FINAL REPORT

FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM

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COMMITTEE AND SUBCOMMITTEE MEMBERS

COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM

Nicholas P. Cafardi, Chair
Dean, Duquesne University School of Law

Honorable Ida K. Chen
Court of Common Pleas, Philadelphia

Thomas L. Cooper, Esq.
Gilardi, Cooper, Lomupo

André L. Dennis, Esq.
Stradley, Ronon, Stevens & Young, LL.P.

Honorable Nelson A. Diaz
City Solicitor, Philadelphia

Professor Phoebe A. Haddon, Esq.
Temple University Beasley School of Law

Roberta D. Liebenberg, Esq.
Fine, Kaplan and Black

Charisse R. Lillie, Esq.
Ballard, Spahr, Andrews & Ingersoll, LL.P.

Lynn A. Marks, Esq.
Executive Director, Pennsylvanians for Modern Courts

Burton D. Morris, Esq.
Harrisburg, PA

Monsignor David Rubino
Seton Hill College

Staff

Lisette M. McCormick, Esq., *Executive Director*
Jennifer Collins, *Research Assistant*
Eileen Mackowiak, *Secretary*
Nancy Mancuso, *Paralegal*
Danielle S. Williams, *Staff Counsel*

RACIAL AND ETHNIC BIAS SUBCOMMITTEE WORK GROUPS

Committee Members

André L. Dennis, Esq., Co-Chair
Professor Phoebe A. Haddon, Esq., Co-Chair
Charisse R. Lillie, Esq., Co-Chair

Reported Occurrences and Perceptions of Racially Biased Behavior

Professor Frank McClellan, Esq., Chair, Philadelphia
AnnDrea Benson, Esq., Erie
Eugene Berry, Esq., Pittsburgh
Lillian Haskins, Esq., Harrisburg
Juan Laureda, Esq., Philadelphia
Honorable Livingstone Johnson, Pittsburgh
Reverend William Moore, Harrisburg

The Court as Appointer

Carl Cooper, Esq., Chair, Pittsburgh
Pamela Cross, Esq., Harrisburg
David Hickton, Esq., Pittsburgh
Glenn Mahone, Esq., Pittsburgh
Honorable Juan Sanchez, Chester

The Court as Employer

Charlotte Jefferies, Esq., Chair, Pittsburgh
Honorable Timothy P. Creany, Altoona
District Justice Fred Pierantoni, Wilkes-Barre

Litigants with Limited English Proficiency

Quan Pham, Chair, Philadelphia
Osvaldo Aviles, Philadelphia
Honorable Ida K. Chen, Philadelphia
Pedro Cortes, Esq., Harrisburg
Luis Diaz, Esq., Philadelphia
Stephen Krone, Esq., Harrisburg
Arthur Read, Esq., Philadelphia
Judith A. Robinson, Esq., Harrisburg
Paul Uyehara, Esq., Philadelphia

Race and Ethnic Bias in Jury Selection

Will Gonzalez, Esq., Co-Chair, Philadelphia
Kurt Saunders, Esq., Co-Chair, California
Clifford Boardman, Esq., Philadelphia
Joel Johnson, Esq., Philadelphia
Tsiwen M. Law, Esq., Philadelphia
Timothy P. O'Brien, Esq., Pittsburgh
Honorable R. Stanton Wettick, Jr., Pittsburgh
Wendy L. Williams, Esq., Pittsburgh

The Criminal Justice System: Sentencing

Philip Friedman, Esq., Chair, Erie
Honorable Renee Hughes, Philadelphia
Caroline Roberto, Esq., Pittsburgh
J. Clayton Undercofler, Esq., Philadelphia
Professor Lu-in Wang, Esq., Pittsburgh

The Criminal Justice System: Death Penalty

Henry Perkin, Esq., Chair, Allentown
Efrem M. Grail, Esq., Pittsburgh
Lt. Sharon Seaborough, Philadelphia
Honorable Gregory E. Smith, Philadelphia
Shelly Stark, Esq., Pittsburgh
Pamela Tucker, Philadelphia
Kevin Vaughan, Esq., Philadelphia
David Zuckerman, Esq., Philadelphia

The Criminal Justice System: Juvenile Justice

Marsha Levick, Esq., Co-Chair, Philadelphia
Robert Listenbee, Esq., Co-Chair, Philadelphia
Honorable Cheryl Allen, Pittsburgh
Meghan Black, Esq., Pittsburgh
Reverend Luis Cortes, Philadelphia
Rhonda Anderson Marks, Esq., Pittsburgh

Family Law

Honorable Cynthia Baldwin, Chair, Pittsburgh
Professor Karen Jackson Vaughan, Esq., Philadelphia

GENDER BIAS SUBCOMMITTEE WORK GROUPS

Committee Members

Lynn A. Marks, Esq., Co-Chair
Roberta D. Liebenberg, Esq., Co-Chair

Reported Occurrences and Perceptions of Gender Biased Behavior

Judy Berkman, Esq., Co-Chair, Philadelphia
Christine Miller, Esq., Co-Chair, Pittsburgh
Honorable Nitza I. Quinones Alejandro, Philadelphia
Honorable Faith Angell, Philadephia
Honorable Kate Ford Elliott, Pittsburgh
Amos Goodall, Esq., State College
Honorable John W. Herron, Philadelphia
District Justice Elaine McGraw, Pittsburgh
Honorable Norma L. Shapiro, Philadelphia
Honorable Eugene B. Strassburger, III, Pittsburgh
Min Soo Suh, Esq., Philadelphia
Audrey Talley, Esq., Philadelphia

