analysis to other aspects of the criminal justice system.[226] Since *Russell*, the Minnesota Court of Appeals in *Mitchell v. Steffen*[227] has determined that the *Russell* court's stricter standard of rational basis review applies to any case arising under the Equal Protection Clause of the Minnesota Constitution.[228] Similarly, other courts may find the Minnesota Supreme Court's reasoning persuasive and apply the *Russell* analysis to facially neutral policies that result in disproportionate impacts on minorities.[229] For instance, some judges in the Eighth Circuit have indicated a strong desire to adopt the *Russell* approach at least in cases involving the crack-powder distinction in the Federal Sentencing Guidelines.[230] The *Russell* court's approach could, therefore, raise serious questions

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221. *Id.* at 902.

222. *See supra* notes 56-59 and accompanying text (discussing requirements for strict scrutiny review under federal equal protection analysis).

223. *Russell*, 477 N.W.2d at 888-89. The majority merely stated that in *Russell* every reason existed to apply an independent state equal protection standard and that the Minnesota test differed from the federal test. *Id.*

224. *Id.* at 889. The court simply stated that invocation of the state standard was particularly appropriate under these circumstances. *Id.* The court did not indicate whether that statement should be seen as a limitation on the use of substantive review. *Id.*

225. *See supra* notes 163-80 and accompanying text (reviewing court's evaluation of legislative testimony and criticizing court for not sufficiently revealing its analysis or requirements).

226. *See* State v. Russell, 477 N.W.2d 886, 888 (Minn. 1991) (stating that Minnesota's equal protection rational basis test is different from federal rational basis test, thereby implying that application of Minnesota test is appropriate in all equal protection challenges that require invocation of rational basis test).

227. 487 N.W.2d 896 (Minn. Ct. App. 1992).

228. Mitchell v. Steffen, 487 N.W.2d 896, 904 n.2 (Minn. Ct. App. 1992).

229. *See State Rights*, *supra* note 125, at 1328-29 (noting increased reliance on state constitutions rather than federal doctrines to invalidate classifications); Williams, *supra* note 154, at 1216 (noting that since 1970 many state courts have been willing to interpret state constitutions to invalidate classifications that would be valid under federal equal protection).

230. *See* United States v. Willis, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J. & Lay, J., concurring) (stating that if they were not bound by federal precedents they would be willing to invalidate crack-powder distinction by closely examining evidence on which Congress based

about other aspects of the criminal justice system in which statistically disparate impacts exist but evidence of discriminatory purpose is wanting.[231]

The discriminatory impact problem is a problem. However, the discriminatory impact problem is a dilemma the legislature, not the judiciary, should address.[232] An examination of the possible implications of the *Russell* substantive equal protection review analysis will illustrate that the approach is an inappropriate exercise of judicial review and will demonstrate that the legislature is best suited to eliminate any policies that are discriminatory.

III. MINNESOTA EQUAL PROTECTION ANALYSIS APPLIED

Because statistics tend to indicate racially disparate impacts exist in almost every aspect of the criminal justice system from arrest through sentencing, those procedures could be subject to the Minnesota court's analysis.[233] In *Russell*, the threshold factor in finding that the crack-powder distinction violates equal protection guarantees was that the distinction imposed a substantially disproportionate impact on African-Americans.[234] Therefore, under the *Russell* rationale, a court could invalidate almost any criminal procedure that results in a similar impact on a racial minority.[235]

A. Arrest Procedures

Arrest procedures and policies are aspects of the criminal justice system that a court could invalidate under *Russell* analysis. In many respects, common arrest procedures that are not discriminatory in design nevertheless disparately

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its decision); United States v. Simmons, 964 F.2d 763, 767 (8th Cir. 1992) (stating willingness to follow *State v. Russell*). The willingness of federal judges to follow *Russell* tends to indicate the potential persuasiveness of the *Russell* decision.

231. *See infra* notes 236-317 and accompanying text (examining possible implications of substantive equal protection approach on other aspects of criminal justice system).

232. *See infra* notes 327-33 and accompanying text (arguing that legislature, not judiciary, should act to eradicate disparate impact problems).

233. *See* Morris, *supra* note 13, at 112 (arguing that measurable skewing against minorities exists throughout criminal justice system); Curriden, *supra* note 15, at D1 (citing National Commission on Crime and Justice report that indicates that persons of color receive disparate and disadvantageous treatment at every stage of criminal process); Laurie Goodstein, *Panel's Report on Racism in N.Y. Courts Draws Praise; Other States, D.C. Investigating Judicial Systems for Signs of Discrimination Inequity*, WASH. POST, June 8, 1991, at A7 (citing New York commission's study that found two-tier system of justice that discriminates against minorities).

234. State v. Russell, 477 N.W.2d 886, 889 (Minn. 1991).

235. *Id.* The *Russell* court stated the application of the Minnesota rational basis test was appropriate in *Russell* because of the significance of the disparate burden on African-Americans. *Id.* A logical inference to make from that statement is that any time a policy results in a substantial burden, then substantive equal protection review should be applicable. Thus, once the threshold requirement is satisfied, the court could engage in the substantive evaluation of the evidence supporting the classifications. *See supra* notes 223-31 (discussing possible application of Minnesota three-prong analysis following finding of substantial burden).

impact racial minorities.[236] For example, police policies designed to implement the war on drugs have a more significant impact on minority neighborhoods than on Caucasian neighborhoods.[237] Although studies indicate that Caucasians are the overwhelming majority of the drug consumers and dealers in this country, minorities occupy the majority of the entries on police arrest blotters for drug offenses.[238] Part of the reason for the disproportionate number of minority arrests is that the police target minority neighborhoods[239] and use drug courier profiles,[240] which mainly consist of minority attributes, when making drug arrests. Indeed, police departments across the country frequently use street-sweeping operations that focus on minority neighbor-

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236. *See* United States v. Willis, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., dissenting) (noting that crack raids target African-American homes and not suburban Caucasian neighborhoods); *see also* Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2320 (1992) (citing studies that indicate African-Americans comprise 90% of drug arrestees but only 12% of country's drug users); Tracey L. McCain, *The Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System*, 25 COLUM. J.L. & SOC. PROBS. 601, 602 n.5 (1992) (citing evidence that indicates that police subject minorities to greater scrutiny which contributes to higher arrest rates); Morris, *supra* note 13, at 112 (stating that African-Americans arrest rate is at least twice as great as Caucasian arrest rate); Powell & Hershenov, *supra* note 13, at 561-62 (arguing that drug war has essentially made minority communities militarized zones).

