ACHIEVING JUSTICE IN A DIVERSE AMERICA

Report of the American Bar Association Task Force on Minorities and the Justice System

July 1992
APPENDIX A

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INTRODUCTION

A. TASK FORCE MANDATE AND METHODOLOGY

The riots that erupted in Los Angeles on April 29, 1992, left scores injured or dead, property and businesses destroyed, and the nation struck yet again by violence sparked by racial unrest. The violence started immediately after a jury in suburban Ventura County, California acquitted several white police officers of assaulting Rodney King, an African American. The case was unusual and received worldwide coverage because a videotape recording of the incident that led to the charges was captured by a local resident. People who had viewed the aired portions of that tape generally believed that the officers were guilty of brutally beating King and that the not guilty verdicts were the result of racial bias. Because the jury had no African Americans in its ranks, people the world over questioned whether America provides "equal justice under law" to anyone who is not part of its white majority.

Nor was the focus simply on the twelve jurors selected. Rather, the fact that a judge removed the case from Los Angeles to a white, middle class suburb raised the question of whether the court system itself was biased in favor of the white officers. In the eyes of many, neither the jury nor the court system had served the ends of justice in this case.

This Task Force was formed not to evaluate the case against the four Los Angeles police officers, but rather to examine the prevalence of racial and ethnic bias in the American justice system. Specifically, the Task Force was charged with the task of determining whether the fears that our system of justice is racially and ethnically biased are justified, and if so, to propose an agenda for future action by the ABA.

Time limitations precluded conducting independent research, but the Task Force was aided by a number of recent studies, including bias studies in New York, Florida, Michigan, Massachusetts, New Jersey, and other states. Although the Task Force had neither the time nor the resources to verify the data in these reports, the consistency of their major findings is disturbing. The reports suggest that our justice system treats minorities inequitably and that past efforts to eliminate bias and promote diversity, although well-intentioned, have fallen considerably

* The Task Force gratefully acknowledges the research assistance of Todd Connors, Carolyn Costle, and Kevin Christof, and the research support of the Georgetown University Law Center.
short of their goals. Much needs to be done, and the ABA can use its leadership role to inaugurate a new national effort to better promote "equal justice" in the United States.

B. TASK FORCE DEFINITIONS

We start by providing the definitions of "racial and ethnic bias" and of "the justice system" that guide this report.

RACIAL AND ETHNIC BIAS

Racial and ethnic bias in the justice system is measured by statutes, rules, policies, procedures, practices, events, conduct and other factors, operating alone or together, that have a disproportionate impact upon one or more minorities.

THE JUSTICE SYSTEM

The justice system includes the courts and the independent institutions that take part in the administration of justice, including police departments, prosecution and defense agencies, correctional departments, law firms that provide representation in courts, and the law schools that produce lawyers.

DISCUSSION

These definitions focus attention on disparate effect wherever it may occur within the justice system. This broad definition of bias reflects the perception that racial and ethnic bias is a systemic problem deeply rooted in our history and culture, which continues to have profound, deleterious effects on minorities. It rejects the limitation of "actionable" bias to discrete and provable instances of intentional bigotry that may be remedied by making the specific victim whole and sanctioning the wrongdoer.

Although, in some instances, a causal relationship will be difficult to identify or isolate, the Task Force can present a clearer picture of the inequities in the justice system by focusing on disparate racial and ethnic impact. Identifying causal connections is not critical because our purpose is to effect change rather than to place blame.

We also note at the outset that many of the Task Force's recommendations for further study and action concern areas where the ABA has already adopted policies and instituted programs. Time limitations do not allow us to fully elaborate on each of these policies and programs. A partial listing of the ABA's policies concerning racial and ethnic bias over the past 30 years include the following:
expressing concern relating to the "educational and economic problems" of racial minorities (1963);

announcing a policy not to discriminate on the basis of race (1965);

adopting a policy "not to discriminate against any person because of race, color, creed or national origin" (1967);

condemning "all forms of discriminatory hiring practices within the profession, whether on the basis of sex, religion, race or national origin" (1972);

condemning all discriminatory hiring practices in the legal profession (1972);

requiring law schools to demonstrate commitments "to providing full opportunities for [the] study of law and entry into the profession" for minorities (1980);

continuing "substantial efforts to increase the participation of women and minorities in all levels of the Association" (1984);

creating a Commission on Opportunities for Minorities in the Profession to investigate and make recommendations on means to fully integrate minorities into the profession, including a Minority Counsel Demonstration Program under which corporations commit to retain minority law firms and minority lawyers in majority firms (1986);

opposing federal financial assistance to institutions which discriminate in any of their operations (1986);

opposing discrimination in the selection of the judiciary (1986);

supporting the full and equal participation in the profession by minorities and women (also known as "Goal IX") (1986);

condemning crimes of violence based on bias or prejudice against the victim's race (1987);

supporting any proposed legislation which strives to eliminate any racial and ethnic bias in capital sentencing (1988); and
This Task Force makes the recommendations contained in this report fully aware that the ABA already has in place many policies and efforts to combat racial and ethnic bias. The Task Force hopes that this report will provide added support within the ABA for these efforts. It also hopes that this report will raise the issue of whether a more direct or different policy focus on racial and ethnic bias, as the Task Force has defined it, is needed to remedy the inequities recent bias studies of the justice system have found.

Although not a part of our mandate, other forms of bias are as urgent a problem in the justice system today as racial and ethnic bias. The Task Force unanimously recommends that strategies pertinent to reducing other forms of bias in the justice system be implemented, whenever possible, in concert with the strategies recommended here. We further recognize that the ABA has, by design, created other entities to address these bias problems. The Task Force recommendations do not disturb this structure.

I. INTRODUCTORY TASK FORCE FINDINGS AND RECOMMENDATIONS

A. EARLY INTERVENTION IN THE COMMUNITY

Any strategy to remove racial and ethnic bias from the justice system must start with early intervention in the lives of inner city youth to break the cycle of poverty and neglect that isolates them from the rest of society and enmeshes them in the justice system as juvenile or adult offenders.

TASK FORCE FINDING

F1. The problems of racial and ethnic bias in the justice system are in large part the inevitable consequence of the racial and ethnic bias in our society that forces disproportionate numbers of minorities to live their lives in isolated, decaying inner cities. The disproportionate number of minorities that commit crime and fill our prisons is linked to poverty and to the lack of family structure and education that plagues the lives of the urban poor.
TASK FORCE RECOMMENDATION

THE LEGAL PROFESSION AND THE COMMUNITY

R1. The ABA should direct appropriate entities to give even greater attention to the need for effective delivery of services to children and families living in poverty. This effort should focus on: a) increasing resource availability to children before they become enmeshed in the juvenile justice system; b) working with other professions toward creating comprehensive legal, medical, and economic programs that effectively address the various components of the problems of poverty and displacement; and c) supporting law reform that will make these services more readily available to those who need them.

DISCUSSION

Although the Task Force recognizes the importance of removing bias within the justice system, larger, social problems must not be obscured in the process. No justice system can provide equal treatment if our society is stratified into "increasingly separate Americas." The ABA, therefore, should begin an assessment of the justice system by looking at racial and ethnic bias in society itself. This analysis leads to the inner city where so many minority youth live. Poor, uneducated, and growing up as adolescents with better chances of dying from gunshot wounds than from natural causes, these disadvantaged children are ill-equipped to escape lifestyles that almost inevitably will bring them in contact with our justice system. Attaining "equal justice" requires the delivery of services which enable children living in poverty to break this cycle and avoid becoming enmeshed in the justice system in the first place:

As a nation, we can no longer afford the staggering human and financial costs of children and families in crisis. We know the warning signs: poverty, single-parent families, poor health, poor education, inadequate housing, unsafe neighborhoods, and lack of social support. The time to address these problems is before they cripple families and irreparably damage children.

The Task Force recognizes the profound nature of these problems and that they are the responsibility of all citizens, not just lawyers to correct. By building on the work of the Center on Children and the Law, the Commission on Homelessness and Poverty, and other entities, the ABA can and should take a leading role in attacking the root problems afflicting the inner city. The legal profession should be at the forefront of new efforts to give
these problems the priority they deserve and to break down complex statutory and regulatory structures that prevent services from getting to the families and children that need them.

B. COORDINATING ABA EFFORTS

TASK FORCE FINDING

F2. ABA policies addressing racial and ethnic bias are not self-executing. To be effective, ABA policy must be adopted by other entities such as government agencies, courts, and state and local bars. Implementation is the responsibility of many different ABA entities, each essentially working independently on the policies of particular interest to that entity. There is no entity within the ABA that is formally charged with the responsibility of coordinating and facilitating these many different efforts in the justice system and the legal profession.

TASK FORCE RECOMMENDATION

ESTABLISH A STEERING COMMITTEE ON RACIAL AND ETHNIC BIAS IN THE JUSTICE SYSTEM

R2. The ABA should establish a Steering Committee that can coordinate and facilitate within the ABA the many efforts--existing and to be launched--addressing racial and ethnic bias in the justice system. That entity, under the direction of the President-Elect, would include the chairs of the Commission on Minorities in the Profession, the Criminal Justice Section, the Individual Rights and Responsibilities Section, the Commission on Women in the Profession and representatives from the Native American Bar Association, National Asian Pacific American Bar Association, Hispanic National Bar Association, and the National Bar Association. It would report annually to the Board of Governors on the progress made in the previous year to eliminate racial and ethnic bias and promote diversity.

The Task Force recommends the following to facilitate this reporting responsibility:

a. ABA entities shall report to the Steering Committee annually on any efforts taken to implement Association policy to reduce racial and ethnic bias in the justice system.
b. All proposed policies relevant to racial and ethnic bias shall be transmitted to the Steering Committee accompanied by an implementation plan specifying the entity(ies) accepting responsibility for promotion of the policies.

**DISCUSSION**

The ABA is a large organization, and at any given point no entity within the organization is aware of all efforts in progress to implement Association policy on racial and ethnic bias. Coordination can strengthen these efforts without interfering with the independence or autonomy of any particular entity. The Steering Committee would facilitate the efforts of these various entities and give them a stronger voice in the ABA through its annual report.

History justifies our concern for vigilance after policies have been adopted. Although past studies have identified the inequities producing the major problems of our inner cities, efforts to respond to these findings have proven to be relatively ineffectual. In 1968 the National Advisory Commission on Civil Disorders noted the testimony of one of its first witnesses who commented on the reports of earlier riot commissions:

I read that report... of the 1919 riot in Chicago, and it is as if I were reading the report of the investigating committee on the Harlem riot of 1935, the report of the investigating committee on the Harlem riot of 1943, the report of the McCona Commission on the Watts riot.

I must again in candor say to you members of the Commission—it is a kind of Alice in Wonderland with the same moving picture reshowed over and over again, the same analysis, the same recommendations, and the same inaction.

The Task Force believes that a Steering Committee can prevent such inaction. It can revitalize the recommendations contained in earlier ABA policies and other major reports to improve the Association's overall ability to implement its policies on racial and ethnic bias. It is contemplated that the Steering Committee reports will sustain and promote the vigor of the ABA's efforts to fight bias and press vigilantly for reforms that bring about meaningful change. These reports will also give guidance to ABA officers and entities regarding the priority projects that must be addressed by the Association and the country in coming years.
The Steering Committee can also serve a critical role similar to that served by other entities. For example, the Commission on Women in the Profession has published a "Goal IX Report Card" charting the ABA’s progress in increasing participation by women in Association activities and leadership positions. The Report Card has successfully raised the visibility of these issues and has been a useful devise for tracking the variety of programs, committees, and projects which ABA entities are undertaking to increase participation by women in Association activities. The Steering Committee may wish to consider the "Goal IX Report Card" as a model for its own annual report to the Board on progress made to increase minority participation in the ABA and the justice system.

The Steering Committee, to be effective, must be credible both within the ABA and minority bar associations and still maintain a manageable size. Its membership, calculated to bring together those people most routinely involved with these issues, should be limited, in the Task Force's opinion, to nine. The Task Force anticipates that other entities will routinely liaison with the Steering Committee.

II. CRIMINAL JUSTICE FINDINGS AND RECOMMENDATIONS

A. THE POLICE*

The police are the first line of the justice system. Of all the elements of the justice system, the police are the most intimately involved with the lives and problems of citizens of all kinds. Virtually no other public officials exercise such broad discretion which daily affects the lives of members of the community. "Because the police are a symbol of authority in the community, they must work with and for the community they police."

The state bias studies reviewed did not directly address racial and ethnic bias within police departments. The Task Force believes, however, that police officers, often the first contact point between minorities and the justice system, figure

* On the same day that this report was submitted to the Board of Governors, a report on the Los Angeles Sheriff's Department was issued. The Los Angeles County Board of Supervisors requested the report. Preliminary news accounts indicate that the report on the Los Angeles Sheriff's Department corroborates the findings made by the Christopher Commission and Amnesty International in their respective reports on the Los Angeles Police Department.
prominently in a study of racial and ethnic bias in the justice system. Fortunately, the Independent Commission on the Los Angeles Police Department, (hereinafter "Christopher Commission"), made a thorough study of the Los Angeles Police Department (hereinafter "LAPD") in 1991 following the arrest of Rodney King. The remarkable similarity between the Christopher Commission's report and major studies from the 1960's and 1970's, (The Report of the National Advisory Commission on Civil Disorders, [1968] [hereinafter "the Kerner Commission"] and the National Advisory Commission on Criminal Justice Standards, Report on Police [1973]), which note similar problems in police departments of those eras, supports the conclusion that police departments can better serve communities and thereby promote equal justice.

FINDINGS FROM THE BIAS REPORTS

F3. A lack of emphasis on cross-cultural training and understanding has led to poor police-community relations in many minority neighborhoods. Police confront minorities more often and more aggressively than non-minorities. 11

F4. Complaint and grievance procedures may favor the alleged offending officer over the complainant and, therefore, these procedures may not effectively detect and remove racially and ethnically biased police officers, or those who use excessive force, from the ranks of police departments. 12

F5. Minority representation on police forces has improved somewhat over the past decade. However, overt discrimination against minority officers, often tolerated by supervisory personnel, persists in the rank and file of some police departments. 13

TASK FORCE RECOMMENDATIONS

PROMOTE CROSS-CULTURAL TRAINING

R3. The ABA should promote cross-cultural training within police departments that focuses on officers' interactions with the community.

R4. The ABA should promote cross-cultural training within police departments that focuses on officers' interactions within the police department itself.
SERVE THE COMMUNITY BEING POLICED

R5. The ABA should endorse programs that improve the quality of police service in minority communities, including effective community policing programs and programs that increase the number of multilingual officers serving multilingual communities.

IMPLEMENT EFFECTIVE GRIEVANCE AND COMPLAINT PROCEDURES

R6. The ABA should identify and promote effective, conflict of interest-free, complaint, grievance, and disciplinary procedures for police misconduct related to ethnic and racial bias and to the use of excessive force.

DISCUSSION

PROMOTE CROSS-CULTURAL TRAINING

The Christopher Commission found fundamental problems within the LAPD involving racial and ethnic bias both in the relations between its officers and minorities and in the relations between its own officers. Specifically, the Christopher Commission found LAPD officers were more frequent and aggressive in their contacts with minorities, lacked cultural sensitivity toward minority communities, and tolerated racially and ethnically derogatory remarks within their own ranks. To help remedy these conditions, the Task Force recommends that the appropriate ABA entity(ies) should review Association policies on police training to determine if additional policies on cultural sensitivity training are necessary. This review of ABA policy should include consideration of training programs designed to increase officers' awareness of the needs of their fellow officers, an increasing number of whom are from different racial and ethnic backgrounds.

SERVE THE COMMUNITY BEING POLICED

The recent trend to implement "community policing" practices is part of an effort to control crime and reduce police-community tensions by re-establishing the police officer as a continual, visible presence on neighborhood streets. The Christopher Commission, for its part, recommended that the LAPD adopt this model. The community policing effort is a response to inner city conditions that other studies have recommended at least since the late 1960's. The Kerner Commission summarized one of the major problems faced by police departments in 1968 thus: "Loss of contact between the police officer and the community he serves adversely affects law enforcement. If an officer has never met, does not know and cannot understand the language and
habits of the people in the area he patrols, he cannot do an effective police job." The same can be said with equal strength in 1992. Therefore the Task Force recommends that the appropriate ABA entity(ies) review Association policy on police departments, including the ABA Standards for Criminal Justice relating to Urban Police Function, to determine whether further support of programs which improve police service to minority communities should be given. This policy review should include consideration of programs that increase the number of multilingual officers serving multilingual communities.

IMPLEMENT EFFECTIVE GRIEVANCE AND COMPLAINT PROCEDURES

The Christopher Commission found that complaints of racial and ethnic bias and of the use of excessive force lodged against police officers by the public were often not handled satisfactorily or fairly. Specifically, the Christopher Commission found that conflicts of interest could arise under current LAPD complaint procedures. Under existing procedures, the division to which the alleged offending officer is assigned is also usually assigned to investigate the complaint against that officer. A "fraternal bond" existing among police officers makes it unlikely that a colleague of the alleged offending officer will review the complaint objectively. These findings are not novel. Studies conducted in the 1960's and 1970's found similar problems in the complaint and grievance procedures in police departments of those eras. Therefore, the Task Force recommends that appropriate ABA entity(ies) study and promote fair and efficient complaint procedures proven to remove officers from a police department, or otherwise discipline officers, when an officer has demonstrated racial or ethnic bias and/or has used excessive force in carrying out his or her duties.