237. *See* Baum, *supra* note 13, at 886 (claiming that war on drugs is designed to harass minorities); Boldt, *supra* note 236, at 2319 (arguing that war on drugs has become war on minorities because people of color are targets of that war); *Developments*, *supra* note 13, at 1496 (maintaining that police use race as significant factor in determining whom to arrest); Powell & Hershenov, *supra* note 13, at 559 (calling war on drugs a war on minorities); Ronald J. Ostrow, *U.S. Imprisons Black Men at 4 Times S. Africa's Rate; Crime: Overall American Incarceration Leads the World. In the Past Decade it Overtook the Soviet Union*, L.A. TIMES, Jan. 5, 1991, at A1 (indicating statistics which demonstrate that war on drugs has affected minorities more than Caucasians).

238. *See* Boldt, *supra* note 236, at 2320 (citing National Institute on Drug Abuse statistics which indicate that African-Americans comprise only 12% of this country's drug users); Philip M. Gleason et al., *Drug and Alcohol Use at Work: A Survey of Young Workers; National Longitudinal Survey of Youth*, 114 MONTHLY LAB. REV. 3 (1991) (citing study that indicated that Caucasians used drugs in workplace at rate 50% greater than minority drug use rates); Powell & Hershenov, *supra* note 13, at 568 (stating that African-Americans comprise 80% to 90% of drug related prosecutions); Allan Ellis, *Of Race and Incarceration*, THE RECORDER, Dec. 5, 1991, at 6 (citing statistics which demonstrate that although African-Americans make up only 12% of all drug users, they account for 44% of all drug possession arrests); Ron Harris, *Blacks Feel Brunt of Drug War*, L.A. TIMES, Apr. 22, 1990, at A1 (citing FBI and National Institute for Drug Abuse studies showing African-Americans comprise only 12% of drug users).

239. *See* Boldt, *supra* note 236, at 2321-22 n.302 (arguing that war on cocaine did not become popular until crack cocaine became available to inner city African-Americans); Joseph L. Galloway et al., *A Bleak Indictment of the Inner City*, U.S. NEWS & WORLD REP., Mar. 12, 1990, at 14 (noting that war on drugs focuses mainly on inner cities which are populated primarily by minorities); Harris, *supra* note 238, at A1 (citing police efforts to enforce drug laws by targeting minority neighborhoods and not Caucasian neighborhoods).

240. *See Developments*, *supra* note 13, at 1503 (discussing police use of race as factor in probable cause determination and as exclusive basis for surveillance); Powell & Hershenov, *supra* note 13, at 583-84, 613 (discussing police use of race in drug courier profile determinations).

hoods to arrest drug dealers.[241] The primary reason police target minority drug dealing is that minorities are easier to arrest because they deal drugs in the open whereas most Caucasian drug deals occur behind closed doors in homes or offices.[242] Moreover, police also target minority drug dealers because more violence is associated with minority drug dealing than with Caucasian drug dealing.[243]

Russell analysis could invalidate these policies as violative of the arrestees' equal protection rights.[244] Because statistics demonstrate that African-Americans and other minorities are not the primary drug users or dealers but do comprise the overwhelming number of drug arrestees,[245] one could argue that arrest policies disparately burden minorities.[246] Consequently, the statistics could suffice to satisfy the threshold requirement of the *Russell* test.[247]

After determining that a substantial disparate impact exists, the court would subject the arrest policies to the three-part *Russell* test.[248] Just as in *Russell*, a primary objective of the police procedures that target minority neighborhoods is to facilitate the prosecution of drug dealers.[249] The court in *Russell* concluded the evidence presented to the legislature did not support sufficiently the claim that the classifications would further facilitate drug dealer prosecutions.[250] Similarly, a court using the *Russell* analysis could conclude that current police policies do not satisfactorily result in the prose-

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241. *See* Powell & Hershenov, *supra* note 13, at 613-14 (citing examples of how police use of street sweep operations focus primarily on arresting minorities); Harris, *supra* note 238, at A1 (citing examples of street sweeping operations in Memphis, Los Angeles, Atlanta, New York and Chicago, all which focused on poor African-American neighborhoods).

242. *See* Ellis, *supra* note 238, at 6 (arguing that police target minorities because they are the easiest to arrest); Harris, *supra* note 238, at A1 (noting that minorities are more "arrestable" because they deal drugs on street corners).

243. *See* Harris, *supra* note 238, at A1 (acknowledging that one reason for targeting minority drug dealing is that more violence is associated with minority drug dealing).

244. *See supra* notes 212-21 and accompanying text (discussing Minnesota court's substantive review analysis).

245. *See supra* note 238 (citing statistics indicating Caucasians are primary drug users but minorities are majority of arrestees).

246. *See* Boldt, *supra* note 236, at 2321-22 (claiming racial basis underlies drug war); Powell & Hershenov, *supra* note 13, at 559 (stating that minorities are real victims of war on drugs); Ostrow *supra* note 237, at A1 (asserting that drug war is single largest contributing factor to increased percentage of arrested and incarcerated African-American males); *Young Black Men*, N.Y. TIMES, May 7, 1992, at A26 (indicating that although African-American males constitute only 6% of United States population, they account for majority of arrestees and 47% of prison population).

247. *See supra* note 156 and accompanying text (noting that Minnesota court's decision to apply substantive review was based on substantiality of burden crack-powder distinction imposed on African-Americans).

248. *See* State v. Russell, 477 N.W.2d 886, 888-89 (Minn. 1991) (describing elements of Minnesota three-prong test).