B. PROSECUTION AND DEFENSE SERVICES

Minority defendants must often rely on indigent defense services. The quality of these services determines a defendant's access to adequate legal representation in matters affecting liberty and/or life. If defense services are underfunded, there is no hope of providing equal justice in the criminal justice system. The prosecution, too, must be vigilant to insure that minorities are treated fairly. If racial and ethnic bias becomes a factor in prosecutors' decisions to charge, plea bargain or use peremptory challenges, the delivery of equal justice to minorities is seriously compromised.
FINDINGS FROM THE BIAS REPORTS

F6. Inadequate funding of indigent defense services deprives many poor, minority defendants of competent representation in matters where life or liberty is at stake. 21

F7. Ethnic and racial bias may affect the charging decisions of prosecutors when the defendant is from a minority group and the victim is not. 22

F8. Although prohibited as a matter of law, lawyers may use peremptory challenges to remove minorities from juries when they perceive minorities may be hostile to their position. Pretextual explanations can be used to circumvent the prohibition against race-based strikes. 23

F9. Criminal laws, including mandatory minimum sentencing provisions, may disproportionately impact upon minorities. 24

TASK FORCE RECOMMENDATIONS

FIGHT TO OBTAIN ADEQUATE FUNDING FOR INDIGENT DEFENSE SERVICES

R7. The ABA should strengthen its already vigorous support for full funding of indigent defense services by federal, state and local governments.

RESTUDY CHARGING AND PLEA BARGAINING DISCRETION

R8. The ABA should reexamine criminal charging procedures to determine whether changes are appropriate to eliminate discriminatory impact due to racial and ethnic bias.

R9. The ABA should reexamine plea bargaining standards and practices and determine whether changes may be appropriate to eliminate discriminatory impact due to racial and ethnic bias.

RESTUDY PEREMPTORY CHALLENGES

R10. The ABA should reexamine peremptory challenge standards to determine whether changes are appropriate to eliminate any racial and ethnic bias which may exist.
REVIEWS CRIMINAL LEGISLATION FOR DISPARATE IMPACT ON MINORITIES

R11. The ABA should review federal and state criminal legislation in light of any possible racial or ethnic bias resulting from the application of the law.

DISCUSSION

FIGHT TO OBTAIN ADEQUATE FUNDING FOR INDIGENT DEFENSE SERVICES

Because minorities are disproportionately poor, minorities have a greater need for indigent defense services. Yet such services are underfunded nationwide. Many indigent defense offices carry case loads well beyond the ABA's recommended ceilings designed to ensure adequate representation. The ABA has consistently voiced support for adequate funding of indigent defense services. The Task Force believes that the criminal justice process will necessarily be biased against minorities unless minorities are given competent legal representation. Therefore the Task Force recommends that the ABA's efforts to secure full funding for indigent defense services be given the highest priority.

RESTUDY CHARGING AND PLEA BARGAINING DISCRETION

Prosecutors exercise considerable discretion when charging defendants or negotiating pleas. Such broad discretion leaves open the possibility that racial and ethnic bias might enter into these important decisions, causing some charging and plea negotiation decisions to be inconsistently applied against criminal defendants. For example, considerable evidence supports a finding that capital murder charges are more likely to be brought against an African American defendant than against a defendant who is not African American, and are even more likely to be brought if the victim is Caucasian. The bias studies we reviewed noted that the evidence with respect to plea bargaining and with respect to charging decisions not involving capital crimes is insufficient to support any formal finding of bias. The Task Force believes that such important issues should be thoroughly researched. Therefore, the Task Force recommends that appropriate ABA entity(ies) should study charging and plea bargaining and make appropriate recommendations.

RESTUDY PEREMPTORY CHALLENGES

The United States Supreme Court has ruled that race is not an appropriate ground to prevent a person from being seated on a jury panel. Yet some bias studies indicate that there are presently no adequate measures to prevent this from happening. Prosecutors and defense attorneys alike are accorded the right to "peremptorily challenge" (and thereby exclude from service) any
juror they wish, and the true reason for their action may be obscured. When such challenges result in a jury with few or no minority jurors, especially in communities with a significant minority presence, a defendant's right of a "jury of his peers" is put in question. The Task Force recognizes that this is a difficult question but still believes that appropriate ABA entity(ies) should reconsider the use of peremptory challenges and should study safeguards that will lower the risk that minority persons will be stricken from jury panels on account of race."

REVIEW CRIMINAL LEGISLATION FOR DISPARATE IMPACT ON MINORITIES

The ABA's effort to ensure equal justice under law should include, where practicable, a review of legislation for any differential treatment which could result from its enforcement. For example, the Minnesota Supreme Court ruled that state sentencing provisions that punish those convicted of possessing "crack cocaine," (92% of whom were African American), to longer prison terms than those convicted of possessing cocaine in its powder-form, (85% of whom were Caucasian), denied African Americans equal protection of the laws. This case underscores the point that without review for possible discriminatory impact, unintended but nevertheless racially biased outcomes can result upon enforcement of legislation. Therefore the Task Force recommends that appropriate ABA entities review state and federal criminal legislation in light of the chance that racially and ethnically disparate outcomes may result in the application of seemingly race-neutral legislation.

C. THE COURTS

The Courts are the arbiters of issues of life and liberty in the justice system. Even the appearance of ethnic and racial bias in this awesome process is inconsistent with the promise of "equal justice."

FINDINGS FROM THE BIAS REPORTS

F10. Despite efforts at reform, money bail remains an especially troubling condition of pretrial release because of its disproportionate impact on poor minorities.

F11. Rules related to change of venue may not account for the concerns of the community from which the case is removed. The recent riots in Los Angeles demonstrate the profound problems that attend a change of venue in a racially or ethnically charged case if the demographics of the county to which the case is removed
are not similar to the demographics of the county where the incident occurred.\textsuperscript{16}

F12. Racial or ethnic bias may influence the imposition of the death penalty, especially when the victim of the crime is Caucasian and the defendant is African American.\textsuperscript{17}

F13. Juror pools may be disproportionately Caucasian, and selection techniques that make juror pools a fairer cross-section of the community are not as widely implemented as they should be to ensure representative venires.\textsuperscript{18}

F14. The juvenile justice system lacks the resources to address the problems occasioned by poverty and fractured family structures. This results in extraordinarily high incarceration rates for minority youth because there are no alternative dispositions available.\textsuperscript{19}

F15. The recent trend to use incarceration, particularly mandatory minimum sentences, as a response to drug offenses has had a profound effect on minority communities, placing substantial portions of the male minority population under the control of the criminal justice system.\textsuperscript{20}

F16. Although many people who are brought under the control of the criminal justice system are in need of drug treatment, very few facilities provide such treatment.\textsuperscript{21}

\section*{Task Force Recommendations}

\subsection*{Reexamine Bail Policies}

R12. The ABA should reexamine its Standards for Criminal Justice relating to Release on Monetary Conditions\textsuperscript{22} to determine what changes are necessary to eliminate racial and ethnic bias.

\subsection*{Reexamine Change of Venue Rules}

R13. The ABA should reexamine its rules on change of venue (e.g., Standards for Criminal Justice relating to Change of Venue and Continuance\textsuperscript{23}), to determine what changes are necessary to eliminate racial and ethnic bias.
REEXAMINE SENTENCING PROVISIONS

R14. As part of the ongoing update of the ABA Standards for Criminal Justice relating to Sentencing Alternatives and Procedures, the ABA should reexamine the imposition of sentences, especially with regard to use of the death penalty and mandatory minimums, to determine what changes are necessary to eliminate racial and ethnic bias.

REEXAMINE JURY POOL SELECTION POLICIES

R15. The ABA should examine Association policy on jury pool diversity and make any recommendations necessary to better insure proportionate minority representation.

STUDY JUVENILE JUSTICE SYSTEM FUNDING

R16. The ABA should significantly expand its efforts which address the underfunding of the juvenile justice system because such underfunding forces judges to incarcerate minority juvenile offenders because there are no community-based alternatives available.

STUDY PRISONER DRUG TREATMENT PROGRAMS

R17. The ABA should continue its support for full funding of drug treatment facilities in prisons and the community.

DISCUSSION

REEXAMINE BAIL POLICIES

The bias studies surveyed noted the widespread belief that racial and ethnic bias can enter bail setting policies and practices. A survey of one state's judges and high level court administrators found that this group tended to believe that judges' bail decisions were at least sometimes influenced by judges' racial attitudes. This result, and a survey showing that an overwhelming proportion of offenders in that state's jails with bails of less than $500 were African American, led that state's bias task force to find that bail setting decisions disproportionately impacted minority defendants. This is so, as other reports noted, because minorities generally earn less than others and because bail considerations may be based on the value systems of judges who lack cross-cultural awareness of the familial and cultural realities of minority lifestyles. The Task Force therefore recommends that appropriate ABA entity(ies) reexamine ABA Release on Monetary Conditions policies and recommend any changes that may better eliminate any racial and ethnic bias in the setting of monetary release conditions.
REEXAMINE CHANGE OF VENUE RULES

The verdicts in *People v. Powell*, ("the Rodney King case"), rendered by a jury drawn from a community vastly different in racial and ethnic composition from that in which the alleged crimes occurred, pushed change of venue issues to the forefront of the debate on racial and ethnic bias in the justice system. The ABA Standards for Criminal Justice do not address problems which can arise when transferring a case from one venue to another venue with different demographics. Therefore the Task Force recommends that appropriate ABA entity(ies) should examine Association policy on change of venue (e.g., ABA Standards for Criminal Justice relating to Change of Venue and Continuance) and also should examine federal and state change of venue rules in order to make any recommendations necessary to eliminate racially and ethnically discriminatory results.

REEXAMINE SENTENCING PROVISIONS

The U.S. Supreme Court ruled in *McCleskey v. Kemp*, 481 U.S. 279 (1987), that statistically supported evidence showing that an African American defendant faces a greater chance of being sentenced to death than a Caucasian is not, in itself, sufficient reason to overturn a sentence of death in any particular case. Since the *McCleskey* ruling, the ABA adopted new policies on race and the imposition of the death penalty opposing "discrimination in capital sentencing on the basis of race of either the victim or the defendant." This policy supports "legislation that strives to eliminate racial discrimination in capital sentencing and which provides that a challenge to a death sentence can result in relief in certain instances." But this policy suggested no specific remedial legislation.

Capital punishment is not the only area of racially disparate sentencing outcomes. Bias reports surveyed noted that there is a tendency for minority defendants to be sentenced under the provisions of mandatory sentencing laws more frequently than majority defendants for comparable crimes. A 1991 Special Report of The United States Sentencing Commission found that "[t]he disparate application of mandatory minimum sentences in cases in which available data strongly suggest that [whether] a mandatory minimum is applicable appears to be related to the race of the defendant, where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum. . . ." The ABA has opposed mandatory minimum sentencing provisions for more than 17 years. The findings of the recent bias studies and other reports confirm the soundness of this position.

The Task Force believes that evidence of such unequal application sentencing provisions bears very closely on the ideal of "equal justice." It therefore strongly recommends that appropriate ABA entity(ies) reexamine sentencing provisions, particularly those
concerning the death penalty and mandatory minimums, and make any necessary recommendations to eliminate racially and ethnically discriminatory results.

REEXAMINE JURY POOL SELECTION POLICIES

Racially and ethnically biased exercises of peremptory challenges may deny a defendant the right to a trial before a "jury of one's peers." Underrepresentation of racial and ethnic minorities in jury pools can deny a defendant that right as well. Therefore the Task Force recommends that appropriate ABA entity(ies) examine Association policy on the racial and ethnic representativeness of jury pools and make any recommendations regarding federal and state jury pool policies necessary to eliminate discriminatory impact.

STUDY JUVENILE JUSTICE SYSTEM FUNDING

Bias reports surveyed noted that minority juveniles are incarcerated in proportions far greater than their presence in the population and that this, in part, results from a lack of adequately funded alternative services available to minority children. In its study of the California Juvenile Justice System, the National Council on Crime and Delinquency found that "[a]fter statistical controls are applied for the factors of offense and prior record, African-American over-representation persists in California secure juvenile facilities." In addition to citing poverty, institutional racism, different familial and cultural values, and language barriers as causes of the over-representation of certain minority youth in juvenile facilities, the report noted as follows:

The juvenile justice system lacks the resources needed to respond effectively to delinquency in general and to minority youth problems in particular. Diversion and alternative disposition programs that used to be available have disappeared, leaving juvenile justice decision makers with fewer options and contributing to higher incarceration rates for some minority groups.

The Task Force therefore recommends that appropriate ABA entity(ies) examine the Association's juvenile justice standards and other policies and consider whether additional emphasis needs to be placed on services to juveniles because of the racial and ethnic bias that currently exists.

STUDY PRISONER DRUG TREATMENT PROGRAMS

The number of inmates with drug charges as their most serious offense grew 328% between 1983 and 1989. The number of Caucasian inmates charged with drug offenses grew 137%, the number of African American inmates so charged grew by 467%, and
the number of Hispanic inmates so charged grew by 404% over the same time period.60 A General Accounting Office report found that of the 27,000 federal prison inmates with moderate to serious drug problems, only 364 were receiving intensive residential treatment.61 Another General Accounting Office report found that state prisons can provide drug treatment to only 100,000 inmates.62 These statistics prompt the Task Force to recommend that appropriate ABA entity(ies) review the Association's policies on corrections and consider the importance of providing better drug treatment as a possible means of reducing the minority prison population.

III. CIVIL JUSTICE FINDINGS AND RECOMMENDATIONS

A. THE COURTS

A court system should reflect the racial and ethnic composition of the community it serves. Yet, in many communities minorities are underrepresented in the judiciary and among court personnel. The problem of underrepresentation of minorities is compounded when the court system does not provide cross-cultural training for its employees and otherwise lacks the services needed by minorities, including interpreters and multilingual attorneys. Finally, when court facilities serving minorities are rundown and the courts' dockets are too heavy to provide fair consideration of each case, the promise of "equal justice" cannot be kept.

FINDINGS FROM THE BIAS REPORTS

F17. Minorities are underrepresented on the state and federal benches.63

F18. Minorities are underrepresented among court employees.64

F19. Minority court personnel generally are concentrated in less prestigious and less rewarding positions and have fewer prospects for promotion or advancement.65

F20. Court personnel do not receive adequate cross-cultural training to enable them to effectively serve their diverse constituencies.66

F21. Minorities lack equal access to courts because linguistic, information, and cultural barriers combine to make the justice system hostile and forbidding.67
F22. Court facilities serving minorities may be rundown and inadequate to handle heavy dockets. The "assembly line justice" which results fuels the perception that minority disputes are not worthy of the time and attention of the justice system."

TASK FORCE RECOMMENDATIONS

CALL FOR A BIAS STUDY OF THE FEDERAL COURTS

R18. The ABA should continue its efforts in support of legislation mandating a comprehensive study of bias in the federal justice system, including the selection process for the federal bench. The ABA should also consider recommending that Congress require the Administrative Office of the United States Courts to develop and maintain a data-collection system on racial and ethnic bias in the federal courts, which system could also serve as a model for adoption by state courts.

CALL FOR STATE BIAS STUDIES

R19. The ABA should call for official racial and ethnic bias studies in those states lacking thorough, comprehensive studies. The ABA should support H.R. 3371 (102nd Congress, omnibus anti-crime legislation), which calls for Congress to fund such studies, and should support adequate funding for the National Consortium of Task Forces and Commissions on Racial/Ethnic Bias in the Courts to coordinate these efforts.

INCREASE THE NUMBER OF MINORITY JUDGES

R20. The ABA should support innovative programs that address underrepresentation of minorities in the judiciary.

INCREASE THE NUMBER OF MINORITY COURT EMPLOYEES

R21. The ABA should support innovative programs that correct minority underrepresentation in the judicial workforce, particularly in positions of authority.

PROMOTE CULTURAL SENSITIVITY TRAINING IN THE COURTS

R22. The ABA should recommend that all federal and state judiciaries and justice agencies provide cross-cultural training for their employees, including members of the judiciary.
PROMOTE TRANSLATION STANDARDS

R23. The ABA should develop and promote standards for translation services in all criminal and civil cases.

DEVELOP MODEL DATA-COLLECTION STANDARDS

R24. The ABA should develop model data-collection standards for all justice agencies that will insure the continuing ability to measure the racial and ethnic demographics of justice system agencies.

PROMOTE COURT OMBUDSMAN PROGRAMS

R25. The ABA should promote ombudsman programs to effectively address complaints of racial and ethnic bias within federal and state courts.

PROMOTE COURT OBSERVER PROGRAMS

R26. The ABA should consider promoting court observer programs to monitor judicial performance and the quality of justice.

DISCUSSION

CALL FOR A BIAS STUDY OF THE FEDERAL COURTS

The Federal Courts Study Committee, after a fifteen month study of the federal judicial system, concluded that a formal analysis of bias in the federal justice system was not necessary. Based on the conclusions of state bias studies, the Committee assumed that bias also existed in the federal system, but asserted its "confidence that the quality of the federal bench and the nature of federal law keep such problems to a minimum." This conclusion ignores statistics suggesting the existence of significant racial and ethnic bias within the federal justice system. For example, minority appointments to the federal bench declined significantly during the Reagan and Bush administrations. Twenty-one percent of President Carter's appointments to the federal bench were minorities, while less than 8% of President Reagan's and President Bush's appointments to the federal judiciary were minorities.93 Minorities now hold only 9.82%94 of District, Circuit, and Supreme Court judgeships, but comprise 24.0%95 of the nation's population. Another example of racial and ethnic bias in the federal justice system is a 1989 federal court ruling that the FBI's promotion practices discriminated against Hispanic American agents.96 Similarly, in 1992, the FBI and the DEA settled similar discrimination suits filed by minority agents.97 In light of these statistics on minority underrepresentation in the federal judiciary and the
outcomes of these discrimination suits, the Task Force recommends that the ABA strengthen its efforts in support of legislation mandating a comprehensive study of bias in the federal justice system, including the selection process for the federal bench. The ABA should also consider recommending that Congress mandate a model program to maintain data relevant to racial and ethnic bias in the federal justice system.

CALL FOR STATE BIAS STUDIES

Less than one-quarter of the states have recently studied racial and ethnic bias in their justice systems. Without such studies, states will not be able to address problems of racial and ethnic bias in their justice systems effectively. Therefore the Task Force recommends that the ABA support federal legislation, including H.R. 1371 (102nd Congress, omnibus anti-crime legislation), which calls for Congress to fund such studies. The Task Force also recommends that the ABA support adequate funding for the National Consortium of Task Forces and Commissions on Racial/Ethnic Bias in the Courts to coordinate these efforts.

INCREASE THE NUMBER OF MINORITY JUDGES

According to U.S. Department of Justice and U.S. Census Bureau statistics, African Americans, Hispanic Americans and Asian Pacific Americans are represented on the federal bench by less than half the number of federal judges that their prevalence in the total U.S. population would warrant. State bias studies noted similar underrepresentation of minorities on their respective state judiciaries. A justice system which is not a racial and ethnic cross-section of the community it serves fosters the perception of racial and ethnic discrimination. Innovative programs are required to mentor qualified minority lawyers into judgeships, the symbols of power in the justice system. A demographically balanced judiciary creates a healthier environment for all litigants. The Task Force believes the ABA should respond to the underrepresentation of minority jurists on federal and state benches by identifying innovative programs that will stimulate more proportionate representation of minorities in the judiciary.

INCREASE THE NUMBER OF MINORITY COURT EMPLOYEES

Several state bias reports found that minorities were underrepresented among court employees, including professional and administrative posts which determine court policies. Proportionate minority representation in positions of authority within the court system provides a natural check against overt discrimination and helps ensure that legal procedures and services will be culturally sensitive to the needs of minority litigants. The Task Force therefore recommends that the ABA
identify and support innovative programs that correct minority underrepresentation among court employees.

PROMOTE CULTURAL SENSITIVITY TRAINING IN THE COURTS

The near unanimous recommendation of the state bias studies surveyed was for development and implementation of cultural sensitivity training for court personnel and the judiciary. The Task Force therefore recommends that appropriate ABA entity(ies) consider requesting that all federal and state judiciaries and justice agencies provide cross-cultural training for their employees, including members of the judiciary.

PROMOTE TRANSLATION STANDARDS

Several state bias reports surveyed found many states' translation services were deficient both in number and quality of their personnel. One report found that deficient numbers of bilingual court staff in effect denied non-English speakers access to a number of probationary and treatment programs for which they might have qualified. People who cannot speak English fluently may be effectively denied access to the justice system. The Task Force therefore recommends that the ABA develop and promote standards for translation services in all criminal and civil cases, including calling on the states to enact court interpreter provisions similar to 28 U.S.C. § 1827.

DEVELOP MODEL DATA-COLLECTION STANDARDS

Some state bias reports surveyed recommended additional survey work to determine if there is a disparity in the outcomes of civil cases and damage awards based on race because very little research exists on racially disparate outcomes in civil cases. The need for racial and ethnic data-collection is further exemplified in other ways. Several state bias studies often relied on data collected by their own researchers because their respective states had not collected such data on a consistent basis. Therefore the Task Force recommends that the ABA develop model data collection standards for all agencies within the justice system that will insure the continuing ability to measure racial and ethnic demographics for all justice system agencies.

PROMOTE COURT OMBUDSMAN PROGRAMS

Some state bias survey reports noted that the courts lacked a designated person to receive and investigate complaints of ethnic and racial bias within the courts. Such programs could provide a means to consider grievances related to racial and ethnic bias and also alert responsible officials to such problems in their organization. The Task Force therefore recommends that the ABA consider sponsoring ombudsman programs that can effectively
address complaints of racial and ethnic bias within federal and state courts.

PROMOTE COURT OBSERVER PROGRAMS

Some state bias studies noted the poor physical condition of courts located in communities with higher concentrations of minorities in contrast to the well maintained court facilities of communities with higher concentrations of Caucasian litigants. One study went on to note that in courts where minorities predominate (e.g., criminal, family, and housing courts), the heavy volume of cases resulted in many cases being tried in less than five minutes. Other problems, including overt racial and ethnic bias, may exist but are not assessable by reviewing statistics. Therefore, to identify and reform these conditions, the Task Force recommends that the ABA consider sponsoring court observer programs to monitor judicial performance and the quality of justice in areas serving minorities.

B. THE LEGAL PROFESSION

The findings of racial and ethnic bias within the civil justice system are in part based upon unequal access to legal representation, remedies, and services. Underrepresentation of minorities in the ranks of the bar adds to the perception that the justice system is not equally accessible to all.

FINDINGS FROM THE BIAS REPORTS

F23. Minorities lack equal access to legal representation due to economic restraints on their ability to retain attorneys or otherwise obtain representation.

F24. Minorities are underrepresented among attorneys.

TASK FORCE RECOMMENDATIONS

REDUCE THE BARRIERS TO LEGAL REPRESENTATION FOR LOW-INCOME GROUPS

R27. The ABA should consider sponsoring bold, innovative measures to make low cost assistance available, including specialists in areas of the law where the poor lack the resources to obtain traditional advice and representation.

R28. The ABA should continue to sponsor innovative pro bono publico programs that make lawyers more widely available to members of minority communities.
R29. The ABA should continue to support full funding for the Legal Services Corporation.

ESTABLISH THE ABA AS A MODEL OF RACIAL AND ETHNIC DIVERSITY

R30. The ABA should undertake a comprehensive study of racial and ethnic diversity within its membership and workforce. It should maintain data adequate to allow for meaningful oversight in the future to help insure proportionate representation throughout its organization.

INCREASE THE NUMBER OF MINORITY LAWYERS

R31. The ABA should support and publicize innovative programs to eliminate underrepresentation of minorities in the legal profession, particularly among positions of prestige and power in government, law firms, and bar associations. The ABA should encourage government and business leaders to retain law firms and corporations that have demonstrated a commitment to hiring, retaining and promoting minority attorneys.

DEVELOP CROSS-CULTURAL AWARENESS PROGRAMS

R32. The ABA should create and provide, in consultation with minority bar associations, model cross-cultural training programs for ABA leaders and encourage use of such programs by state and local bars.

R33. The ABA, in consultation with minority bar associations, should develop cross-cultural awareness programs related to the law and sponsor their use across the country in local communities and school systems.

R34. The ABA, in consultation with minority bar associations, should develop cross-cultural awareness programs which include outreach components which send people, including members of minority bar associations, into local communities to provide information about the justice system and how it may be used.

RACIAL AND ETHNIC BIAS ISSUES AND LAW SCHOOLS

R35. The ABA should recommend that law schools maintain current information about the racial and ethnic composition of their workforces and student bodies and that they institute programs necessary to address any underrepresentation.
R36. The ABA should recommend that law schools consider the inclusion of cross-cultural sensitivity training in professional responsibility courses and in all other courses where it is relevant to the subject material.

R37. The ABA should recommend that law schools consider the adoption of comprehensive public service programs, including clinical programs, to expose their students to the problems of providing justice in a diverse society.

RACIAL AND ETHNIC BIAS AND PROFESSIONAL ETHICS

R38. The ABA should consider making intentional ethnic or racial discrimination by an attorney in the practice of his or her profession a violation of the Model Rules of Professional Conduct.

DISCUSSION

REDUCE THE BARRIERS TO LEGAL REPRESENTATION FOR LOW-INCOME GROUPS

Legal rights are meaningless without access to legal remedies. The ABA should promote innovative alternatives to costly, traditional legal representation that will increase access to legal remedies. College educated, non-attorney, legal specialists may be able to fill the gap between costly representation and no representation at all by providing expertise in areas of law, (e.g. family law, immigration, contracts, and wills), which are important to lower income groups. Such specialists may expand the access of those currently denied representation because of their low income.

The ABA should also consider innovative, comprehensive pro bono publico programs" and continue its strong support of the Legal Services Corporation.

ESTABLISH THE ABA AS A MODEL OF RACIAL AND ETHNIC DIVERSITY

The ABA serves as a national voice of the legal profession and should be a role model with respect to proportional minority representation. The ABA can best stimulate efforts to increase the number of minority attorneys in law firms and government agencies by demonstrating its own ability to achieve racial and ethnic diversity. It should start by conducting an in-depth study of its own membership and workforce.

INCREASE THE NUMBER OF MINORITY LAWYERS

In addition, the ABA should identify and promote programs which best increase minority representation in large law firms,
corporate legal departments, and government agencies. The ABA should also continue to support mentoring programs to increase minority access to legal careers, thereby helping to create new minority leaders in the community. Finally, the ABA should sponsor appropriate programs designed to increase the number of minority law students who successfully complete their studies, pass the bar and become practicing lawyers.

DEVELOP CROSS-CULTURAL AWARENESS PROGRAMS

Cross-cultural awareness has significance in several contexts. As part of the goal of becoming a model of racial and ethnic diversity, the Task Force recommends that the ABA should develop cross-cultural training programs for its own use and for the use of state bar associations. In response to some bias reports' findings that minority group members do not understand our justice system well, the Task Force recommends that appropriate ABA entities, working with members of minority bar associations, develop programs to provide communities with information about the justice system and how it may be used. In the same spirit, the Task Force also recommends that the ABA develop and sponsor cross-cultural awareness programs related to legal issues for use in school systems.

RACIAL AND ETHNIC BIAS ISSUES AND LAW SCHOOLS

Racial and ethnic bias is a serious problem and will be so for many years to come. Law schools must better enable future lawyers to deal with these problems. The inclusion of racial and ethnic bias issues into regular and clinical curricula may be an important part of this effort. Just as the ABA, in order to become a model of racial and ethnic diversity, should maintain data on the racial and ethnic composition of its workforce, so too should law schools.

RACIAL AND ETHNIC BIAS AND PROFESSIONAL CONDUCT

No lawyer should intentionally engage in racially or ethnically discriminatory acts in the practice of his or her profession. The Task Force recommends that the ABA consider amending its Model Rules of Professional Conduct to make acts of racial and ethnic discrimination while acting in one's professional capacity sanctionable and unprofessional conduct.
ENDNOTES

1. For a full listing of state bias reports surveyed and a brief summary of each, see Appendix A.

2. ABA policies related to racial and ethnic bias are collected at the end of this report in Appendix B and many can also be found in A.B.A., BLUEPRINT FOR IMPROVING THE CIVIL JUSTICE SYSTEM (1992).

3. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 225 (1968) [hereinafter THE KERNER COMMISSION].

4. NAT'L COMM'N ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 4-5 (1991) [hereinafter CHILDREN AND FAMILIES].

5. See, e.g., IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES, 47 (1989) ("... minority youth now comprise approximately 50 percent of all the juveniles confined in publicly operated juvenile detention and correctional facilities in the United States. Black males are overrepresented by almost 180 percent in comparison to their numbers in the general population, and Hispanic males are overrepresented by 86 percent. In contrast, 65 percent of the youth showing up in private youth detention and correctional facilities are white. This suggests that a racially segregated system of youth corrections may be evolving in the United States, a system in which black, hispanic and native American youth are ending up in public institutions and whites are in private facilities.").

6. CHILDREN AND FAMILIES, supra note 4, at 73; THE RES. AND POL'Y COMMITTEE OF THE COMMITTEE FOR ECON. DEV., CHILDREN IN NEED: INVESTMENT STRATEGIES FOR THE EDUCATIONALLY DISADVANTAGED 6 (1987) ("An early and sustained intervention in the lives of disadvantaged children, both in school and out, is our only hope for breaking the cycle of disaffection and despair.").

7. Implementation of policy is the responsibility of the many entities that are part of or are sponsored by the ABA. The Association has a strong lobbying presence before Congress and actively works to promote its federal legislative policy. ABA Sections sponsor reports and studies relevant to ABA policy and seek its implementation in the courts and legislatures. The ABA supports a Commission on Opportunities for Minorities in the Profession and a Commission on Women in the Profession. The Criminal Justice Section established a Committee on Race and Racism in the Criminal Justice System in 1990. The ABA continuously brings these issues before the American people through literature and audio-visual presentations.
APPENDIX A

SUMMARY OF RECENT REPORTS ON BIAS IN THE JUSTICE SYSTEM
## APPENDIX A

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Achieving Justice in a Diverse America

Report of the American Bar Association
Task Force on Minorities and the Justice System

APPENDIX A

I. INTRODUCTION

The state bias studies and additional sources listed below aided the Task Force's investigation of racial and ethnic bias in the justice system. We do not purport to verify or adopt their Studies here, but, rather, report the major findings made by each which, in turn, guided our recommendations.

A. STATE BIAS REPORTS

More than ten states have conducted or are now conducting studies of racial and ethnic bias in their justice systems. The studies are briefly identified here and discussed in more detail in the pages that follow:

1. NEW JERSEY

In January of 1986 the New Jersey Supreme Court created the Task Force on Minority Concerns. The Task Force conducted meetings with representatives and administrators of public and private agencies and associations, telephone surveys, a questionnaire survey administered to all Superior Court judges and top-level court managers, and focus groups. It also heard expert testimony. The Task Force submitted an interim report (NJ) in August of 1989. The Task Force found:

With the expert assistance of two eminent social scientists from two major universities, we have reached a conclusion that racial and ethnic bias in fact exist against persons of color.

We have found no substantive evidence to date that any judicial officer or employee has been consciously biased. However, the Task Force recognizes that this malady is oftentimes subtle or totally unrecognized. It is apparent from other state task forces, which have followed our lead in this endeavor, that our findings
are not unique.¹

2. MICHIGAN

In September of 1987, the Michigan Supreme Court established the Task Force on Racial/Ethnic Issues in the Courts. The Task Force studied whether citizens believe that bias exists in the court system and where bias (if any) actually operates. The Task Force gathered information from public hearings, legal research, transcripts and judicial opinions, analyses of court demographics, and existing published and unpublished surveys. The Task Force issued its final report (MI) in December of 1989. The Task Force found:

Throughout the state considerable testimony was received regarding language issues, the availability of interpreters, the confusion and frustration of individuals who cannot speak or understand English, and those who speak non-standard English.

Testimony was also received about the difficulties faced by minority judges and attorneys. Inadequate representation on the bench and in the bar served as the foundation for stories of discrimination, tokenism, isolation and scapegoating. Concerns about the appointment process, access to business, and unfair media attention to predominantly minority courts were expressed. Some testimony indicated that many minority attorneys were unwilling to testify due to concern about possible retribution and negative reaction.²

3. WASHINGTON

In June of 1988, pursuant to legislative order, the Washington Supreme Court appointed the Minority and Justice Task Force to study the treatment of minorities in the state court system, to recommend reforms, and to provide an education program for the judiciary. The Task Force conducted ten empirical studies and heard testimony at public forums over a period of 30 months. The Task Force submitted its final report (WA) in December of 1990. The Task Force concluded:

During the past two years the Washington State Minority and Justice Task Force has served as a clearinghouse


for concerns regarding the treatment of racial and ethnic minorities in our state court system. After conducting public forums throughout the state and several empirical studies to identify the possible existence of bias, the Task Force concludes that minority bias does exist to some extent in this state's court system. Infrequently, it is manifested by the overt and subtle acts or decision of persons within the court system. It is also occasionally manifested unconsciously by individuals within the court system. While their intent may be to be fair and unbiased, their actions or decision may still, unfortunately, result in disparate treatment, which may or may not be apparent. It appears that institutionalized bias (resulting from the system's formal and informal practices, policies and procedures) often goes unchecked.³

4. NEW YORK

In January of 1988, the New York Court of Appeals created the New York State Judicial Commission on Minorities. The Commission held public and private hearings and meetings, conducted several surveys, and reviewed independent research. The Commission released its five volume final report (NY1, NY2, NY4) in April of 1991. The Commission concluded:

The system serving most minorities does not conform to our society's notion of individualized justice, of hallowed halls, of impartial, reflective decision making. Many minorities in our courts receive "basement justice" in every sense of the phrase -- from where their courts are located (for example, the Housing Court in the Bronx) to the "assembly line" way in which their cases are decided. Similarly, many minorities who work in the courts, or in the legal profession, are relegated to the bottom tiers.

This "double-tiered justice" lies at the core of the perception that many minorities have of our state courts. The history of their interaction with the courts has been marked by swings of grand hope and deep despair. The hope which followed the Kerner Commission report was that at last the courts would treat minorities the way they treat Whites -- as individuals. But this hope has not been realized. Nearly a quarter of a century later, inequality, disparate treatment and

³. ST. OF WASH. MINORITY AND JUST. TASK FORCE, FINAL REPORT 197 (Dec. 1990) [Hereinafter WA].
injustice remain hallmarks of our state justice system. 4

5. FLORIDA

In December of 1989, the Florida Supreme Court created the Racial and Ethnic Bias Study Commission. The Commission heard testimony and conducted empirical studies to determine if racial or ethnic considerations adversely affect the dispensation of justice to minorities. The Commission released volumes in December of 1990 (FL1) and December of 1991 (FL2) documenting practices and policies that result in the unequal administration of justice for racial and ethnic minorities in Florida. The Commission concluded:

The current [justice] system --characterized by an abundance of minorities in positions of vulnerability and a dearth of minorities in positions of responsibility-- disadvantages the individual and society as a whole. Both fairness to the individual and economic self-interest of the State mandate the need for fundamental reforms to eradicate the stain of racism from the garments of justice in Florida. 5

6. WASHINGTON, D.C.

In 1990, The Joint Committee on Judicial Administration in the District of Columbia established the Task Force on Racial and Ethnic Bias in the Courts. The Task Force was charged with the responsibility of examining the court system to identify racial or ethnic bias and to propose methods for reducing and ultimately eliminating any bias found. The Task Force relied on public forums, surveys, interviews, examinations of court records, focus groups and a joint conference. The Task Force issued its final report (DC) in May of 1992. The Task Force found:

According to one witness at the Conference workshop, the Court's need for bilingual staff is increasing at a faster rate than the rate at which employees with such qualifications are being hired. As an example, another witness, who works for the Courts, testified that caseload requests for interpreters have increased from 20 per month five years ago to 300-350 requests per month, and while her office is able to provide services during court proceedings, it cannot at the same time

4. 1 N.Y. ST. JUD. COMM’N ON MINORITIES, REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES 1 (Apr. 1991)[hereinafter NY1].