249. Powell & Hershenov, *supra* note 13, at 557-58 (citing studies indicating that although drug war targets drug dealers it has not extinguished drug trade).

250. *Russell*, 477 N.W.2d at 889-90.

cution of drug dealers because most dealers are Caucasian.[251] Therefore, a court could view the minority targeting policies as manifestly arbitrary by independently weighing existing statistical evidence of arrests and drug use.[252] Additionally, a court could conclude that the minority targeting policies do not achieve the purpose of prosecuting drug dealers and therefore the policies fail to satisfy the second prong of the *Russell* test.[253]

Finally, a court might determine that the arrest policies fail to meet the third requirement of the *Russell* test.[254] Although the eradication and prosecution of drug dealers might be a legitimate government purpose, in *Russell*, the court concluded that the statute employed an illegitimate means to achieve that purpose.[255] Because the statute employed an illegitimate means to achieve a legitimate end, the statute violated the third prong of the test.[256]

In the case of arrest procedures, a court could conclude that the street sweeps and minority targeting policies are illegitimate means to a legitimate end.[257] For example, a court could decide that the warrantless searches, which often coincide with these targeting procedures, violate the arrestees' Fourth Amendment rights.[258] Likewise, a court could determine that these policies violate due process rights and therefore are illegitimate.[259] As in *Russell*, a court could use the violation of the third prong as dictum merely to support its invalidation of the arrest policies.[260] A court could, independent of executive

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251. *See supra* note 238 (presenting statistics which indicate that Caucasians are primary drug users and dealers). A court could reach the conclusion that arrest policies fail to eradicate drug dealing because some statistics indicate drug dealing has not decreased since the inception of the drug war. *See* Powell & Hershenov, *supra* note 13, at 558 n.3 (noting statistics which indicate drug usage not in decline).

252. *Russell*, 477 N.W.2d at 902 (Coyne, J., dissenting). Since *Russell* analysis chiefly involves the court acting as a super-legislature, the court could agree that the classification is genuine and substantial based on its own independent evaluation of the evidence. *Id.* Alternatively, the court could independently weigh the evidence and reach the opposite conclusion. *Id.*

253. *See id.* at 888 (stating that second element of test requires that classification be relevant to purpose of challenged government action). There would be no guarantee that the court would conclude that because the policies have not eradicated the drug problems, the classification was not relevant to the policies' purpose.

254. *See* State v. Russell, 477 N.W.2d 886, 888 (Minn. 1991) (laying out third requirement of three-part test).

255. *But see* State v. Clausen, 493 N.W.2d 113, 118 (Minn. 1992) (holding that state drug possession law did not create impermissible conclusive presumption of intent to distribute).

256. *Russell*, 477 N.W.2d at 891.

257. *See* Powell & Hershenov, *supra* note 13, at 1515 (arguing that police procedures which target minority neighborhoods impermissibly use race as motivating criterion in those policies). The goal of the street sweeping policies is to eradicate the drug problem and the violence that is associated with drug dealing. *Id.*

258. *See* Powell & Hershenov, *supra* note 12, at 579-82 (noting that some courts have upheld warrantless searches under drug exception to Fourth Amendment but arguing that courts should invalidate searches made without warrants).

259. *See id.* at 582 (arguing that war on drugs threatens constitutional due process protections).

260. State v. Russell, 477 N.W.2d 886, 891 (Minn. 1991).

or legislative decisions, substitute its own judgment for that of the other branches regarding the wisdom of these policies.[261]

B. Prosecutorial Discretion

Similarly, courts could use *Russell* analysis to overturn convictions based on prosecutorial discretion that results in disparate racial impact. Studies indicate that prosecutors often exercise discretion in a manner that results in disproportionate racial impact.[262] For instance, prosecutors may charge minority defendants with offenses punishable by mandatory penalties more than they charge Caucasians with offenses punishable under mandatory sentencing provisions.[263] Prosecutors may seek full prosecution more often when the crime involves a Caucasian victim and a minority defendant than when the crime involves a minority victim.[264] Additionally, prosecutors may be more willing to reach plea agreements with Caucasian defendants than with minority defendants.[265] Each of these instances of discretion may disparately affect racial minorities.

If a court concludes that the impact substantially burdens a racial minority, then the court could subject the challenged government actions to

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261. *See* McKnight, *supra* note 25, at 735 (noting that Minnesota substantive review permits court to substitute its judgment for legislature's on issues that involve competing public policies). McKnight, in her article, before *Russell*, argued that the Minnesota Supreme Court impermissibly intruded on the powers of the legislature. *Id. See also infra* notes 327-33 (arguing that legislature not judiciary is best suited to re-evaluate these criminal procedure policies).

262. *See Developments*, *supra* note 13, at 1525-29 (tracing findings of studies indicating disparate treatment of minorities at initial stages of prosecution); McCain, *supra* note 236, at 638 (arguing that broad authority permits prosecutors to exercise discretion in manner which disparately impacts African-Americans).

263. *See* Forer, *supra* note 14, at 12 (stating that prosecutors charge African-Americans under mandatory sentencing laws more often than they do Caucasians).

264. *See Developments*, *supra* note 13, at 1525 (citing study showing prosecutors seek full prosecution more often when victim is Caucasian); Kennedy, *supra* note 60, at 1396-98 (citing Baldus study demonstrating racial bias in capital punishment); Morris, *supra* note 13, at 112 (citing study indicating prosecutors sought death penalty more frequently when victim was Caucasian); Martin Dyckman, *Justice Still Isn't Color-Blind*, ST. PETERSBURG TIMES, Nov. 10, 1992, at 13A (citing Florida statistics indicating that killers of white victims are four times more likely to receive death sentence than killers of minority victims); Ruth Marcus, *Racial Bias Widely Seen in Criminal Justice System; Research Often Supports Black Perceptions*, WASH. POST, May 12, 1992, at A4 (maintaining that race of victim is important element in determining length of defendant's sentence); Tracy Thompson, *Studies Find Criminals Getting Longer Sentences; Race Disparities Remain*, WASH. POST, Aug. 23, 1991, at A6 (citing United States Sentencing Commission study finding that minorities are less likely to plea bargain out of mandatory prison sentences for drug crimes).

265. *Developments*, *supra* note 13, at 1631 n.41 (citing study demonstrating that Caucasians are more likely to plea bargain than minorities); McCain, *supra* note 236, at 602 n.5 (quoting research showing that African-Americans have fewer opportunities to plea bargain than Caucasians); Blake Nelson, *The Minnesota Sentencing Guidelines: The Effects of Determinate Sentencing on Disparities in Sentencing Decisions*, 10 LAW & INEQUALITY J. 217, 223-24 n.28 (1992) (citing studies indicating discrimination has shifted from sentencing to plea bargaining phase); Thompson, *supra* note 264, at A6 (citing study indicating that Caucasians are more likely to reach plea bargains than African-Americans).

the three-part substantive equal protection analysis.[266] For example, the court could compare prosecutors' decisions to charge minority defendants with offenses subject to mandatory minimum penalties with the decisions not to charge Caucasians with those offenses.[267] The court then independently could weigh the justifications supporting the prosecutorial decisions.[268] Because the *Russell* standard is not deferential to legislative or executive decisions, the court easily could determine that the classification of those charged with mandatory sentence crimes was arbitrary.[269]

A court also might invalidate plea agreement policies if they created a substantially disparate impact.[270] A court might decide that prosecutorial discretion regarding plea bargaining violates equal protection guarantees.[271] Again, the court would independently evaluate existing evidence to determine whether the classifications of those who reach plea bargains and those who do not are arbitrary. The court also would evaluate whether the classifications fulfill the underlying purposes of the plea bargaining process.[272] Because a court under the *Russell* approach would weigh the justifications for the classifications independently, a court might, but would not necessarily, conclude that they were arbitrary or illegitimate.[273]

C. *Bail and Pretrial Detention*

Evidence also indicates that more minority defendants than Caucasians are unable to make bail and therefore remain in jail prior to their trials.[274]

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266. *See* State v. Russell, 477 N.W.2d 886, 887, 889 (Minn. 1991) (citing trial court's finding of disparate impact and concluding that three-part test was applicable).

267. *See id.* at 887 (determining that statutory distinction is between individuals convicted of crack possession and individuals convicted of powder possession).

268. *See* McKnight, *supra* note 25, at 733 (describing process of substantive review as evaluation unaided by substantive values).

269. *Russell*, 477 N.W.2d at 902 (Coyne, J. dissenting). The problem with permitting the judiciary to invalidate mandatory sentencing laws is that the courts would then be intruding upon legislative and executive decisionmaking processes and disregarding the discretion those branches need to operate the criminal justice system. *Id.*

270. *See supra* note 265 (citing evidence showing prosecutors are more likely to reach plea agreements with Caucasians than with minorities).

271. State v. Russell, 477 N.W.2d 886, 887, 889 (Minn. 1991). The threshold issue is whether the disparate impact is substantial. *Id.* at 889. If so, then under *Russell*, the policy is probably a violation of equal protection. *Id.*

272. *Id.* at 902 (Coyne, J., dissenting).

273. McKnight, *supra* note 25, at 735. One of the biggest failings of substantive review is that the courts base their decisions on undefined principles of fairness, not on any specific constitutional or statutory provisions. *Id.* Therefore, predicting exactly what interests the court will value more highly than others is nearly impossible. *Id.*

274. McCain, *supra* note 236, at 602 n.5 (citing research which concluded that African-Americans have fewer opportunities to post bail); Ellis, *supra* note 238, at 7 (citing Florida statistics indicating discrimination in pretrial detention); Brant Houston & Jack Ewing, *Blacks and Hispanics Must Pay More to Get Out of Jail; Inequalities Are the Rule in the Bail System*, HARTFORD COURANT, June 16, 1991, at A1 (revealing findings of Connecticut study of bail process). Houston and Ewing cite a study of Connecticut felony cases which concluded that on average judges set bonds 84% higher for African-American men and 69% higher for Hispanic men than for Causcasian men. *Id.* The study also found that judges set bonds 197 times higher for Hispanic women than Caucasian women. *Id.*

Generally, bail is regarded as a means of guaranteeing attendance at trial.[275] Pretrial release is also important in facilitating the best possible defense for the defendant.[276] Statistics indicate that probability of conviction increases tremendously when a person remains in detention prior to trial.[277] Therefore, bail-setting policies that result in the detention of more minorities will often also result in the conviction of proportionately more minorities.[278]

A court could subject bail-setting policies that take into account factors that lead to substantially more minorities remaining detained pretrial to the *Russell* three-part analysis.[279] Most likely, the purposes of bail procedures are objectives the state legitimately can hope to achieve. Therefore, the purposes underlying bail procedures most likely satisfy the third prong of the Minnesota test.[280] Whether the factors that determine bail amount and eligibility satisfy the other two *Russell* factors is more questionable.[281] For example, the extent and nature of the charged offense are often two key factors in bail determinations.[282] Both of those factors are most likely genuine and substantial.[283]

However, courts also use employment, family ties, and connections to the community as determinative factors.[284] Because a disproportionate number of minority defendants are often unemployed and unmarried, those factors will weigh against minority defendants.[285] The result could be that because of

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275. *See* Houston & Ewing, *supra* note 274, at A1 (stating that purpose of bail is to assure defendant's attendance at trial).

276. *See* Ellis, *supra* note 238, at 7 (acknowledging that defendants incarcerated pretrial are more likely to be convicted and subsequently sentenced to imprisonment).

277. *See* Houston & Ewing, *supra* note 274, at A1 (citing study showing that pretrial incarceration correlates with higher conviction rates and longer sentences).

278. Ellis, *supra* note 238, at 7; Houston & Ewing, *supra* note 274, at A1. The conclusion that more minority convictions result is only logical following the evidence that pretrial detention enhances probability of conviction. *Id.*

279. *See* State v. Russell, 477 N.W.2d 886, 887, 889 (Minn. 1991) (indicating that substantiality of burden was threshold question).