5. 2 FLA. SUP. CT. RACIAL AND ETHNIC BIAS STUDY COMM’N, WHERE THE INJURED FLY FOR JUSTICE viii (Dec. 1991)[hereinafter FL2].
meet the need for bilingual information and other services for non-English speaking users of the Courts.  

7. HAWAII

In 1989, the Hawaii State Supreme Court created the Permanent Committee on Gender and Other Fairness to continue the work of an earlier, ad hoc committee. The Committee works to implement the recommendations resulting from the findings of a 1987 questionnaire survey of licensed attorneys. The Committee issued a status report (HI) in May of 1992.

8. ARIZONA

In June of 1990, the Arizona Supreme Court established the Arizona Supreme Court Commission on Minorities in the Judiciary to make recommendations on concrete ways to increase racial and ethnic diversity within the Arizona judiciary. The Commission released statistical data (AZ) in May of 1992.

9. MASSACHUSETTS

In April of 1990, the Supreme Judicial Court of Massachusetts created the Commission to Study Racial and Ethnic Bias in the Courts. The Commission was mandated to examine where and to what extent racial and ethnic bias exists within the state judicial system. The Task Force Collected data from mid 1990 to the Fall of 1991 through focus groups, public hearings, task force meetings, questionnaire surveys, and courtroom observation and interviews. The Commission published a draft progress report (MA) in May of 1992, but has not yet released a final report.

10. IOWA

In December of 1990, the Supreme Court of Iowa created the Equality in the Courts Task Force. The Task Force was charged with examining whether racial or ethnic bias exists in the legal profession and in processes under the control or influence of the judiciary. The Task Force will employ both qualitative and quantitative methods of research including hearings, surveys, interviews, examinations of court records, case studies, and independently submitted information. The Task Force released an

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interim report\(^8\) (IA), but has yet to make any formal findings.

B. OTHER BIAS STUDIES

Following the Rodney King incident, the City of Los Angeles commissioned an independent study on its police department. Because the various state bias studies did not focus on the police, we referred extensively to this report.

1. LOS ANGELES

In April of 1991, the Independent Commission on the Los Angeles Police Department\(^9\) began its investigation of excessive use of force in the department. The Commission published its final report in July of 1991. The Commission found:

The problem of excessive force is aggravated by racism and bias within the LAPD. That nexus is sharply illustrated by the results of a survey recently taken by the LAPD of the attitudes of its sworn officers. The survey of 960 officers found that approximately one-quarter (24.5\%) of 650 officers responding agreed that 'racial bias (prejudice) on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and community.' More than one-quarter (27.6\%) agreed that 'an officer's prejudice towards the suspect's race may lead to the use of excessive force.'\(^{10}\)

C. OTHER SOURCES REFERRED TO

1. MARGARET C. MORROW, BOARD OF GOVERNORS, STATE BAR OF CALIFORNIA, MEMORANDUM ON "CHANGE OF VENUE IN CRIMINAL CASES" (June 1992). The memorandum summarizes existing California law and procedure governing change of venue and proposed changes that are now before the California legislature.

2. J. Austin, Ph.D, J. Dimas, & D. Steinhart, Ph.d., The Over-Representation of Minority Youth in the California Juvenile Justice System, CAL. ST. ADVISORY GROUP ON JUV. JUST. & THE

\(^8\) Sup. Ct. of IOWA EQUALITY IN THE CTS. TASK FORCE, INTERIM REPORT (May 1992)[hereinafter IA].

\(^9\) The Independent Commission is also known as the Christopher Commission, after its Chairman.

\(^{10}\) THE IND'T COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 6 (July 1991)[hereinafter LA].
CAL. OFF. OF CRIM. JUST. PLAN. (Apr. 1992). The report chronicles the disparity between majority and minority incarcerated in the California juvenile justice system.\(^\text{1} \)  


4. FEDERAL COURTS STUDY COMMITTEE, REPORT ON THE FEDERAL COURTS (Apr. 1990). The Committee studied the problems of congestion, delay, expense, and expansion of the federal courts. It made findings and recommendations on dealing with bias in the federal justice system.\(^\text{3} \)  

5. UNITED STATES GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (Feb. 1990). From a synthesis of 28 prior published and unpublished studies, the report concluded that the race of the victim influenced the decision to seek and impose the death penalty.  

6. Marc Mauer, Young Black Men and the Criminal Justice System: A Growing National Problem THE SENTENCING PROJECT (Feb. 1990). The Sentencing Project is a national, non-profit organization which promotes sentencing reforms and alternative sentencing programs. This report identifies the impact of the criminal justice system on minority communities.\(^\text{4} \)  


\(^{1}\) J. Austin, Ph.D, J. Dimas, & D. Steinhart, Ph.d, The Over-Representation of Minority Youth in the California Juvenile Justice System, CAL. ST. ADVISORY GROUP ON JUV. JUST. & THE CAL. OFF. OF CRIM. JUST. PLAN. (1992)[hereinafter Minority Youth].  


\(^{3}\) FED. CTS. STUDY COMMITTEE, REPORT ON THE FEDERAL COURTS (1990)[hereinafter FEDERAL COURTS STUDY].  

largest proportion of its population behind bars.¹⁵

8. Robert L. Spangenberg, We Are Still Not Defending the Poor Properly, 4:3 A.B.A. CRIM. JUST. SEC. 10 (Fall 1989). The article asserts that despite modest efforts by individual states to increase indigent defense services, dramatic increases in drug offenses and "get tough" law enforcement policies have created a crisis in the provision of indigent defense services.

9. ABA CRIM. JUST. SEC. SPECIAL COMMITTEE ON CRIM. JUST. IN A FREE SOC'Y, CRIMINAL JUSTICE IN CRISIS (Nov. 1988). The committee held public hearings, reviewed criminal justice studies, and conducted a national telephone survey to study the impact of constitutional rights on crime and crime control in the United States.¹⁶

10. NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS AND GOALS, POLICE (1973). This report is part of a broad study criminal justice study funded by the Law Enforcement Assistance Administration. It makes findings and offers recommendations to improve the ability of the police to prevent and reduce crime at the State and local levels.¹⁷

11. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT ON CIVIL DISORDERS (Nov. 1972)(also known as the Kerner Commission Report). The Kerner Commission investigated the causes of the 1967 riots in Newark and Detroit. It concluded that the nation is moving toward two separate and unequal societies, one white and one black.

12. NAT'L COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY (Dec. 1969). The Violence Commission undertook an in-depth and well-funded study of the causes of violence in American cities. The Commission's report makes a series of recommendations to combat the cause of violence and unrest in America, including unequal treatment in our courts.


¹⁶ A.B.A. CRIM. JUST. SEC. SPECIAL COMMITTEE ON CRIM. JUST. IN A FREE SOC'Y, CRIMINAL JUSTICE IN CRISIS (1988)[hereinafter CRIMINAL JUSTICE IN CRISIS].

¹⁷ NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS & GOALS, POLICE (1973)[hereinafter POLICE].
The Commission details the obstacles inhibiting low income claimants from obtaining access to legal remedies.18

II. CRIMINAL JUSTICE

A. THE POLICE19

Bias influences both a police department's internal operation and community relations.

Minorities are better represented on police forces now than a decade ago but appear to be concentrated in lower ranks. Overt discrimination against minority officers is still discernible in rank and file interactions and is largely tolerated by supervisory personnel.

There is a greater incidence of violent police confrontation in minority communities. A lack of cross-cultural training and understanding has led to poor police-community relations in minority neighborhoods.

Complaint and grievance procedures allow some officers to discourage complaint filing and thus prevent removal or demotion of racially and ethnically biased police officers.

1. FINDINGS OF BIAS

a. HIRING, PROMOTION, AND TREATMENT OF POLICE PERSONNEL

The Christopher Commission's Report on the Los Angeles Police Department found that the "vast majority of minority officers are concentrated in the entry level police officer ranks in the Department. More than 80% of African American, Latino, and Asian officers hold the rank of Police Officer I-III."20 Florida's

18. NAT'L COMM'N ON THE CAUSES & PREVENTION OF VIOLENCE TASK FORCE ON L. & L. ENFORCEMENT, LAW AND ORDER RECONSIDERED (1969)[hereinafter LAW AND ORDER].

19. Of the recent bias studies we reviewed, only the Christopher Commission study extensively discussed police departments. See LA, supra note 10. To avoid relying too heavily on the study of one police department, we reviewed two earlier national reports on police departments. See POLICE, supra note 17; and LAW AND ORDER, supra note 18. These earlier reports found similar problems and made similar recommendations to those of the Christopher Commission.

20. LA, supra note 10, at 7.
report found that "[m]inority police officers tend to receive fewer promotions than similarly-situated whites" and "are disproportionately underrepresented in the management and supervisory ranks" of Florida police agencies. The Commission also found that minority "officers are still too frequently subjected to racist slurs and comments and to discriminatory treatment within the Department. While the relative number of officers who openly make racially derogatory comments . . . is small, their attitudes and behavior have a large impact because of the failure of supervisors to enforce vigorously and consistently the Department's policies against racism. That failure conveys to minority and non-minority officers alike the message that such conduct is in practice condoned by the Department."  

b. PUBLIC INTERACTION

1) OVERT RACIAL DISCRIMINATION

The Christopher Commission found, on reviewing LAPD telecommunications transmissions, an "appreciable number of disturbing and recurrent racial remarks." Florida's report found that "African Americans and Hispanic individuals are stopped and detained more frequently than a non-minority would be under similar circumstances and are treated with less respect and more unnecessary force than are their white counterparts."  

2) CONFRONTATIONAL POLICING TACTICS

The Christopher Commission found that "[w]itness after witness testified to unnecessarily aggressive confrontations between LAPD officers and citizens, particularly members of minority communities."  

3) COMPLAINT AND GRIEVANCE MECHANISMS

The Christopher Commission found that the Los Angeles Police Department's current "complaint system is skewed against complainants. People who wish to file complaints face significant hurdles. Some intake officers actively discourage filing by being  

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21. 1 FLA. SUP. CT. RACIAL AND ETHNIC BIAS STUDY COMM'N, WHERE THE INJURED FLY FOR JUSTICE 6 (Dec. 1990)[hereinafter FL1].
22.  LA, supra note 10, at 7.
23.  LA, supra note 10, at 6.
24.  FL1, supra note 21, at 6.
25.  LA, supra note 10, at 8.
uncooperative or requiring long waits before completing a complaint form,"

"Some commanding officers . . . evaluate witnesses' credibility in inconsistent and biased ways that improperly favor the officer." Such indifferent treatment of complainants is aided by "the officers' unwritten code of silence: an officer does not provide adverse information against a fellow officer."

4) CROSS-CULTURAL INSENSITIVITY

Florida's report noted that "[r]elationships between police officers and minorities are adversely affected by cultural differences and misunderstandings."

2. RECOMMENDATIONS

a. HIRING AND PROMOTION

Florida's report suggested that "[l]aw enforcement organizations should adopt plans to recruit, hire, retain, and promote minorities," and that State and local law enforcement agencies should "develop a minority career development program."

b. SCREENING OFFICER CANDIDATES

The Christopher Commission noted that "[e]xperts agree that the best predictor of future behavior is previous behavior. Thus, . . . background investigations [of officer candidates] offer the best hope of screening out violence-prone applicants. Unfortunately, the background investigators are overworked and inadequately trained."

c. TRAINING

The Christopher Commission suggested that "[i]n each phase of [officer] training[,] additional emphasis is needed on the use of verbal skills rather than physical force to control potentially
volatile situations and on the development of human relationship skills."³³ In addition, "supervisors must understand their role to include training and counseling officers to cope with the problems policing can entail, so that they may be dealt with before an officer loses control or requires disciplinary action."³⁴ To that end, Field Training Officer candidates "should be required to pass written and oral tests designed to measure communications skills, teaching aptitude, and knowledge of Departmental policies regarding the appropriate use of force, cultural sensitivity, community relations, and nondiscrimination."³⁵

d. CULTURAL AWARENESS

The Christopher Commission report added that greater cultural awareness training should be provided to officers, including bilingual training.³⁶

e. COMMUNITY INVOLVEMENT

The Christopher Commission believed community policing concepts, "if successfully implemented, to offer the prospect of effective crime prevention and substantially improved community relations," but the LAPD "must recognize the merits of community involvement in matters that affect local neighborhoods, develop programs to gain an adequate understanding of what is important to particular communities, and learn to manage departmental affairs in ways that are consistent with the community views expressed. Above all, the Department must understand that it is accountable to all segments of the community."³⁷

f. COMPLAINT MECHANISMS

The Christopher Commission recommended creation of an "Office of the Inspector General within the Police Commission with responsibility to oversee the disciplinary process and to participate in the adjudication and punishment of the most serious cases. The Police Commission should be responsible for overseeing the complaint intake process. . . . All complaints relating to excessive force (including improper tactics) should be investigated by (the Internal Affairs Division), rather than

³³ LA, supra note 10, at 10.
³⁴ LA, supra note 10, at 10.
³⁵ LA, supra note 10, at 11.
³⁶ LA, supra note 10, at 10-11.
³⁷ LA, supra note 10, at 9.
the involved officer's division, and [the complaint process] should be subject to periodic audits by the Inspector General." 38

B. PROSECUTION AND DEFENSE SERVICES

Ethnic and racial biases have been statistically shown to affect the charging decisions of prosecutors in capital murder cases, particularly when the victim is Caucasian and the defendant is from a minority. Evidence of abuse of prosecutorial discretion in the charging and plea bargaining stages is less conclusive in cases not involving capital murder, but sufficient anecdotal evidence exists to suggest that such bias exists.

Though prohibited as a matter of law, lawyers appear to use peremptory challenges to remove minorities from juries where they perceive that racial or ethnic bias may be an issue in the case.

1. FINDINGS OF BIAS

a. CHARGING

Michigan's report found that "[m]any complaints and requests for reform were directly related to the exercise of discretion within the Prosecutor's office, and the influence of racially and ethnically biased attitudes on those exercises. To the extent that minorities are involved in policy decisions, and leadership positions in these offices, there may be a heightened awareness of the consequences of bias and an increased sensitivity to the treatment of minorities." 39 Michigan's prosecutors' offices "are overwhelmingly populated by white males. . . . Consequently, [discretion in charging decisions] resides almost exclusively in the hands of white males. The criteria for the exercise of prosecutorial discretion in charging decisions are often informal and unwritten." 40 Michigan's report cited anecdotal evidence suggesting that "racial and ethnic minorities were routinely over-charged to extract pleas. . . . Racial and ethnic minorities in the metropolitan area surrounding Detroit are repeatedly [and] routinely charged with felonies in . . . cases where majority persons are brought to court on misdemeanor

38. LA, supra note 10, at 14.
39. MI, supra note 2, at 58.
40. MI, supra note 2, at 51, citing a survey conducted by the Michigan Task Force. Florida's report noted that with the discretion to invoke habitual offender statutes resting with state attorneys, a danger of unfair or biased application against racial and ethnic minorities is created. FL2, supra note 5, at 38.
New York's report cited a study which noted that "where the victim of the crime is white and the perpetrator is black, . . . prosecutors are more likely to upgrade the charges brought." New York's report cited two studies which both found that the likelihood that a defendant will be charged with capital murder and sentenced to death is greater when the defendant is African American, and even greater when the victim is Caucasian. New York's report therefore concluded that there is a race-based disparity in the conviction rate and the sentence type between minority and non-minority defendants.

b. PLEA BARGAINING

New York's report found that "[r]esearch regarding the negotiation and charge reduction phases of the criminal court process suggests that racial bias may exist in this area, but the evidence of discrimination is not obvious." It added that "the relationship between this and other stages of the criminal justice process lends credence to the perception that plea bargaining does result in disparate treatment. The inability to make bail, for example, may force defendants to accept otherwise undesired plea offers." Florida's report concurred:
"Defendants unable to make bail are more likely to plead guilty

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31. MI, supra note 2, at 51.


The General Office of Accounting reported that 82% of studies collected noted that the race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty and that the findings was consistent across data sets, states, data collection methods and methods of analysis. GEN. ACCT. OFF., DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 6 (1990)[hereinafter GAO REPORT].