280. *Id.* at 888. The only challenges to whether the bail setting policies' purposes were legitimate probably would be due process or Eighth Amendment excessive bail challenges. Those challenges presumably would be grounded on individual cases and not systemic failures. The equal protection challenge, however, would be a challenge to the system, not just its individual application. *Id.*

281. *See id.* (detailing requirements to satisfy Minnesota rational basis test).

282. Houston & Ewing, *supra* note 274, at A1 (describing bail determination factors).

283. *Russell*, 477 N.W.2d at 889. Although the court did not clearly delineate the outer boundaries of what constitutes "genuine," arguing that the nature of the crime is not genuine would be very specious. *Id.*

284. *See* Boldt, *supra* note 236, at 2318 (listing family stability as one factor in bail determination decision); Galloway, *supra* note 239, at 14 (citing Rand Corporation expert's conclusion that one reason for increased incarceration of African-Americans is reliance on employment in determination formulas); Houston & Ewing, *supra* note 274, at A1 (listing bail determination factors).

285. *See* Powell & Hershenov, *supra* note 13, at 559 n.5 (citing studies that indicate poverty and unemployment often coincide with minority status); Galloway, *supra* note 239, at 14 (noting that Rand Corporation studies show that African-Americans score worse when judges consider unemployment as factor in decisionmaking process); Houston & Ewing, *supra* note 274, at A1 (arguing that African-American incomes are on average only 60% to 65% of Caucasian incomes).

those factors, courts would eventually deny bail to those defendants, a decision leading to pretrial detention.[286] Moreover, even if bail is set at a relatively low amount, because statistically more minority defendants belong to lower socio-economic classes, those defendants are incapable of raising even the meager amount necessary to post bail.[287] All of these factors contribute to the pretrial incarceration of more minorities than Caucasians.[288]

If the purpose of bail is to assure attendance at trial, a court could determine that employment status and family and community ties are not relevant to the inquiry and serve as arbitrary criteria for the bail determination.[289] The court would, of course, be providing its own judgment on the validity of relevant bail-determining factors.[290] Because no other constitutional provisions would guide the court, the court would be free to reach whatever conclusion it desired.[291] Additionally, if the purpose of bail is to permit the defendant to build the best defense possible, then a court might conclude that the factors that disparately impact minorities are not relevant to that goal either.[292]

D. Sentencing

Several aspects of state sentencing policies and procedures also might be invalid under the *Russell* analysis.[293] Whether the jurisdiction uses a determinate sentencing scheme, such as prescriptive sentencing guidelines,[294] or an

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286. *See* Houston & Ewing, *supra* note 274, at A1 (indicating higher pretrial detention rates for minorities and examining bail determination factors).

287. *See id.* (arguing that because African-American incomes are on average lower than Caucasian incomes, even if judges set bonds at equal levels for African-Americans and Caucasians, disparately more African-Americans would be unable to obtain the necessary resources).

288. *See supra* note 274 and accompanying text (discussing disproportionately large percentage of minorities incarcerated pretrial).

289. *See* McKnight, *supra* note 25, at 733-35 (criticizing Minnesota court's substantive review standard).

290. State v. Russell, 477 N.W.2d 886, 902 (Minn. 1991) (Coyne, J., dissenting).

291. *Id.*; *see* McKnight, *supra* note 25, at 738 (arguing that problem with substantive review is that courts can invoke it at any time under Minnesota Supreme Court's approach).

292. *See* McKnight, *supra* note 25, at 733-38 (arguing that frequent use of substantive review could call any legislative or executive decision into question and create sense of unpredictability in judicial review).

293. *See Russell*, 477 N.W.2d at 891 (invalidating statute sentencing guidelines provision).

294. *See* Nelson, *supra* note 265, at 220 (defining prescriptive sentencing guidelines); Michael Tonry, *The Politics and Processes of Sentencing Commissions*, 37 CRIME & DELINQ. 307, 311 (1991) (defining prescriptive guidelines as those that presume the appropriate sentence in individual cases should fall within authorized range); Andrew H. Malcolm, *Sentencing Criminals: A Formula for Fairness*, N.Y. TIMES, Feb. 17, 1990, § 1 at 10 (describing how California's prescriptive sentencing guidelines apply formulas in every sentencing decision). The federal system, California, Minnesota, Oregon, Pennsylvania and Washington all use prescriptive sentencing guidelines. Tonry, *supra*, at 311. For the purpose of this Note, prescriptive and presumptive guidelines are synonymous.

indeterminate sentencing scheme, such as voluntary guidelines[295] or no guidelines,[296] studies have indicated that minorities receive longer sentences and actually serve more time than Caucasians convicted of similar offenses.[297] As with every other aspect of the criminal justice system, the sentencing schemes are not discriminatory in purpose but only in effect.[298] Many jurisdictions adopted determinate sentencing plans in an effort to eliminate racial disparities in sentencing.[299]

Despite the designed intent of reducing sentencing disparity, statistics indicate that even the determinate sentencing schemes may not have eliminated the racial disparity problem.[300] Moreover, even if the determinate scheme has eliminated the bulk of the discriminatory effects of indeterminate sentencing schemes, particular areas of sentencing guidelines schemes, especially involving drug offenses, could result in racially disparate impacts.[301] Such was the issue

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295. *See Developments*, *supra* note 13, at 1627-29 (describing mechanics of indeterminate sentencing scheme); Nelson, *supra* note 265, at 220 (comparing voluntary guidelines to prescriptive guidelines). Nelson's comparison implies that voluntary guidelines are voluntary because they do not have the force of law. *Id.*; *see also* Tonry, *supra* note 294, at 310 (defining voluntary guidelines as judicially adopted and not legislatively enacted).

296. *See* Nelson, *supra* note 265, at 220 (listing varieties of sentencing schemes).