34. NY2, supra note 42, at 176.

35. NY2, supra not 42, at 157.

36. NY1, supra note 4, at 40.
and accept a plea bargain . . . solely to get out of jail."

c. PEREMPTORY CHALLENGES

Florida's report found that because the "strength of the jury system lies in the accurate representation of the diverse community in which the defendant stands accused, it is imperative that juries are a composite of the community." New York's report found that the "underrepresentation of minorities on juries increases the likelihood that minority litigants will perceive that they have not had the opportunity to be heard by an impartial tribunal.""49

Despite case law prohibiting racially discriminatory use of peremptory challenges,"50 the voir dire process still allows for the possibility of racial bias by a prosecutor to taint the jury selection process through pretextual explanations. For instance, prosecutors can issue a peremptory challenge to prevent minorities from serving as jurors in a trial of a minority by expressing some non-racial ground."51 New York's report recognized a perception "among some litigators that the exercise of race-based peremptory challenges in criminal cases continues to be used to exclude minorities from juries."52

47. FL2, supra note 5, at 25.

48. FL2, supra note 5, at 28. The same argument applies to peremptory challenges of minorities in civil cases as well.

49. NY2, supra note 42, at 222; Accord MI, supra note 2, at 46. New York's report also noted that the presence and participation of a member of a minority on a jury may change the way the jury discusses and resolves the case. NY1, supra note 4, at 57; NY2, supra note 42, at 243.


51. NY1, supra note 4, at 56. See Hernandez v. New York, 111 S. Ct. 1859 (1991) (upholding, for Batson purposes, peremptory challenges to bilingual Hispanic venirepersons on the basis that the prosecutor was not certain that they could accept the translator as the final arbiter on the meaning of testimony given in Spanish).

52. NY1, supra note 4, at 59.
d. DEFENSE SERVICES

The ABA found that criminal defendants received defense representation "too often inadequate because of underfunded and overburdened public defender offices."53

2. RECOMMENDATIONS

a. CHARGING AND PLEA BARGAINING

Although the studies are less than conclusive concerning the extent to which bias affects charging and plea bargaining decisions, New York's report cited studies which found that bias appears to play some role in the decision to seek the death penalty.54 One state, Massachusetts, recommended that a more thorough study be made of bias in the prosecutorial exercise of discretion."

b. PEREMPTORY CHALLENGES

New York's report suggested that judges "exercise heightened scrutiny to ensure that peremptory challenges are not used improperly in the voir dire process."55 Michigan's report suggested that "trial judges be encouraged to implement the Batson standard on their own initiative in any jury selection process in which peremptory challenges appear to be racially motivated."56 New York's report further recommended that "[j]udges should be discouraged from engaging in group questioning of potential jurors regarding their racial feelings and [that] rather than doing it themselves, they should be encouraged to permit counsel to conduct this questioning."57

C. THE COURTS

The criminal justice system raises special concerns because a statistically disproportionate number of minorities are prosecuted under our criminal laws. While this is an inevitable

54. NY2, supra note 42, at 166, citing Baldus, supra note 42, at 661-703, and Radelet, supra note 42, at 918-927.
55. MA, supra note 7, at 5.
56. NY1, supra note 4, at 59.
57. MI, supra note 2, at 49.
58. NY1, supra note 4, at 59.
result of the fact that minorities are disproportionately poor, there is significant evidence that the criminal justice system systematically discriminates against minorities.

Money bail, particularly low money bail, disproportionately impacts on poor minorities.

The use of mandatory minimum sentences has a disproportionate effect on minority communities; the sentences that judges or juries impose, particularly the death penalty, may be influenced by racial and ethnic bias.

Criminal law enforcement has had a profound effect on minority communities. The system has failed to provide adequate treatment and halfway house alternatives to incarceration, placing substantial portions of the minority population behind bars without any hope of rehabilitation.

1. FINDINGS OF BIAS

a. BAIL

New York's report cited a study that found that race affected both the decision to release the defendant on bail, and the amount of bail set.60 New Jersey's report found that judges and court administrators tended to believe that judges' bail decisions were at least sometimes influenced by a judge's racial

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   Minority inmates surveyed in New Jersey perceived that Caucasians received lower bails than minorities. NJ, supra note 1, at 24. Florida's report cited a study finding that minority offenders were less likely than Caucasians, other factors being equal, to have bail set below scheduled boundaries. FL2, supra note 5, at 23, citing M.J. Lynch & E.B. Patterson, Race and Gender Bias in Bail Amount Decisions: Some Evidence from Florida 23 (1990)[hereinafter Lynch & Patterson].
attitudes.\textsuperscript{51} Also, most court administrators agreed that bail is often set much higher when a defendant is from out-of-town (especially when an urban minority defendant is charged in a more affluent suburban community).\textsuperscript{52} That the overwhelming portion of offenders in New Jersey jails with bails of less than $500 are African American supports the finding that bail setting decisions disproportionately work against the interests of minority defendants.\textsuperscript{53} Florida’s report cited one study which found that the inability to make bail works not only against the minority defendant’s immediate freedom interest but also against the probability of his acquittal.\textsuperscript{54}

New York’s report, citing anecdotal evidence, found that the setting of bail is determined by variables heavily affected by race, including employment history, income source, family stability, marital status, community ties, educational background, prior contact with the court, issuance of prior bench warrants, and a defendant’s conviction record.\textsuperscript{55} Minorities are disadvantaged at the bail stage of the criminal process because minorities generally earn less than Caucasians\textsuperscript{66} and because bail considerations may be based on the value systems of judges who lack cross-cultural sensitivity to the familial and cultural realities of minority lifestyles.\textsuperscript{57} The State of Washington’s report cautioned:

\begin{quotation}
It is important to stress that this bias [in setting bail] is not necessarily attributed to racial or ethnic prejudices of individual actors in the criminal justice system. Rather, it appears to be a result of a systemic, institutionalized bias which negatively impacts minorities in the courts through their lack of financial resources. This means, of course, that the disparities in the treatment of minorities in
\end{quotation}

\textsuperscript{51} NJ, \textit{supra} note 1, at 41 & Tables 8, 9, & 10.

\textsuperscript{52} NJ, \textit{supra} note 1, at 37.

\textsuperscript{53} NJ, \textit{supra} note 1, at 43 & Table 11.

\textsuperscript{54} FL2, \textit{supra} note 5, at 24-25, citing LYNCH & PATTERSON, \textit{supra} note 60, at 23.

\textsuperscript{55} NY1, \textit{supra} note 4, at 39.

\textsuperscript{56} NY2, \textit{supra} note 42, at 152, citing GAINES, \textit{TABULATIONS FROM THE CURRENT POPULATION SURVEY FOR NEW YORK STATE} Tables 1-12 (1988).

\textsuperscript{57} FL2, \textit{supra} note 5, at 27; NY2, \textit{supra} note 42, at 176.
Washington courts may be difficult to remedy.\textsuperscript{65}

Regarding alternatives to bail, Michigan's report found anecdotal evidence that minorities were less likely to be granted release on recognizance bonds,\textsuperscript{66} however, New York's report cited a study which found that the race of the defendant did not have an effect on the decision to release on recognizance.\textsuperscript{70}

b. SENTENCING

1) RATES OF INCARCERATION

a) DISPROPORTIONATE INCARCERATION OF AFRICAN AMERICAN MALES

The U.S. prison population doubled in the years between 1980 and 1990,\textsuperscript{71} while the rate of incarceration of young African American males increased at an even faster pace. Nationally, one of every four young African American males is incarcerated, on probation or on parole.\textsuperscript{71} African American males are incarcerated in the U.S. at a rate four times that of African males in South Africa.\textsuperscript{71} The incarceration rate for Hispanic-

\textsuperscript{65} WA, \textit{supra} note 3, at 161.

\textsuperscript{66} MI, \textit{supra} note 2, at 36, citing its own survey of judges and lawyers on perceptions of differential treatment of minority defendants.

\textsuperscript{70} NY2, \textit{supra} note 42, at 142, citing Nagel, \textit{supra} note 60, at . Despite the absence of any racial bias observed in the decision to release a defendant on his own recognizance, race was found to affect both the decision to release the defendant on bail, and the amount of bail offered.

\textsuperscript{71} Mauer, \textit{Americans Behind Bars}, \textit{supra} note 15, at 6.

\textsuperscript{72} NY2, \textit{supra} note 42, at 139, citing Mauer, \textit{Young Black Men}, \textit{supra} note 13, at 8, which found that 23\% of African American men in the age group 20-29 are either in prison or jail, or on probation or parole. According to the State of Iowa's preliminary report, 22\% of Iowa's prison population is African American though only 1.6\% of Iowa's population is African American. IA, \textit{supra} note 8, at 12.

\textsuperscript{73} Mauer, \textit{Americans Behind Bars}, \textit{supra} note 15, at 3. The U.S. incarceration rate for African American males is 3,109 per 100,000 versus South Africa's incarceration rate of 729 per 100,000.
American males is 10.4%. While the incarceration rates for women are much lower than for their male counterparts, the racial disparities in women's rates persist. The incarceration rates for African American, Hispanic-American and Caucasian females, respectively, are 2.7%, 1.8% and 1.0%.

b) IMPOSITION OF FINE VERSUS JAIL

Florida's report found that the institutional policies and practices of the criminal justice system tend to treat minorities more harshly than their Caucasian, English-speaking counterparts. One preliminary sentencing study cited by New York's report consistently found that, for similar misdemeanor cases, Caucasian defendants were typically fined while African American and Hispanic American defendants were typically jailed. The finding was state-wide and not found to be a function of income. Another study cited by New York's report found that race had "a negligible effect on decisions to incarcerate in New York City, but a substantial effect on suburban and 'upstate' jurisdictions."

c) DRUG OFFENSES

According to one sentencing study, enforcement of drug laws disproportionately targets inner-city drug-users, resulting in an increasing number of prisoners and an ever larger share of African American male inmates. In 1986, drug offenders in Florida accounted for 22.9% of all that state's prison admissions; by 1990-91, the percentage rose to 32.9%. In 1995, drug offenders will account for 49.9% of all Florida's prison admissions.

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74. Mauer, Young Black Men, supra note 14, at 3.
75. Mauer, Young Black Men, supra note 14, at 3.
76. FL2, supra note 5, at 5.
admissions.81

2) LENGTH OF INCARCERATION

Washington's report found that "little disparity existed between the sentences received by minorities and non-minorities under determinate sentencing," but that "there was [a] significant disparity between minorities and non-minorities in certain exceptional sentencing cases--the first offender waiver and special sexual offender sentencing alternative[s]."82 New Jersey's report found that in the sentencing of minorities and non-minorities "[e]vidence supporting a hypothesis of discrimination is mixed and results vary by the locale of decisions in the criminal justice system and by the jurisdiction studied."83 New York's report cited a study which found a similar regional effect: "although statewide figures did not show a significant difference in the treatment of white and minority felony defendants with prior criminal records, this difference did exist in certain counties."84

3) TYPES OF PUNISHMENT

a) MANDATORY MINIMUMS

Florida's report cited a federal study which found that whether the mandatory sentencing "minimum is applicable appears to be related to the race of the defendant" and that "whites are more likely than non-whites to be sentenced below the applicable


82. WA, supra note 3, at 144, citing SENTENCING GUIDELINES COMMISSION data. A Minnesota court recently struck down on equal protection grounds a state law which called for longer sentences for "crack cocaine" versus powder-form cocaine use. The court found that because the majority (92%) of those charged with "crack cocaine" use were African American and the majority (85%) of those charged with powder-form cocaine use were Caucasian, the statute disproportionately and adversely affected African Americans, denying them equal protection. State v. Russell, No. 89-067067 (Hennepin County, Minn. Dec. 27, 1990), aff'd, 477 N.W.2d 886 (Minn. 1992).


84. NY2, supra note 42, at 163, citing NELSON, supra note 79, at __.
mandatory minimum." Also, mandatory minimum sentences, especially for drug offenders, preclude the trial judge "from considering any factors which may warrant imposing a sentence below the statutory minimum, even if the judge concludes that an alternative, non-incarcерative approach would better serve the goals of punishment or rehabilitation."  

b) CAPITAL PUNISHMENT

More than three-quarters of the studies assembled by the General Accounting Office on the imposition of the death penalty found that an African American defendant was more likely to receive a death sentence than a Caucasian defendant. The likelihood that a defendant will be charged with capital murder and sentenced to death is greater when the defendant is African American, and even greater when the victim is Caucasian. One Florida researcher found that "other things being equal, the odds of a death sentence for those who kill White victims are approximately 3.4 times higher than for those who kill African Americans."

The U.S. Supreme Court ruled that statistical evidence showing that the death penalty is disproportionately applied against minority defendants does not, in and of itself, invalidate a particular death sentence."


The federal study added: "This differential application [of sentencing rules] on the basis of race . . . reflects the very kind of disparity and discrimination the Sentencing Reform Act . . . was designed to reduce." FL2, supra note 5, at 37.

86. FL2, supra note 5, at 35.

87. GAO REPORT, supra note 43, at 6.

88. NY2, supra note 42, at 166, citing Baldus, supra note 43, at 661-703, and Radelet, supra note 43, at 918-27. The General Accounting Office reported that 82% of studies collected noted that the race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty and that the finding was consistent across data sets, states, data collection methods and methods of analysis. GAO REPORT, supra note 43, at 5.

89. FL2, supra note 5, at 46, citing empirical study of Dr. M. Radelet, University of Florida.

c. CROSS-RACIAL WITNESS IDENTIFICATION

New Jersey's report found that judges and court administrators tended to believe that the chances of a jury wrongfully convicting a defendant are higher for a minority defendant than for a Caucasian defendant.\(^9\) New Jersey found that people are better at remembering and identifying members of their ethnic group.\(^9\) Cross-racial identifications were found to be up to 50% less reliable than same-race identifications.\(^9\) New Jersey's report concluded: "If eyewitness misidentifications are more likely to occur in cross-racial circumstances, the lack of safeguards in the New Jersey criminal justice system could be construed as de facto discrimination."\(^9\)

2. RECOMMENDATIONS

a. BAIL

Florida's report suggested that "[i]n view of their importance, bail and pre-trial release decisions should be made to be uniform and fair."\(^5\) Pre-trial release practices should be reformed to "enhance the judge's ability to make more equitable decisions as to pre-trial release" and to "reduce the extent to which pre-trial detention is a function of income."\(^5\) New Jersey's report suggested that courts "adopt a bail policy whose release criteria focus upon factors relating demonstrably to the defendant's likelihood to appear in court. The bail policy should take [into consideration that] . . . economic criteria should be given minimum weight, in that those factors generally impact unfairly upon racial minorities [and that] verification of significant background factors which insure likelihood to appear should be weighted appropriately to avoid racial disparities caused by

\(^9\) NJ, supra note 1, at 60 & Table 13.

\(^9\) NJ, supra note 1, at 60, citing a symposium on witness identification given by Professors R. Buckhout and T. Luce (March 18, 1988).

\(^9\) NJ, supra note 1, at 60.

\(^9\) NJ, supra note 1, at 59.

\(^5\) FL2, supra note 5, at 26. New Jersey's report suggested a "major overhaul," of the state's bail rules based on the presumption that all individuals are release-worthy. NJ, supra note 1, at 36 & 50. Massachusetts' report called for a study of bail practices with respect to minority accused. MA, supra note 7, at 5.

\(^5\) FL2, supra note 5, at 26.
[the] inferior socioeconomic status of minorities. [Additionally, judges should take into account the] defendant's likelihood to make a cash bail." \(^97\)

Florida's report recommended that judges be educated as to cultural differences so as to avoid the use of stereotypes regarding minority lifestyles when making bail decisions. \(^98\) It further called for developing a pre-trial services program to provide the presiding judge with "comprehensive, accurate, and culturally sensitive information regarding the defendant's background which is pertinent to the release decision." \(^99\) New Jersey's report recommended that courts adopt bail policies that include "non-monetary release options to minimize the setting of bail unless probability of nonappearance has been established by the court." \(^100\) Florida's report called for comprehensive information about pre-trial release opportunities within each circuit to be disseminated to all judges presiding over criminal cases to ensure full utilization of release options by eligible defendants. \(^101\)

b. SENTENCING

1) RECOMMENDED STUDIES

New Jersey's report noted that the available studies on sentencing outcomes lacked sufficient rigor to permit firm conclusions. \(^102\) The report recommended that the state expand upon empirical analyses of recent New Jersey samples of bail and sentencing outcomes and identify areas in "the Judiciary where there are thought to be indications or perceptions of bias." \(^103\)

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\(^97\) NJ, supra note 1, at 40.

\(^98\) FL2, supra note 5, at 27. New York's report suggested that "[j]udges should review their bail and sentencing decisions to ensure that they are fair and not influenced by racial or ethnic stereotypes." NY2, supra note 41, at 176.

\(^99\) FL2, supra note 5, at 26 (emphasis in original).

\(^100\) NJ, supra note 1, at 46. New Jersey's report suggested that such options include "[s]upervised pretrial release with conditions" and "release to a community agency or family member willing to assume responsibility for the defendant's appearance in court." Id.

FL2, supra note 5, at 28.

NJ, supra note 1, at 73.