297. *See Developments*, *supra* note 13, at 1630 n.35 (citing studies finding that minorities receive longer sentences than Caucasians); Heaney, *supra* note 14, at 205-07 (finding that under Federal Sentencing Guidelines, African-American males still receive longer sentences than Caucasians); Nelson, *supra* note 265, at 247-48 (indicating that race still factors into sentencing decisions); Forer, *supra* note 14, at 16 (citing study indicating African-American males serve longer prison terms than Caucasian males); Marcus, *supra* note 264, at A4 (citing Federal Judicial Center study finding that African-Americans' sentences were longer than Caucasians); Thompson, *supra* note 264, at A6 (maintaining that mandatory sentencing laws account for longer sentences for minorities).

298. *See* State v. Russell, 477 N.W.2d 886, 900 (Minn. 1991) (Coyne, J., dissenting) (acknowledging that legislature did not intend to discriminate against minorities when it established crack-powder distinction); Morris, *supra* note 13, at 113 (maintaining that law and order movement is discriminatory in effect but not intent); Thompson, *supra* note 264, at A6 (indicating that racial disparities continue to exist even though Congress enacted Sentencing Guidelines to eliminate disparities).

299. *See* UNITED STATES SENTENCING COMMISSION: UNPUBLISHED PUBLIC HEARINGS 1986 (1988) (indicating that chief purpose of Federal Sentencing Guidelines was to avoid unwarranted sentencing disparities among defendants with similar records guilty of similar criminal conduct); *Developments*, *supra* note 13, at 1637 (stating that jurisdictions adopted determinate sentencing in order to alleviate flaws of indeterminate schemes); Heaney, *supra* note 14, at 162 (listing Congressional goals in adopting Sentencing Guidelines); Nelson, *supra* note 265, at 220 (recounting reasons for adopting determinate sentencing scheme); Duff Wilson, *State Drug Laws Tilt Against Blacks*, SEATTLE TIMES, Jan. 17, 1993, at A1 (stating that legislature intended sentencing laws to reduce discretion and decrease disparate racial treatment).

300. Heaney, *supra* note 14, at 205; *see also* Forer, *supra* note 13, at 16 (citing Federal Sentencing Commission data that indicates African-American males now serve 83.4 months to Caucasian males' 53.7 months for same offenses); Thompson, *supra* note 264, at A6 (noting that one reason for continued disparity is that prosecutors charge minorities with crimes subject to mandatory minimum sentences more often than they charge Caucasians with such crimes).

301. *See* Jim Newton, *Harsher Crack Sentences Criticized as Racial Inequity*, L.A. TIMES, Nov. 23, 1992, at A1 (noting disparate sentencing treatment between "ice" and crack). Newton comments that although medical evidence indicates the effects of smoking ice are greater than

the *Russell* court addressed with regard to the crack-powder distinction.[302] Similarly, nearly every state has adopted the Uniform Controlled Substances Act,[303] which establishes analogous distinctions between illegal drugs.[304] Thus, if a state court found that African-Americans use one substance which receives a more severe sentence than a similar substance which Caucasians use, then that court could invalidate that distinction. Hypothetically, if possession of ten grams of lysergic acid diethylamide (LSD), a hallucinogenic drug, receives the same penalty as possession of 100 grams of phencyclidine (PCP), another hallucinogenic drug, and more African-Americans use LSD and Caucasians use PCP, then the state court may invalidate the LSD-PCP distinction.[305] As with the distinction between crack cocaine and powder cocaine, even if the legislature determined that although the hallucinogenic effect on the brain may be similar, LSD is more dangerous, and therefore possession of a lower quantity of LSD should result in the same sentence as possession of a much greater quantity of PCP, the court could strike down the sentencing distinction.[306] Moreover, a court could use the *Russell* approach to invalidate such a distinction based on gender discrimination or possibly age discrimination if the court accepted the Minnesota Court of Appeals determination that the *Russell* rational basis test should apply to all equal protection challenges.[307]

Additionally, courts might use *Russell* analysis to invalidate capital sentencing schemes.[308] Statistics indicate that race plays an integral role in capital punishment throughout the country.[309] For instance, more African-Americans

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crack, possession of crack still carries twice as severe a penalty as possession of ice. *Id.* Newton implies that the justification might be that most ice dealers and users are Caucasian while most crack dealers are African-American. *Id.* The disparate treatment of these drugs could also serve as the basis for equal protection challenges.

302. State v. Russell, 477 N.W.2d 886 (Minn. 1991).

303. UNIF. CONTROLLED SUBSTANCES ACT, 9 U.L.A. (1988). Only New Hampshire and Vermont have not enacted any sections of the Uniform Controlled Substances Act.

304. *Id.* at §§ 101-401. The state of Washington, for example, adopted a sentencing distinction between possession of crack and powder cocaine very similar to Minnesota's distinction. *See* Wilson, *supra* note 299, at A1 (noting similarities in the sentencing laws of the two states).

305. 21 U.S.C. § 841(b)(1)(A)(iv)-(v) (1988). Section (b) penalizes any person who possesses either 10 grams of LSD or 100 grams of PCP to a mandatory term of imprisonment of at least 10 years.

306. *See* 21 U.S.C. § 841(b) (1988) (setting penalties for drug possession offenses based on congressional determination of dangerousness of specific drugs).

307. *See* Mitchell v. Steffen, 487 N.W.2d 896, 904 n.2 (Minn. Ct. App. 1992) (ruling that *Russell* standard applies to any state equal protection challenge). If statistics indicate that females use LSD more than they use PCP and males are more likely to use PCP, an innovative defense attorney could raise the *Russell* argument based on gender discrimination. Presumably, at least the Minnesota Court of Appeals would then engage in substantive review of the sentencing scheme. *Id.*

308. McCleskey v. Kemp, 481 U.S. 279, 286-87 (1987). McCleskey grounded his equal protection claim on statistical proof of disparate racial impact of capital punishment in Georgia. *Id.*

309. *See* David C. Baldus et al., *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375, 1399-1402 (1985) (finding

receive capital sentences than Caucasians.[310] Additionally, murderers whose victims are Caucasian are more likely to receive the death penalty than murderers of minority victims.[311] The evidence from *McCleskey v. Kemp* indicated that race significantly influenced the decision whether or not to impose the death penalty.[312]