NJ, supra note 1, at 74.
Iowa's report similarly recommended that the sentencing of criminal defendants be analyzed with data gathered "case-by-case" to determine the extent to which bias contributes to decision making, and that multivariate statistical techniques be employed to sort out the effect of race, gender and a number of legally relevant factors.\textsuperscript{104}

New York's report suggested that "[s]entencing statistics concerning the race of victim, defendant, and complainant should be maintained along with case outcomes and [that such statistics] should be published."\textsuperscript{105} The report also suggested developing "[j]udicial training programs . . . [which] include a review of alternatives to incarceration, especially regarding circumstances common among minority defendants."\textsuperscript{106}

2) TREATMENT FOR DRUG OFFENDERS

Florida's report suggested that "the screening/selection criteria used to assess eligibility for [drug] treatment programs should neither by intent nor effect disadvantage minority offenders."\textsuperscript{107} The report also noted that "[t]he educational, vocational, and drug-treatment needs of Florida's offenders, particularly drug offenders, are simply not being met by the current correctional approach which places its funding priorities on merely warehousing these offenders in the ever-expanding slew of prisons."\textsuperscript{108} "The long-term protection of the public's safety is being short-changed by the exclusive focus on incarcerating large numbers of individuals, particularly drug- and non-violent offenders. Treatment programs and the provision of education and employment are less costly and--in the long run--more effective than the current approach of incarcerative warehousing."\textsuperscript{109}

c. CROSS-RACIAL WITNESS IDENTIFICATION

New Jersey's report recommended that because "no data on the frequency or accuracy of eyewitness identification in courtroom hearings are available in New Jersey or other states," the New Jersey Supreme Court "should authorize a statewide study to determine the prevalence and frequency of cross-racial eyewitness

\begin{enumerate}
\item IA, supra note 8, at 13.
\item NY1, supra note 4, at 43.
\item NY2, supra note 42, at 176.
\item FL2, supra note 5, at 42.
\item FL2, supra note 5, at 33-34.
\item FL2, supra note 5, at 40.
\end{enumerate}
identifications in criminal investigations and indictable cases . . . [and] encourage more frequent utilization of expert witnesses on eyewitness identifications in trials."[10] Court rules authorizing such use should be formulated.[11]

New Jersey's report also recommended that "the judiciary . . . develop cautionary instructions and/or model jury charges . . . for use by judges to educate juries on the inherent unreliability of eyewitness identification generally and particularly respecting cross-racial identifications."[12] The report recommended that defense counsel "be present during all lineup procedures,"[13] and that criminal justice practitioners "attend an educational seminar on eyewitness identification."[14]

D. UNEQUAL JUVENILE JUSTICE

The juvenile justice system lacks the resources to address the problems occasioned by poverty and fractured family structures. Systemic bias results in extraordinarily high incarceration rates for minority youth.

1. FINDINGS OF BIAS

Florida's report found that "[t]he differential treatment of minority juveniles results, at least in part, from racial and ethnic bias on the part of enough individual police officers, intake workers, prosecutors, and judges, to make the system operate as if it intended to discriminate against minorities. It results from bias in institutional policies, structures, and practices."[15] As evidence of such a systemic bias, 27% percent of New Jersey's juveniles, 43% of its juveniles charged with delinquency, and 80% of its incarcerated juveniles are from minority groups.[16]

New Jersey's report cited a commission on juvenile delinquency which continued in the same vein: "Rather than reflecting

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110. NJ, supra note 1, at 63.
111. NJ, supra note 1, at 63.
112. NJ, supra note 1, at 62.
113. NJ, supra note 1, at 64.
114. NJ, supra note 1, at 62.
115. FL1, supra note 21, at 8.
116. NJ, supra note 1, at 82.
discriminatory intent, evidence suggests that the rate of minority [juvenile] incarceration is due to other indirect factors that often unwittingly impact minorities."[117] Rural counties, which are most likely to have predominately Caucasian populations, are hesitant to commit juveniles to correctional institutions. In the inner city, with a predominant minority population, judges have fewer options to use in lieu of correctional placement. For example, minority juveniles handled by the juvenile justice system are less likely to have intact families. Yet family structure influences decisions to remove juveniles from their homes. Also, the families of minority youth are less likely to be able to afford, or have insurance to cover, the costs of private services. Assignment of the youth to state facilities may be the presiding judge's only option. [118]

2. RECOMMENDATIONS

New Jersey's report recommended that the courts "undertake a public information campaign to provide information to . . . minority communities on the operation of the juvenile justice system and the steps that are being taken to eliminate unfairness to minority juveniles."[119] The same report also suggested that, as the question of family stability plays such an important role in juvenile delinquency cases, judges should consider actual family circumstances when making dispositional and other decisions in delinquency cases. [120]

III. CIVIL JUSTICE

A. THE COURTS

Minorities are underrepresented among judges, attorneys, jurors and court employees. This underrepresentation undermines the belief within minority communities that a minority litigant will receive "equal justice."[121] It also reduces the likelihood that


[118] NJ, supra note 1, at 85, citing JUVENILE JUSTICE, supra note 117, at 51.

[119] NJ, supra note 1, at 95.

[120] NJ, supra note 1, at 86.

[121] New Jersey concluded that a "minority litigant's expectation of obtaining justice from the system corresponds closely with the visible presence of some minority persons in the
predominantly Caucasian judges, attorneys, court employees and jurors will be appropriately sensitive to the rights of the minorities to equal access to justice.\textsuperscript{122}

Those minority persons who do enter the justice system workforce tend to remain concentrated in less prestigious or rewarding positions. This deprives minority communities of effective role models\textsuperscript{123} and leaders who can have an impact on public policy.\textsuperscript{124} Because of their diminished opportunities for advancement, minority lawyers and court employees tend to be functionally isolated within the justice system and the profession.

1. FINDINGS OF BIAS

a. JUDGES

1) MINORITY UNDERREPRESENTATION IN THE FEDERAL JUDICIARY

African Americans comprise 5.39\% of the District Court bench, 4.46\% of the Circuit Court bench,\textsuperscript{125} and 12.1\% of the total U.S. system." NJ, supra note 1, at 105. Accord NY1, supra note 4, at 19; NY2, supra note 42, at 45. Florida's report noted that "by threatening the withdrawal of the tacit 'consent of the governed,' the underrepresentation of minorities in positions of responsibility in the judicial system weakens the very system of ordered liberty upon which our democracy is based." FL2, supra note 5, at viii.

\textsuperscript{122} Washington observed: "Minorities in the judiciary perform important symbolic functions that cannot be performed by non-minorities no matter how sensitive or understanding they may be." WA, supra note 3, at 79.

\textsuperscript{123} Florida observed that a minority group member who becomes a judge or lawyer creates a source of inspiration, pulling other minorities through the educational system to the ranks of the professions. FL2, supra note 5, at 5.

\textsuperscript{124} Florida's report concluded that as long as minorities are underrepresented among the ranks of attorneys, especially in large, influential law firms, minorities will have less say in public policy matters including those policies which impact upon the disproportionality of incarcerated minorities. FL2, supra note 5, at 5.

\textsuperscript{125} Alliance for Just., Women and Minorities in the Federal Judiciary (1992) [hereinafter Federal Judiciary].
Hispanic Americans comprise 4.00% of the District Court bench, 2.23% of the Circuit Court bench, and 9.0% of the total U.S. population. Asian Pacific Americans comprise 0.62% of the District Court bench, 0.55% of the Circuit Court bench, and 2.9% of the total U.S. population. By the end of 1991, President Bush had nominated 6 African Americans and 4 Hispanic Americans for federal judgeships, 4.8% and 3.2%, respectively, of the total of 126 nominations. President Bush has yet not nominated an Asian Pacific American to a seat on the federal judiciary.

2) MINORITY UNDERREPRESENTATION IN STATE JUDICIARIES

Washington, Iowa, and Michigan's reports found that their state benches lacked minority representation in proportion to their minority populations. New Jersey's report found that minority judges were rarely given prestigious assignments, such as to the appellate courts, and were completely unrepresented on the New Jersey Supreme Court.

b. NON-JUDICIAL COURT PERSONNEL

Washington's report found that to the "extent that minorities are represented in non-judicial positions, they are heavily


127. FEDERAL JUDICIARY, supra note 125, at 1.

128. 1990 U.S. CENSUS, supra note 126, at __.

129. FEDERAL JUSTICE, supra note 125, at 1.

130. 1990 U.S. CENSUS, supra note 126, at __.

131. JUDICIAL SELECTION PROJECT, supra note 12, at 4-5.

132. JUDICIAL SELECTION PROJECT, supra note 12, at 4-5.

133. WA, supra note 3, at 9 & 13; IA, supra note 8, at 9; MI, supra note 2, at 67. Only 2.4% of state judges are Latino. Dolores Antencio, It's Time to do Justice by Placing More Latinos on Federal Bench, DENVER BUS. J., May 29, 1992, at 15.

134. NJ, supra note 1, at 123. Washington's report noted that minority judicial aspirants are excluded to the extent that an informal patronage system controls the selection of pro tempore judges. WA, supra note 3, at 96.
concentrated in the office/clerical category." The Michigan's report found that minorities were underrepresented in professional and administrative positions which exercise authority and determine or recommend policy.

**c. JURY POOL DIVERSITY**

New York's report found that "[m]inorities are significantly underrepresented on many juries in the court system." Such "underrepresentation of minorities on juries increases the likelihood that minority litigants will perceive that they have not had the opportunity to be heard by an impartial tribunal. The relative absence of minority jurors, especially in areas with significant minority populations, fuels the perception that there is racial bias at work throughout the jury selection process." Anecdotal evidence suggests the existence of bias in the outcome of civil cases for minority litigants. Extensive and reliable data on this topic does not exist, as current court record keeping procedures do not include the race or ethnicity of the litigants.

New York's report found that "little research has been conducted on racially disparate case outcomes in the civil context." As "civil awards are usually based on the loss of income suffered by the injured party[, and b]ecause minority litigants, on average, earn less than their white counterparts, they tend to lose less, monetarily, when injured."

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135. WA, supra note 3, at 103. The District of Columbia Report noted that 94.7% of administrative/clerical hires in 1990 were not Caucasian. DC, supra note 6, at 18.

136. MI, supra note 2, at 47.

137. NY1, supra note 4, at 58; NY2, supra note 42, at 250.

138. NY2, supra note 42, at 222.

139. NY2, supra note 42, at 179.

140. NY1, supra note 4, at 45. Washington's report cited a study of landlord-tenant cases that went to trial which found no significant difference between the minority and non-minority case outcomes. However, those cases that did not go to trial showed differences in the manner in which those cases were resolved. WA, supra note 3, at 142.
d. MINORITY ACCESS TO LEGAL SERVICES

1) PSYCHOLOGICAL BARRIER

New York's report found distrust of the court system more prevalent among racial minorities.\textsuperscript{141} Such distrust rests not only on overt forms of racial bias in courts, but on subtler forms as well, including addressing minorities by their first name\textsuperscript{142} and disrespect shown to minority litigants and witnesses by court personnel in both their verbal and non-verbal behaviors.\textsuperscript{143}

2) LINGUISTIC BARRIER

Language barriers can render a criminal defendant virtually absent from his own trial.\textsuperscript{144} Civil minority litigants faced with a language barrier may not be able to understand court proceedings and so do not seek intervention of the courts to redress grievances.\textsuperscript{145} Most studies found existing translation services were deficient in both number and quality of personnel.\textsuperscript{146} The District of Columbia's report found that deficient numbers of bilingual court staff in effect denied non-English speakers access to a number of probationary and treatment programs for which they might have qualified.\textsuperscript{147}

3) INFORMATIONAL BARRIER

New Jersey's report found that the average minority group member does not understand the court system as a whole.\textsuperscript{148} New York's report noted that some ethnic groups prefer "to settle legal

\textsuperscript{141} NY2, \textit{supra} note 42, at 6-24 & 99.

\textsuperscript{142} NY1, \textit{supra} note 4, at 22-23; NY2, \textit{supra} note 42, at 61.

\textsuperscript{143} MI, \textit{supra} note 2, at 24; NY1, \textit{supra} note 4, at 22-23 & 27. Michigan found that Caucasian male judges and lawyers did not perceive such behaviors. MI, \textit{supra} note 2, at 24.


\textsuperscript{145} MI, \textit{supra} note 2, at 47; NY1, \textit{supra} note 4, at 26.

\textsuperscript{146} DC, \textit{supra} note 6, at 18 & 26; MI, \textit{supra} note 2, at 44 & 47; FL2, \textit{supra} note 5, at viii-ix; NY1, \textit{supra} note 4, at 51; NY2, \textit{supra} note 42, at 220.

\textsuperscript{147} DC, \textit{supra} note 6, at 19.

\textsuperscript{148} NJ, \textit{supra} note 1, at 94.
disputes through informal mediation and community groups" rather than through the judicial system.\textsuperscript{149} Minorities' fears of involvement with the courts are compounded by the lack of readily available information on the system. New York's report found that there was no "readily available information about the court system [making] it difficult for all users of the court system to negotiate the system."\textsuperscript{150}

e. COURT FACILITIES & OVERCROWDED DOCKETS

Court facilities that serve minorities are often rundown and inadequate to deal with heavy dockets. The resulting "assembly line justice" fuels the perception that minority disputes are not worthy of the time and attention of the justice system.

1) PHYSICAL PLANT

Not only do inadequate facilities contribute to the perception of unequal justice by minority litigants, but they must also necessarily influence the attitudes of court personnel, including judges, regarding the importance of the judicial process. New York and New Jersey's reports noted the poor physical condition of certain courts located in communities with higher concentrations of minorities, as opposed to the well-maintained court facilities of communities with high concentrations of Caucasian litigants.\textsuperscript{151}

2) OVERCROWDED DOCKETS

New York's report found that "[t]he accelerated processing of matters in [the Criminal, Family and Housing Courts where] . . . minorities predominate as litigants, due to the heavy volume of cases, fuels the perception that the judicial system places a heavy value on administration of cases rather than on the dispensation of justice."\textsuperscript{152} "The confidence of minority litigants in the court system is undermined by the speed with which their cases are frequently decided, a phenomenon known as

\begin{itemize}
\item \textsuperscript{149} NY1, \textit{supra} note 4, at 26-27.
\item \textsuperscript{150} NY2, \textit{supra} note 42, at 99.
\item \textsuperscript{151} NY1, \textit{supra} note 4, at 12-17; NY2, \textit{supra} note 42, at 99; NJ, \textit{supra} note 1, at 93. The New York study also noted that inadequate space in some courts interfered with the ability of defendants to confer with their lawyers. Accord NJ, \textit{supra} note 1, at 93.
\item \textsuperscript{152} NY2, \textit{supra} note 42, at 48.
\end{itemize}
"assembly line justice". Twenty-three years ago, the National Commission on the Causes and Prevention of Violence found the same problem: "The deliberate pace of the superior courts is not for the poor; their tribunals more reasonably resemble the racetrack on opening day. Cases of enormous importance to the participants are handled in an assembly-line fashion, with less than five minutes to a case."

2. RECOMMENDATIONS

a. INCREASING THE NUMBER OF MINORITY JUDGES

1) FEDERAL JUDICIARY

None of the state reports addresses the issue of the federal judiciary. The Federal Courts Study Committee, which assessed the state of the federal justice system in 1990, recommended that the "President and Senate ... endeavor to select the most qualified candidates for federal judicial office, irrespective of party affiliation, but with due regard for the desirability of reflecting the heterogeneity of the American people."

2) STATE JUDICIARIES

Washington's report commented that the judiciary must be a cross-section of the racial and ethnic make-up of the community to "protect minorities from the possible dominance by the majority." And Michigan's report recommended that "[p]rogress must be continued toward a representational bench throughout the State through the appointive authority, and by the support and recruitment of minority candidates for the bench." Washington State's report recommended that judicial screening organizations "may need to review their methods for recruiting and selecting a cross-section of the minority community [to serve on] screening committees." New York's report added that potential judges "should be examined for racial and ethnic biases and for cross-

154. LAW AND ORDER, supra note 18, at 34.
155. FEDERAL COURTS STUDY, supra note 13, at 167.
156. WA, supra note 3, at 78.
157. MI, supra note 2, at 69.
158. WA, supra note 3, at 97.
cultural sensitivity."\(^{159}\)

b. NON-JUDICIAL COURT PERSONNEL

Massachusetts' report called for study of the clustering of racial groups in certain levels of the court system, as well as disparities in hiring, benefits and promotion.\(^{160}\) Michigan's report called for formal personnel policies and procedures which "include . . . equal opportunity, recruitment, promotional procedures and disciplinary policies."\(^{161}\) Florida and Washington's reports called on courts to identify a wider, more ethnically diverse applicant pool so as to increase the number of minority court personnel.\(^{162}\) New Jersey's report called for monitoring of all court Equal Employment Opportunity plans\(^{163}\) and for such plans to focus on recruiting minorities for the more responsible, visible positions.\(^{164}\)

c. JURY POOL DIVERSITY

New York's report suggested that jury commissioners use "\(^{[a]dditional lists (e.g. utility bills, library address lists, high school graduate lists) . . . to identify potential jurors in order to assure that minorities are included on master juror source lists in proportion to their numbers in the population.\(^{165}\) Also, the jury commissioner should keep data on the current racial composition of the jury pool and take corrective action if a minority's representation falls below its representation in the community as a whole.\(^{166}\) Michigan's report


\(^{160}\) MA, supra note 7, at 5.

\(^{161}\) MI, supra note 2, at 48.

\(^{162}\) FL, supra note 5, at 58-59; WA, supra note 3, at 15-16. Florida's report called on its courts to provide minority women opportunities to participate in state funded educational and training programs to acquire skills necessary to increase their chances of being hired and promoted within the court system. FL, supra note 5, at 59.

\(^{163}\) NJ, supra note 1, at 132.

\(^{164}\) NJ, supra note 1, at 134.

\(^{165}\) NY, supra note 4, at 59. Accord FL, supra note 5, at 29; MI, supra note 2, at 49; WA, supra note 3, at 16.

\(^{166}\) NY, supra note 4, at 59.
suggested that "[j]ury terms of service ... be shortened ... in those courts using a relatively long term, in order to lessen the financial impact on those economically disadvantaged, and to decrease the likelihood that such persons will seek excusal from jury service." \[167\]

New Jersey, New York, Massachusetts and Iowa recommended additional survey work to, in the words of New York's report, "determine whether there is a disparity in civil case outcomes and damage awards based on race, and ... to consider distribution of the study to judges for the monitoring of the consistency of awards between minority and nonminority litigants in civil cases." \[168\]

d. MINORITY ACCESS TO LEGAL SERVICES

A justice system that is equally accessible to all citizens requires significant sensitivity training for judges, lawyers and court personnel; substantial improvement in the availability of translators; information in languages other than English; and accessible remedies. New Jersey's and New York's reports recommended establishing court ombudsman programs to handle complaints about the court or court personnel as a means of making the justice system more accessible and responsive to minorities. \[169\]

1) CULTURAL SENSITIVITY TRAINING

The District of Columbia, Iowa, Massachusetts, Michigan, New York, New Jersey and Washington's reports recommended cultural sensitivity training for judges and court personnel as part of ongoing legal education. \[170\] New Jersey's report recommended the creation of a justice system ombudsperson who would investigate written and oral complaints made against judges and court staff based on allegations of racial bias. \[171\] Michigan's report suggested amending the state's Administrative Procedure Rules to prohibit discriminatory conduct by quasi-judicial officers and to

\[167\] MI, supra note 2, at 49.

\[168\] NY2, supra note 42, at 197. Accord NJ, supra note 1, at 108 & 109; MA, supra note 7, at 5; IA, supra note 8, at 10.

\[169\] NJ, 92; NY1, 28.

\[170\] DC, supra note 6, at 30-31; IA, supra note 8, at 10; MA, supra note 7, at 6; MI, supra note 2, at 37 & 55; NY1, supra note 4, at 27-28; NJ, supra note 1, at 28 & 92; WA supra note 3, at 14 & 19J.

\[171\] NJ, supra note 1, at 92.
provide for appropriate sanctions.\textsuperscript{172}

2) INTERPRETERS

Florida's report found the State's present approach, which leaves to individual judges or administrators the responsibility of eliminating any language barrier, had not met the needs of minority litigants.\textsuperscript{173} Florida and New York's reports suggested statutorily providing for the right to an interpreter.\textsuperscript{174} New York's report noted, however, that without data on the number of cases requiring interpreters, it was impossible to engage in a meaningful planning process or to make substantiated representations regarding the need for additional interpreters. The report therefore recommended that local court administrators maintain data necessary to determine the need for interpretive services.\textsuperscript{175} Florida's report suggested that court interpreters should be made available to any individual for whom English is not his primary language at the first stage of the criminal process and that the courts, by a rule of practice and procedure, be required to determine affirmatively a criminal defendant's need for the services of an interpreter.\textsuperscript{176} New Jersey's report suggested another role for interpreters: to explain court procedures to linguistic minorities.\textsuperscript{177}

e. COURT FACILITIES

New Jersey's report recommended a detailed, formal review of the physical condition of some of its courts, and that, where necessary, county governments upgrade the facilities.\textsuperscript{178} The New York study called for "prompt action to cure the crisis . . . of

\textsuperscript{172} MI, \textit{supra} note 2, at 37.

\textsuperscript{173} FL2, \textit{supra} note 5, at viii-ix & 18.

\textsuperscript{174} FL2, \textit{supra} note 5, at ix & 18; NY2, \textit{supra} note 42, at 221. Florida's report limited the proposed right to criminal defendants; New York's report did not. Both states noted that such a provision was only a first step; ensuring the availability of trained and certified interpreters was the second. New York suggested development of a code of ethics for all persons who interpret court proceedings.

\textsuperscript{175} NY2 \textit{supra} note 42, at 207 & 221.

\textsuperscript{176} FL2, \textit{supra} note 5, at 17.

\textsuperscript{177} NJ, \textit{supra} note 1, at 31.

\textsuperscript{178} NJ, \textit{supra} note 1, at 94.
the 'ghetto courts.'

B. THE LEGAL PROFESSION

1. FINDINGS OF BIAS

   a. MINORITY ACCESS TO REPRESENTATION

A justice system that is equally accessible to all citizens takes account of the diverse culture that the system serves, including: 1) significant sensitivity and cross-cultural training for judges, lawyers and court personnel; 2) adequate pro bono, low-cost, and government funded representation and counseling for those who cannot otherwise afford such services; and 3) multilingual court personnel and informational literature.

Because our justice systems are deficient in virtually all of these categories, minorities are denied equal access to the courts. Psychological, cultural, linguistic, economic, and information barriers combine to make the justice system hostile and forbidding to large portions of the minority population.

New York's report found that African American and Hispanic American litigants' overrepresentation in lower income groups meant that economic barriers affect minority litigants disproportionately. New York and New Jersey's reports found that minorities face some difficulty in getting private attorneys to take their cases. New York's report found that "measures currently in place are inadequate to ensure competent, let alone equal, legal representation for the minority poor." Other economic barriers minority litigants face include: daytime court hours with uncertain schedules (which pose the loss to a litigant of a day's salary or even his job), filing fees, and the cost of obtaining deposition transcripts.

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179. NY1, supra note 4, at 27. New York City "must take prompt action to cure the crisis regarding deteriorated facilities and 'ghetto courts.'"

180. NY1, supra note 4, at 24.

181. NJ, supra note 1, at 106; NY2, supra note 42, at 137.

182. NY2, supra note 42, at 137.

183. NY1, supra note 4, at 24.
b. UNDERREPRESENTATION OF MINORITY ATTORNEYS

1) IN THE PROFESSION, GENERALLY

In 1990, African Americans comprised 3.2% of the legal profession\textsuperscript{184} and 12.1% of the total U.S. population.\textsuperscript{185} Hispanic Americans comprised 2.7% of the legal profession\textsuperscript{186} and 9.0% of the total U.S. population.\textsuperscript{187} Data on attorneys of other races, particularly for Asian Pacific Americans, was not available.

2) MINORITY UNDERREPRESENTATION IN THE PRIVATE SECTOR

New York and Florida's reports, citing separate studies, found that minority attorneys were underrepresented at major law firms and at in-house corporate law departments.\textsuperscript{188} New York's report found that "[m]ost organizations/firms do not make systematic, sustained efforts to recruit minority lawyers."\textsuperscript{189} Michigan, Florida, and Washington found that minority lawyers were concentrated in government and less prestigious private practices.\textsuperscript{190}

3) MINORITY UNDERREPRESENTATION IN HIGHER INCOME LEVELS

Washington's report found that differences in attorneys' incomes are partly the result of differences in years of experience practicing law. Minority attorneys in [Washington's report's]

\textsuperscript{184}. FL2, supra note 5, at 72, citing UNITED STATES BUREAU OF LABOR AND STATISTICS.

\textsuperscript{185}. 1990 U.S. CENSUS, supra note 126, at __.

\textsuperscript{186}. FL2, supra note 5, at 72, citing UNITED STATES BUREAU OF LABOR AND STATISTICS.

\textsuperscript{187}. 1990 U.S. CENSUS, supra note 126, at __.


\textsuperscript{189}. NY4, supra note 159, at 38.

\textsuperscript{190}. MI, supra note 2, at 64, citing A.B.A., MINORITIES IN THE LEGAL PROFESSION: REPORT WITH RECOMMENDATIONS 6 (1986); FL2, supra note 5, at 71; WA supra note 3, at 63 & 65 & 67.
sample, on the average, had practiced law for fewer years than whites. . . . Income differences also occur due to differences in occupations. Minority attorneys . . . were much less likely to be employed in private firms than whites, even though they may have been educated at law schools of equal standing and practiced law for similar periods of time. This contributes directly to income disparities between minority and white attorneys, even though it has no apparent basis in meaningful differences between the qualifications—such as educational attainment—of minority and white attorneys. ¹⁹¹ Washington's report added: "Minority attorneys . . . are much more likely than other groups to hold positions in government which pay significantly lower salaries than private law firms." ¹⁹² It concluded: "There are pronounced differences between minority and white attorneys which are not necessarily attributable to objective qualifications of competence in the practice of law [and t]hat the differences remain unexplained following multivariate analyses of many factors which should adequately explain income and occupational differences is particularly troublesome." ¹⁹³

4) MINORITY UNDERREPRESENTATION IN COURT APPOINTMENTS

Michigan and New Jersey's reports found that minority attorneys received fewer court appointments.¹⁹⁴ Michigan's report observed that minority attorneys do not have access to cases which are more serious, higher in profile or more economically rewarding.¹⁹⁵

¹⁹¹ WA, supra note 3, at 75. New York's report cited a study which found that the "[m]edian income for minority attorneys is well below that of white attorneys. . . . [A] 1988 study by the Bar Association of San Francisco found that income and status differences persist[ed] even when data [were] controlled for rank in law school graduating class and rank of law school." New York's report acknowledged, however, that the racial disparity in income "may be attributable to the concentration of greater proportions of minorities in government agencies or other public service areas of practice." NY4, supra note 159, at 41-42, citing Minority Employment Survey: Final Report, S.F.B.A __ (1988).

¹⁹² WA, supra note 3, at 67.

¹⁹³ WA, supra note 3, at 76.

¹⁹⁴ MI, supra note 2, at 36; NJ, supra note 1, at 120-121.

¹⁹⁵ MI, supra note 2, at 36. The District of Columbia's report noted that while the total percentage of African Americans on D.C. Court committees (32.75%) was twice as high as the percentage of African American lawyers in D.C. (15%), it was still
2. RECOMMENDATIONS

a. INCREASING THE NUMBER OF MINORITY ATTORNEYS

1) LAW SCHOOL INITIATIVES

New York, Florida and New Jersey's reports noted that law schools should be encouraged to admit more minorities.\(^{196}\) New Jersey's report called for conditional scholarship programs to meet minority students' costs in return for their subsequent work as legal aid lawyers or for work in the public sector.\(^{197}\) Florida's report called on law school placement offices to "develop relationships with law firms which have proven records of minority hiring"\(^{198}\) . . . and for law schools [to periodically] review their curricula to include course materials that will engender sensitivity . . . to different cultures,"\(^{199}\) and to develop minority alumni-student mentor programs.\(^{200}\)

2) BAR EXAMINER INITIATIVES

New York's report found that the evidence is mixed as to the existence of any racial bias in the development and grading of bar exams.\(^{201}\) Florida and New York's reports added that bar

\[^{196}\text{NY1, supra note 4, at 65; FL2, supra note 5, at xxv-xxvii; NJ, supra note 1, at 130.}\]
\[^{197}\text{NJ, supra note 1, at 130.}\]
\[^{198}\text{FL2, supra note 5, at xxvii.}\]
\[^{199}\text{FL2, supra note 5, at xxviii.}\]
\[^{200}\text{FL2, supra note 5, at xxvii.}\]
\[^{201}\text{New York's report cited two studies which conflict as to the degree race plays a role in bar exam performance. The NAT'L COMM'N ON TESTING AND PUB. POL'Y, FROM GATEKEEPER TO GATEWAY: TRANSFORMING TESTING IN AMERICA 13 (1990), concluded that "even carefully designed test instruments may include some degree of cultural bias that artificially lowers the tested performance of [African Americans] relative to [Caucasians]." But, S. KLEIN AND R. BOLUS, MINORITY GROUP PERFORMANCE ON THE CALIFORNIA BAR EXAMINATION (1987), found that bar examination scores are very closely related to the applicant's law school grades and LSAT scores; differences in pass rates can be predicted with 80% accuracy by using those measures; and adding information about the applicant's racial/ethnic background does not increase the accuracy of prediction by even 1%. NY4, supra note}\]
examiners should compile racial and ethnic information on candidates for the bar exam so that exam performance levels can be continually monitored\textsuperscript{203} and the exam itself reviewed for possible bias.\textsuperscript{204} New York's report recommended that state law schools develop bar exam preparation programs\textsuperscript{205} with financial aid made available for minority students preparing for the bar exam.\textsuperscript{205}

b. RAISING THE STATUS OF MINORITY ATTORNEYS

1) LAW FIRM INITIATIVES

Florida and New York's reports called on private law firms to actively recruit from law schools with high minority enrollments for both permanent and summer associate positions.\textsuperscript{206} Florida's report called on private law firms to review their hiring and promotion practices\textsuperscript{207} and called on the State Bar to amend the rules of professional conduct "to proscribe and discipline conduct reflective of racial animus and to establish a professional and ethical obligation on the part of lawyers and law firms actively to recruit, hire, promote and retain minorities."\textsuperscript{208} New York's report suggested that minority lawyer mentoring programs be developed in both private and public practices.\textsuperscript{209}

\textsuperscript{202} FL2, supra note 5, at xxx-xxxi; NY4, supra note 159, at 19. Accord IA, supra note 8, at 8; NJ, supra note 1, at 132.

\textsuperscript{203} FL2, supra note 5, at xxxi; NY4, supra note 159, at 20. Accord IA, supra note 8, at 8; NJ, supra note 1, at 132. New York and Florida's reports recommended that minorities should be included in both the development and review of the bar exam. NY4, supra note 159, at 20; FL2, supra note 5, at xxxii.

\textsuperscript{204} NY4, supra note 159, at 19-20.

\textsuperscript{205} NY4, supra note 159, at 20.

\textsuperscript{206} FL2, supra note 5, at xxiii; NY4, supra note 159, at 81-82. New York's report called on firms to consult with minority partners with respect to hiring minorities. NY4, supra note 159, at 82.

\textsuperscript{207} FL2, supra note 5, at 81 & 83-84.

\textsuperscript{208} FL2, supra note 5, at xxii-xxiii. Accord NY4, supra note 159, at 82-83.

\textsuperscript{209} NY4, supra note 159, at 82-83.
2) STATE INITIATIVES

Florida's report called on the Legislature to "statutorily 1) ensure that minority lawyers and law firms are extended equal opportunities to perform legal services for the State; 2) require state agencies to make aggressive efforts to target and cultivate relationships with minority lawyers and law firms; 3) limit state contracts with majority-owned law firms only to those firms which themselves recruit, hire, promote, and retain minority attorneys; and 4) endorse 'joint venturing' between majority and minority firms where necessary to achieve the goal of full utilization of minority lawyers and firms." 210

3) BAR ASSOCIATION INITIATIVES

Florida's report called on all voluntary bar associations to increase collaboration among minority and non-minority attorneys in order to increase minority attorneys' professional contacts. 211 Michigan and Washington's reports noted the role of the bar in judicial appointments and recommended that the bar "take the lead" in making both the judicial screening process and the bench itself more representative. 212

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210. FL2, supra note 5, at xx-xxi.

211. FL2, supra note 5, at xxi. Florida's report further called for developing a statewide directory of minority attorneys to assist law firms in identifying experienced minority attorneys. FL2, supra note 5, at 83.

212. MI, supra note 2, at 38; WA, supra note 3, at 98.
APPENDIX B

SELECTED ABA POLICIES & REPORTS RELATED TO RACIAL AND ETHNIC BIAS IN THE JUSTICE SYSTEM
APPENDIX B

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ACHIEVING JUSTICE IN A DIVERSE AMERICA

Report of the American Bar Association
Task Force on Minorities and the Justice System

APPENDIX B

I. CRIMINAL JUSTICE

Children's Issues: Urge legal profession to direct attention to issues affecting children including the preservation of children's legal rights; the needs of children who have no effective voice of their own in government; establishment of character, citizenship, parenting skills and child safety programs in public education; implementation of statutory and programmatic resources to meet the health and welfare needs of children; missing and molested children; and establishment of guardian ad litem programs. 2/84

A. THE POLICE

1. COMMUNITY POLICING

American Bar Association Standards For Criminal Justice (CJS), Urban Police Function. 2/73, amended 2/79

B. PROSECUTION AND DEFENSE SERVICES

Crimes of Violence: Condemn crimes of violence including those based on bias or prejudice against the victim's race, religion, sexual orientation or minority status, and urge vigorous efforts by federal, state and local officials to prosecute the perpetrators and to focus public attention on the problem. 8/87

CJS, Prosecution Function. 2/71, amended 2/79

CJS, Defense Function. 2/71, amended 2/79, 2/91

1. INDIGENT SERVICES FUNDING

CJS, Providing Defense Services. 2/68, amended 8/79

Legal Aid: Approve cooperation with the Office of Economic Opportunity. 2/65

Right to Counsel: State position that any person faced with the loss of liberty or property, including selective service
registrants, should be afforded a hearing complete with procedural safeguards, including the right to counsel, at all levels. 2/72

Urge state and local bar associations and communities to take more vigorous steps to upgrade the quality and broaden the scope of the representation of defendants in criminal proceedings who are financially unable to employ counsel. 2/68

Approve position that the OEO legal services program should operate with full independence of lawyers within the program, including cases involving action against government agencies. 2/70

Recommend action by Congress to amend the Criminal Justice Act of 1964 to expand options available to a federal district court for furnishing counsel to include as choices a public defender or a nonprofit community defender or a nonprofit community defender organization and to provide for adequate compensation to counsel. 2/70

Approve Standards for Legal Aid and Defender Services, 2/66; approve revised standards, 8/70

Recommend establishment of a defender organization in those federal districts in which at least two hundred assignments of counsel are required annually, as authorized by the Criminal Justice Act of 1964 as amended by Pub.L.No. 91-447. 2/71

Authorize study of steps necessary to provide an affirmative response to the Supreme Court's mandate, in Argersinger v. Hamlin, that all misdemeanants be represented by counsel whenever imprisonment may be involved. 8/72

Support the establishment of specifically planned experimental legal services programs that would further test both Judicare and staffed office systems to provide quality legal services for those unable to afford an attorney. 5/74

Recommend that the U.S. Supreme Court adopt a rule providing for appointment of counsel to prepare petitions for discretionary review of state court convictions, including appropriate postconviction or clemency petitions if necessary, in death penalty cases where the defendant cannot afford to hire counsel; offer its assistance in identifying qualified attorneys; and recommend the amendment of the Criminal Justice Act (19 U.S.C. Sec. 3600A) to provide adequate compensation to counsel so appointed. 2/79