Under *Russell* analysis, such evidence would serve to establish the substantial burden necessary to trigger the three-part review.[313] As with the other facets of the criminal justice system that are facially neutral but discriminatory in impact, once the court decides the statistics satisfy the threshold requirement, whether the court will invalidate the procedure depends primarily on the court's application of the three-part test and its evaluation of the evidence supporting the distinctions.[314] The court independently would evaluate the procedures used in capital cases.[315] Similarly, the court independently would examine the differences between those defendants who received death penalties and those who did not.[316] The court then would decide for itself whether the classifications are arbitrary or genuine.[317]

IV. SOLUTION

As the previous examples illustrate, courts could decide to use *Russell* substantive equal protection analysis to invalidate a variety of facially neutral

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race of victim influences death penalty decisions); Samuel R. Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275, 1279-82 (1985) (discussing 10 different studies that concluded that substantial discrimination exists in capital sentencing by race of victim); Kennedy, *supra* note 60, at 1396 n.25 (citing studies finding that race influences capital sentencing decisions); Morris, *supra* note 13, at 112 (noting that African-Americans account for 42% of death row inmates); Joseph F. Sullivan, *Race Engulfs Study on Using Death Penalty*, N.Y. TIMES, Sept. 26, 1991, at B2 (citing Baldus study in New Jersey finding that minority offenders run greater risk of receiving death penalty).

310. *See* Morris, *supra* note 13, at 112 (citing statistics indicating race plays crucial role in capital sentencing); Kathy Fair, *Lethal Justice*, HOUSTON CHRON., May 24, 1992, at A1 (noting that county in Texas sends more African-Americans to death row than Caucasians).

311. *See Developments*, *supra* note 13, at 1618-19 (citing study that supports Baldus' finding that murderers of Caucasian victims are more likely to receive death penalty); Kennedy, *supra* note 60, at 1396 n.27 (citing numerous studies concluding that race of victim plays determinate role in capital sentencing); Dyckman, *supra* note 260, at 13A (referring to Florida study finding courts sentence killers of Caucasian victims to death four times as often as they sentence killers of minority victims).

312. *See supra* notes 77-79 and accompanying text (discussing findings of Baldus study).

313. State v. Russell, 477 N.W.2d 886, 887, 889 (Minn. 1991).

314. *See supra* notes 212-21 and accompanying text (recounting Justice Coyne's discussion of subjectivity of substantive review). Because substantive review primarily involves independent judiciary evaluation, a court which opposes capital punishment could use statistical disparate impact evidence as the means to invalidate the death penalty.

315. *Russell*, 477 N.W.2d at 902 (Coyne, J., dissenting).

316. *Id.*, 477 N.W.2d at 889-91.

317. *Id.*, 477 N.W.2d at 902 (Coyne, J., dissenting).

criminal procedures[318] that disparately impact minorities.[319] Although something must be done to remedy the disproportionate impact problems, the Minnesota Supreme Court's approach is not the best available means. One problem associated with pure statistical impact analysis is that the statistics are seldom conclusive.[320] Rather, most studies suffer from a variety of underlying methodological flaws that undermine the credibility of the statistical data.[321] Therefore, judicial reliance on statistical evidence of disparate impact in the criminal process is subject to the charge that the courts are relying on defective evidence.[322]

In addition to the problems associated with the judiciary's drawing conclusions from statistical evidence, another problem with "heightened rational basis review" is that no tenable intermediate ground exists for review of facially neutral legislative decisions.[323] Because no tenable intermediate

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318. *See supra* note 263 and accompanying text (discussing disparate impact of mandatory sentencing laws). In the case of mandatory sentencing, the mandatory sentencing laws do not target any particular racial group and yet under the *Russell* court's analysis those statutes could be invalid. In *Russell*, because the crack-powder distinction resulted in a statistical disparate impact, the law was unconstitutional. *Russell*, 477 N.W.2d at 891. Similarly, because the mandatory sentencing laws tend to result in lengthier sentences for minorities, those laws also may be invalid.

319. *See supra* note 229 and accompanying text (indicating increased willingness on part of state courts to adopt review standards independent of federal doctrines).

320. *See supra* notes 13-16, 19 and accompanying text (discussing studies which reach different conclusions as to whether racial discrimination exists in criminal justice system and evaluating methodologies of those studies); *see also* McCleskey v. Kemp, 481 U.S. 279, 313 (1987) (determining that Baldus study was insufficient to establish significant risk of racial bias in capital sentencing scheme).

321. *See supra* notes 94-97 and accompanying text (discussing underlying methodological flaws in most criminal justice system studies); *see also* Klein et. al., *supra* note 16, at 812 (noting that most criminal justice studies fail to account for important range of variables, and specifically assailing two recent studies).

322. *See* Savage, *supra* note 15, at 19 (indicating that Supreme Court is squeamish about relying on study-generated statistical evidence). If, on the other hand, the legislature relies on faulty evidence and the public determines such reliance was unwise, the public can always vote the legislators out of office. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 45-46 (1990) (arguing that substantive review is judicial usurpation of legislative powers and that legislature is proper forum for these types of decisions because legislature is accountable to the people).