Urge states to take immediate action to ensure adequate funding to provide counsel to indigent defendants. 8/81

Pro Bono: Resolve that it is a basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services without fee or at a substantially reduced
fee in the following areas: poverty law, civil rights law, public rights law, charitable organizations representation and administration of justice. Resolve that it should always be provided in a manner consistent with the Model Rules of Professional Conduct. Resolve that the organized bar should assist each lawyer in fulfilling his or her responsibilities in providing such services as long as there is a need and should assist, foster, and encourage governmental, charitable, and other sources to provide public interest legal services. 8/75

Recognize and support the professional obligation of all attorneys to devote a reasonable amount of time, but in no event less than at least 50 hours per year, to pro bono and other public service activities; urge law firms and corporate employers to promote and support the involvement of associates and partners in pro bono and public service activities; and urge law schools to adopt a policy under which they would request law firms recruiting on campus to provide a written statement of its policy, if any, concerning the involvement of its attorneys in such activities. 8/88

Center for Defense Services: Support the establishment of an independent, federally funded center for defense services for the purpose of strengthening state and local criminal defense service programs. 8/73; 2/79

Compensation for Assigned Counsel: Support action by circuit judicial councils to provide compensation for assigned counsel in criminal cases comparable to that paid for private counsel for similar services. 2/74

Urge all jurisdictions to provide by statute or rule of court that attorneys appointed to represent persons who have a constitutional or statutory right to counsel receive reasonable compensation and full reimbursement for costs and expenses. 8/88

Counsel in Death Cases: Urge the U.S. Supreme Court to adopt a rule providing for appointment for counsel to pursue postconviction remedies in death penalty cases, and recommend that the Criminal Justice Act be amended to provide for adequate compensation to counsel in such cases. 2/79

Recommend adoption of Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, subject to such exceptions as may be appropriate in the military, by entities providing counsel in death penalty cases. 2/89

Urge implementation of certain measures in the litigation of death penalty cases, including the provision of competent and adequately compensated counsel, and commend to Congress sample legislation as a way to implement the recommendations. 2/90

Criminal Justice Act: Urge Congress to increase, or to provide a
mechanism for administratively increasing, the per-hour and maximum total of compensation authorized under the Criminal Justice Act of 1964 so that attorneys receive reasonable compensation in accordance with prevailing standards. 2/82

**Death Penalty Cases:** Recommend that when attorneys are appointed to represent defendants in the trial of death penalty cases, two attorneys shall be appointed as trial counsel to represent the defendant, and the primary attorney shall have substantial trial experience which includes the trial of serious felony cases. 2/85

Support full utilization of certain provisions pertaining to representation in federal habeas corpus death penalty proceedings and acknowledge the efforts of the federal judges to implement them. Urge the federal courts to consult extensively with appropriate state criminal justice leaders in developing and carrying out such implementation plans. 2/88

Recommend adoption of Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, subject to such exceptions as may be appropriate in the military, by entities providing counsel in death penalty cases. 2/89

Urge implementation of certain measures in the litigation of death penalty cases, including the provision of competent and adequately compensated counsel, and commend to Congress sample legislation as a way to implement the recommendations. 2/90

**Habeas Corpus:** Oppose legislation to (1) limit state prisoner access to the federal courts by means of petition for writs of habeas corpus; (2) similarly limit federal petitioners; and (3) support specific procedures to expedite the processing of habeas corpus cases and to provide competent representation at all stages in the process. 8/82

**Indigent Defense Programs:** Support congressional legislation mandating the inclusion of state and local indigent defense programs among those eligible for funding under the Anti-Drug Abuse Act of 1988 and similar federal laws, and further mandating the inclusion of research, training and technical assistance programs for state and local indigent defense systems in the discretionary grant programs under the Bureau of Justice Assistance and similar agencies; urge Congress to authorize and appropriate funding to assist state and local governments in implementing the constitutional obligation to provide effective assistance of counsel for indigent defendants in states where funding for indigent defense services is primarily provided at the local level to increase the level of state funding. 2/91

2. **PLEA BARGAINING**

CJS, Pleas of Guilty. 2/68, amended 2/79
3. PEREMPTORY CHALLENGE


Steven J. Fram, Restricting Inquiry Into Racial Attitudes During the Voir Dire: Lopez versus United States, American Criminal Law Review. (Spring 1982).

4. PENDING CRIMINAL LEGISLATION WITH DISPARATE IMPACT ON MINORITIES

Anti-Drug Abuse Amendments Act: Recommend that Congress reconsider section 6486 of the Anti-Drug Abuse Amendments Act of 1988, which provides for civil penalties for personal-use possession of controlled substances, and that if Congress wishes to retain civil penalties for such possession, it revise those provisions of 6486 that pertain to the standards of proof in judicial proceedings involving such penalties and consider certain additional revisions. 2/90

C. THE COURTS

CJS, Function of the Trial Judges. 8/72, amended 8/78

Criminal Justice in Crisis, Criminal Justice Section (1988) (Report which found the effectiveness of the criminal justice system hampered little by defendants' constitutional rights but significantly by the tremendous numbers of drug cases and insufficient and unbalanced allocation of resources.).

1. BAIL POLICIES

CJS, Pretrial Release. 7/85, amended 2/88

Bail Reform Act: Support numerous improvements in pretrial procedures such as are contained in the Act. 2/72

2. CHANGE OF VENUE RULES

Transfer of Venue: Support legislation permitting a federal court, when in the interest of justice, to transfer an improperly filed case to the appropriate U.S. court. 8/79

3. SENTENCING

CJS, Postconviction Remedies. 2/68, amended 8/78

CJS, Appellate Review of Sentences. 2/68, amended 8/78
CJS, Sentencing Alternatives and Procedures. 8/68, amended 8/79

Death Penalty Legislation and Native Americans: Without taking a position on the enactment of general federal death penalty legislation, support in principle legislative measures which would prevent or minimize any disproportionate effects of general federal death penalty legislation on Native Americans subject to federal jurisdiction. 8/91

 Discrimination in Capital Sentencing: Oppose discrimination in capital sentencing on the basis of race of either the victim or the defendant; support legislation that strives to eliminate racial discrimination in capital sentencing and which provides that a challenge to a death sentence can result in relief in certain instances. 8/88


4. JURY POOL SELECTION

Voir Dire: Oppose FRCP amendments prohibiting voir dire by counsel; propose voir dire amendments to FRCP. 2/75; 8/76; 2/81

Voir Dire: Proposed voir dire amendments to Federal Rules of Civil Procedure. 2/81

Jury Selection and Service Act: Outline methods obtaining the largest possible cross-section of a community to act as jurors and give control of venire list to the supreme court of the state. 2/71; amendment approved. 2/72

CJS, Trial by Jury. 8/68, amended 8/78

5. JUVENILE JUSTICE SYSTEM

Juvenile Courts: Urge Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice to support the implementation of adequate defense and prosecution services in the nation's juvenile courts. 8/84

Urge state and local bar associations to support amendments to the statutory law and court rules in their states with respect to the right to counsel in juvenile court proceedings to bring them into compliance with the Institute of Judicial Administration/American Bar Association Standards Relating to Counsel for Private Parties. 2/87
Juvenile Justice Standards: ABA approves the following volumes of the Juvenile Justice Standards:

Adjudication. 2/79
Appeals and Collateral Review. 2/79
Architecture of Facilities. 2/79
Corrections Administration. 2/79
Counsel for Private Parties. 2/79
Court Organization and Administration. 2/80
Dispositional Procedures. 2/79
Dispositions. 2/79
Interim Status. 2/79
Juvenile Delinquency and Sanctions. 2/80
Juvenile Probation Function. 2/80
Juvenile Records and Information Systems. 2/79
Monitoring. 2/79
Planning for Juvenile Problems. 2/79
Police Handling of Juvenile Problems. 2/79
Pretrial Court Proceedings. 2/79
Prosecution. 2/79
Rights of Minors. 2/79
Transfer Between Courts. 2/79
Youth Service Agencies. 2/79

6. CORRECTIONS

Prison Work-Release Programs: Support elimination of procurement policies that discriminate against such programs. 2/74

Prisoner Education: Urge all states to make basic education available to all prisoners needing it, especially reading skills and instruction leading to attainment of high school equivalency diplomas and to encourage voluntary participation in such programs.
by providing payment for education or additional good-time credits to participants. 8/76

**Discrimination in Employment:** Support elimination of employment discrimination in correctional systems. 8/75

**Commissions on the Drug Crisis:** Urge state and local bar associations to establish special committees to inform the bar on all aspects of the drug crisis; to study the impact, consequences and effectiveness of current drug policies on their areas' entire justice system; to participate in an examination and improvement of our nation's drug policies; and to facilitate the participation by their members in antidrug programs in their communities. 8/91

**Coordinating Councils on Crowded Jails:** Urge establishment of coordinating councils composed of key figures in the criminal justice system who have the authority to ameliorate the problems of crowded jails and the related issue of court delay. 2/90

**Correctional Education:** Support legislation to create an office or center of correctional education within the U.S. Department of Education to perform certain functions; support legislation that provides for funding of vocational education in adult and juvenile correctional institutions and programs; and support legislative initiatives at the federal and state levels that specifically recognize, address and attempt to correct illiteracy within adult and juvenile correctional institutions and programs. 2/90

**Correctional Standards:** Support correctional standards of the National Advisory Commission on Criminal Justice Standards and Goals. 8/74

**Detention Standards:** Urge all states to enact and implement legislation to eliminate deplorable conditions and deficiencies in so many of the nation's jails and juvenile detention facilities by authorizing the promulgation, monitoring and enforcement of appropriate detention standards. 8/75

**Responding to the Problem of Drug Abuse: Strategies for the Criminal Justice System,** Criminal Justice Section (1992) (Findings and recommendations relating to many aspects of the drug problem, including minorities' involvement in the criminal justice system).

**The Use of Incarceration in the United States: A Look at the Present and Future,** Criminal Justice Section (1992) (Compilation and summary of information addressing numbers, demographics (race, age, education) and crimes of incarcerated persons, length of incarceration, and costs, benefits, and efficacy of present incarceration policies).
II. CIVIL JUSTICE

A. THE COURTS

Standards for Providers of Civil Legal Services to the Poor: Adopt revised standards. 8/86

Standards of Judicial Administration: ABA approves the following volumes of the Standards of Judicial Administration:

- Appellate Courts. 2/77
- Court Organization. 2/74, amended 2/90
- Trial Courts. 2/76, amended 8/84, amended 2/92

1. FEDERAL JUSTICE SYSTEM BIAS STUDY

Bias in Judicial System: Support the enactment of authoritative measures requiring studies of the existence, if any, of bias in the federal judicial system, including bias based on race, ethnicity, gender, age, sexual orientation and disability, and the extent to which bias may affect litigants, witnesses, attorneys and all those who work in the judicial branch; urge that such studies should include the development of remedial steps to address and eliminate any bias found to exist. 8/91

2. INCREASE THE NUMBERS OF MINORITY JUDGES

Discrimination in the Judiciary: Urge appointing authorities to ensure that there are no barriers to the selection of women and minorities as judges and for service on merit selection judicial nominating commissions. 8/86

3. INCREASE THE NUMBER OF MINORITY COURT EMPLOYEES

Discrimination in the Court System: Urge judicial leaders to encourage and promote the full participation in the work forces of the court systems under their jurisdiction of all persons regardless of their race, sex, color, national origin, religion, age or handicap; encourage adoption of merit-based personnel systems that encompass all facets of court personnel management, including recruitment, hiring, training, promotion and advancement; urge incorporation of affirmative action values in deciding whom to recommend and appoint to judicial positions and encourage implementation of equal employment opportunity and affirmative action plans and programs in the courts. 2/90
4. PROMOTE COURT CULTURAL SENSITIVITY TRAINING

Judicial Education Programs: Recommend that state and federal education programs for judges include a course devoted to fairness and the judiciary’s role in ensuring a courtroom free of race and sex bias and an analysis of race and sex-biased stereotypes, myths, beliefs and biases that may affect judicial decision making. 8/86

5. TRANSLATION SERVICES

Spanish in the Courtroom: Support legislation providing that certain proceedings and pleadings of the U.S. District Court of Puerto Rico be conducted in Spanish and that Spanish-speaking Puerto Ricans serve on grand and petit juries in proceedings before same court. 2/80

B. THE LEGAL PROFESSION

Civil Rights and Constitutional Law: Statement approved on the necessity for law and order, the necessity for communication and local service, the lawyer’s concern with educational and economic problems, membership in bar associations regardless of race or creed and the lawyer’s duty to aid defendants in unpopular causes, upon recommendation of the Committee of Civil Rights and Racial Unrest. 8/83

Initiative: A Resource Guide to Developing Successful Minority Programs, Commission on Opportunities for Minorities in the Profession (1989) (MAP program to involve minority lawyers and law students in the legal profession).

1. LEGAL REPRESENTATION FOR LOW-INCOME GROUPS

Civil Rights Attorney’s Fees Awards Act: Urge Congress to enact legislation amending the Civil Rights Attorney’s Fees Awards Act of 1976 and other federal civil rights fee-shifting statutes to permit the award to a prevailing party of reasonable expert fees for testimonial and nontestimonial services. 8/91

Private Lawyer Involvement: Urge amendment of the Legal Services Corporation Act to mandate the opportunity for substantial involvement of private lawyers in providing legal services to the poor. 8/80

Filing Fees: Support amendment to the Bankruptcy Act to permit waiver of filing fees for persons who are financially unable to pay in involuntary bankruptcy proceedings. 8/66

Urge state and local bar association to cooperate with state and local Legal Services Corporation grantees and other agencies providing civil legal services to indigent persons. Urge the Legal
Services Corporation to cooperate with the American Bar Association and state and local bar associations in developing and implementing plans and procedures for involving private attorneys in providing and supporting civil legal services for indigent persons. 2/84

**Legal Representation for Indigent Parents:** Urge state and local judicial systems and bar associations to work to ensure that competent attorneys be appointed for every indigent parent at all stages of protection proceedings, and that all attorneys receiving such appointments have sufficient training or experience to provide effective legal representation to parents. 11/87

**Legal Services Corporation:** Support strengthening of charter and adequate funding for Corporation. 2/65; 5/73; 4/81

Strongly urge the President, the executive branch, the Legal Services Corporation Board of Directors, and Congress to support substantially increased funding of the Corporation so that there are adequate resources for a high-quality legal services program. Strongly urge the President and the executive branch to be supportive of the purposes for which the Legal Services Corporation was founded—to ensure equal justice under law for all through a strong and independent legal services program. Strongly urge the President of the United States in nominating and the Senate of the United States in confirming members of the board of directors of the Legal Services Corporation to meet five specified requirements. Strongly urge Congress to pass a reauthorization bill for the Legal Services Corporation with certain specifications. 2/89

**Legal Services Corporation Act.** Oppose legislation which would amend the Legal Services Corporation Act in certain ways and urge state and local bar associations to adopt resolutions opposing the legislation and to communicate their opposition to their congressional delegations. 8/90

**Monitoring and Evaluation of Providers of Legal Services. Standards for:** Adopt Standards for the Monitoring and Evaluation of Providers of Legal Services for the poor, dated February 1991; and recommend appropriate application of the standards to the monitoring and evaluation of providers of free legal services to the poor by their public and private funding sources. 2/91

2. **ABA RACIAL AND ETHNIC DIVERSITY**

**Discrimination:** Whereas, the policy of the ABA is not to discriminate against any person because of race, color, creed or national origin, officers and sections of the Association should endeavor to use all reasonable means to effectuate this policy. 8/65

**Participation in Association:** Continue to make substantial efforts to increase the participation of women and minorities in all levels
of the Association. 8/84

Perceptions--Minority Lawyers: Where Are We Now?, Young Lawyers Division (1983) (Deals with individual perceptions of why minority lawyers do not participate in state and local bar association activities and recommends measures to increase such participation. Videotape).

3. INCREASE THE NUMBER OF MINORITY LAWYERS

Discriminatory Hiring Practices: Strongly condemn all forms of discriminatory hiring practices within the legal profession, whether on the basis of sex, religion, race or national origin. 2/72

Terry A. Dalton, And Then There Were None: Samuel Johnson Was the Only Black Lawyer in Vermont -- Until He Tried to Find a Job With a Private Firm There, Law Student Division (Feb. 1988).

4. LAW SCHOOLS

Council on Legal Educational Opportunity (CLEO): Support continued authorization of and appropriations for this program to enable disadvantaged students to attend law school. 10/67; 2/72

Reaffirm, in light of the decision in the Bakke case, ABA position taken in 1972 encouraging "programs at law schools having as their purpose the admission to law school and ultimately to the legal profession of greater numbers of interested but disadvantaged members of minority groups who are capable of successful completion of law school"; urge the law schools of this nation to renew their commitment to provide adequate and appropriate opportunity for members of disadvantaged groups; and also urge that efforts be made by the legal profession to provide greater means of financial assistance for all students admitted to law school with financial need and that adequate and appropriate employment opportunities be provided to persons who complete their legal education, are admitted to the bar and are members of groups which have previously encountered discrimination in seeking employment. 8/78

Standards for the Approval of Law Schools: Amend Standard 211 to add "including the employment of faculty and staff" to the nondiscrimination/equal opportunity provisions. 8/89

Adopt the following statement concerning opportunities for the study of law and entry into the profession by qualified members of minority groups:

Consistent with sound education policy and the Standards, the law schools are urged to demonstrate, by concrete action, a commitment to expanding opportunities for the study of law and entry into the profession by qualified members of groups (notably racial and