323. *See* Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 50-51 (1977) (asserting that pure disparate impact test is not acceptable alternative to intent requirement and noting that variety of other proposals exist); Randall Fox, *Equal Protection Analysis: Laurence Tribe, The Middle Tier, and the Role of the Court*, 14 U.S.F. L. REV. 525, 561-66 (1980) (indicating application problems with heightened rational basis review); Dennis J. Hutchinson, *More Substantive Equal Protection? A Note on* Plyler v. Doe, 1982 SUP. CT. REV. 167, 180 (explaining that Supreme Court's use of conceivable basis test is partially result of Court's determination that any higher standard of review would result in invalidation of judgments upon which reasonable people may differ); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 208 (1976) (arguing that any rational basis review with bite inevitably leads courts to evaluate classification on basis of some policy objective other than immediate effect of law); Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and*

approach exists, courts are left with all-or-nothing approaches. Either a court follows the federal equal protection conceivable basis test that almost always yields to legislative judgments,[324] or the court actually reviews the rationality and substantiality of the classification.[325] Even the commentators who argue that the United States Supreme Court's purposeful discrimination requirement is too deferential to legislative judgments do not agree on the level of substantive review a court should invoke when reviewing facially neutral classifications that result in disproportionate impacts.[326]

Racially disparate impacts in the criminal justice system are a problem and some remedy is necessary when a classification obviously imposes a disproportionate burden on minorities.[327] The judiciary, though, is not the proper forum for evaluating statistical evidence of disparate impact in the criminal justice context.[328] Rather, the legislature should determine the accuracy of the statistical evidence and the viability of the facially neutral policies that arguably discriminate against minorities.[329] The legislature is better equipped

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Deconstruction, 73 GEO. L.J. 89, 125 (1984) (arguing that challenge to process theorists is to create middle ground, but implying none exists).

324. *See supra* notes 31-33 and accompanying text (noting that Supreme Court almost always upholds legislative classifications under rational basis review); *see also* Note, *Equal Protection: A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 790 (1978) (asserting that under conceivable basis test, almost all equal protection challenges fail).

325. *See* Hutchinson, *supra* note 323, at 180 (noting that higher standard of review involves judicial intrusion onto legislative authority).

326. *See supra* note 323 and accompanying text (noting disagreement over proper approach to heightened rational basis review).

327. *See* Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1042 (1979) (noting that general agreement among scholars exists that some remedy to disparate impact policies is imperative).

328. *See supra* notes 93-100 and accompanying text (indicating difficulties with judicial evaluation of criminal justice statistical evidence). Although the judiciary relies on statistical evidence in employment, voting, and jury venire cases, those cases are distinguishable from the type of statistics in the criminal justice context. *See* McCleskey v. Kemp, 481 U.S. 279, 293-94 (1987) (distinguishing capital sentencing study from employment and jury selection cases). The statistics in employment, voting, and jury selection cases are basically simple comparisons between the available pool of eligible participants and the actual participation rates. *Id.* The studies that attempt to indicate racial bias in the criminal justice system, on the other hand, must try to account for numerous variables in determining whether discrimination exists. *See supra* notes 94-97 and accompanying text (discussing methodological flaws with studies). Because no study is flawless, reliance on such a study as absolute proof of discrimination or proof discrimination does not exist is tenuous at best.

329. *See* McCleskey v. Kemp, 481 U.S. 279, 319 (1987) (deciding that legislatures are better able than courts to evaluate statistical evidence); McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819) (establishing that as long as government's purpose is legitimate and means are rational, then judiciary should defer to judgment of legislature on issues about which reasonable minds might differ); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 21-22 (2d ed. 1982) (arguing that judicial review in general is counter-majoritarian and if not restrained could weaken democratic processes and weaken legislative authority); Hutchinson, *supra* note 323, at 180 (noting that any higher standard of rational basis review will lead to invalidation of legislative judgments upon which reasonable people may differ); Sherry, *supra* note 323, at 95 (noting that allowing judges to substitute their judgments for the legislature's is counter-majoritarian and inconsistent with need for principles of predictability in judicial process).

to evaluate the statistical evidence.[330] Moreover, the legislature is better able to determine whether the facially neutral classification is the best means of achieving the legitimate purpose of crime control.[331] Additionally, even the judiciary agrees that its role is not to second-guess the wisdom of legislative policies.[332] In *McCleskey*, for example, the United States Supreme Court stated bluntly that McCleskey should present his arguments to the legislature rather than the judiciary.[333]

V. CONCLUSION

The Minnesota Supreme Court in *State v. Russell* tried to rectify what it thought to be an egregious wrong.[334] In solving the problem and invalidating the distinction between crack and powder cocaine, the court substituted its judgment for that of the legislature.[335] Such an approach has not been acceptable judicial review since the United States Supreme Court rejected that *Lochner*-type analysis in 1937.[336]

The Minnesota court, though, would renew that substantive review under the auspices of rational basis review of equal protection challenges.[337] The judiciary should not encroach upon legislative powers. The legislature is better able to evaluate the significance and accuracy of disparate impact evidence, especially in the criminal justice context.[338] Therefore, the legislatures and not the judiciary should become the leaders in preserving equal protection guarantees from policies that disproportionately burden minorities.

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330. *See supra* notes 93-97 and accompanying text (citing sources indicating difficulties associated with judicial evaluation of statistical evidence generated by criminal justice studies). The function of the legislature is to evaluate conflicting evidence on controversial issues and reach compromise policies which are satisfactory to the public. If the public disagrees, then the legislators will learn of the public displeasure during the next election.

331. *See* BORK, *supra* note 322, at 49 (arguing that democracy is foundation of American system and therefore popularly elected legislature should make important political decisions not the judiciary); Davis, *supra* note 42, at 294 (noting Chief Justice Rehnquist's view that judiciary's proper function is not to intrude upon political decisions of legislative branch). The legislature's job is to determine the correct course of action regarding politically divisive issues.

332. *See supra* note 89 (citing cases in which United States Supreme Court acknowledges its role is not to rule on the wisdom of legislative policies).

333. McCleskey v. Kemp, 481 U.S. 279, 319 (1987).

334. State v. Russell, 477 N.W.2d 886, 888 n.2 (Minn. 1991).

335. *Id.* at 902 (Coyne, J., dissenting).

336. *See* Williamson v. Lee Optical, 348 U.S. 483 (1955) (indicating that United States Supreme Court rejects substantive due process review and citing Nebbia v. New York, 291 U.S. 502 (1934), and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)); *see also* McKnight, *supra* note 24, at 733 (discussing disfavored status of substantive review by United States Supreme Court and commentators).

337. *Russell*, 477 N.W.2d at 889-91.

338. *See supra* notes 93-97, 320-22, 328 (citing authorities indicating that judiciary is not suited for evaluation of statistical evidence and that such decisions fall within ambit of legislative authority).