The Court as Appointer

Sara Davis Buss, Esq., Pittsburgh
Honorable Rita Hathaway, Greensburg
Honorable Maureen Lally-Green, Pittsburgh
(Participated in fact-finding process only)
Honorable Kathleen R. Mulligan, Pittsburgh
Rhoda Neft, Esq., Pittsburgh

The Court as Employer

Bunny Baum, Philadelphia
Professor Martha Chamallas, Esq., Pittsburgh
Honorable Maureen Lally-Green, Pittsburgh
Elizabeth "Dolly" Shuster, Esq., Harrisburg
Deborah Weinstein, Esq., Philadelphia

Civil Litigation

Professor Martha Chamallas, Esq., Chair, Pittsburgh
Kim Borland, Esq., Wilkes-Barre
Gloria M. Gilman, Esq., Philadelphia
Jon Pushinsky, Esq., Pittsburgh
Richard Ruth, Esq., Erie
Jamie Sheller, Esq., Philadelphia

Gender Bias in Jury Selection

Marguerite Walsh, Esq., Chair, Philadelphia
Professor Robert Boatright, Esq., Washington D.C.
Andrew A. Chirls, Esq., Philadelphia
Julia Hoke, Esq., Philadelphia
Honorable Flora Wolf, Philadelphia

Sexual Assault

Delilah Rumburg, Chair, Harrisburg
Commander Gwen Elliott, Pittsburgh
Ellen Greenlee, Esq., Philadelphia
Mila Hayes, Norristown
Honorable Patricia McInerney, Philadelphia
Mimi Rose, Esq., Philadelphia
Carol Tracy, Esq., Philadelphia

Domestic Violence

Sharon Lopez, Esq., Chair, Harrisburg
Lorraine Bittner, Esq., Pittsburgh
Honorable Ida K. Chen, Philadelphia
Ingrid Cronin, Esq., Wilkes-Barre
Patricia A. Dubin, Esq., Philadelphia
Christine McLaughlin, Esq., Wilkes-Barre
Officer Ana Rodriguez, Philadelphia

Family Law

Mary Cushing Doherty, Esq., Chair, Philadelphia
Professor Vanessa Browne-Barbour, Esq., Pittsburgh
Kathleen C. Daley, Esq., Harrisburg
Terry L. Fromson, Esq., Philadelphia
Chris Gillotti, Esq., Pittsburgh
Honorable Leslie Gorbey, Lancaster
Scott M. Hollander, Esq., Pittsburgh
Elizabeth Jackson, Esq., Philadelphia
Joann Jofrey, Esq., Sharon
Bill Madeira, Esq., Philadelphia
James Mahood, Esq., Pittsburgh
Judge Lillian Ransom, Philadelphia
Professor Louis Rulli, Esq., Philadelphia

Intersection of Race and Gender

Professor Phoebe A. Haddon, Esq., Chair, Philadelphia
Honorable Jacqueline Allen, Philadelphia
Roberta D. Liebenberg, Esq., Philadelphia

ACKNOWLEDGMENTS

It is of particular importance to acknowledge that this study would not have taken place without the commitment and support of the Supreme Court of Pennsylvania, the General Assembly of Pennsylvania, and former Governor Tom Ridge. In particular, Joseph Daily, Executive Administrator of the Supreme Court, and his staff assisted the Committee staff on a regular basis.

The Committee also acknowledges the work of the Philadelphia Bar Association in 1993 that resulted in a survey and the filing of a petition with the Supreme Court of Pennsylvania requesting that the Court appoint a committee to study issues of race and ethnicity within the justice system. In addition, the Committee is grateful to Will Gonzalez for his efforts to obtain initial funding for the study.

The Committee is indebted to the chairs and members of the work groups for their diligence and resourcefulness exhibited throughout the study. The Committee also wishes to thank the staff, along with the writers, editors, particularly James Davidson, Nancy Koerbel, and Chris Miller, and law students, who spent countless hours researching, reviewing and drafting the fourteen chapters of this report. Lisette McCormick, our executive director, has provided extraordinary leadership to this effort, and we are grateful to her and the staff.

The Committee extends its deepest appreciation to the court administrators throughout the Commonwealth for devoting many hours to completing surveys and compiling data in order to facilitate our evaluation of the inner-workings of the justice system. The staff of the Administrative Office of Pennsylvania Courts offered support and expertise throughout the study.

Special thanks are also extended to the court administrators and judges in areas where the public hearings were held: Pittsburgh, Philadelphia, Harrisburg, Erie, State College and Wilkes-Barre/Scranton. The Committee gratefully acknowledges their assistance in community outreach efforts, securing conference rooms large enough to accommodate the audiences, and for supporting our work. The Committee also thanks all of the witnesses who testified at the public hearings and the many participants in our roundtable discussions around the Commonwealth.

The Committee wishes to recognize the invaluable contribution of Dr. Yolande P. Marlow of the Administrative Office of the Courts in New Jersey for graciously reviewing countless reports and providing many hours of support and consultation to the Committee, and of Lynn Hecht Schafran and the National Judicial Education Program for the wealth of information they provided to the Committee's study.

The Committee consulted with a number of individuals to develop surveys for our work groups' research efforts and to conduct sophisticated statistical analyses of the data. Amy Anderson, Wanda Foglia, John Kramer, Monique Martin, Andrea Piccinin, Ralph Taylor, Gail Johnston Ulmer, Jeffrey Ulmer, and Rangita de Silva-de Alwis, Bob Spangenberg and their staff all produced reports of the highest quality for the Committee. Nancy Hirschinger and Alan Rosin also consulted with the Committee in the design of survey instruments.

The Committee is also indebted to Agnew Moyer Smith Inc. who designed and produced the final report for the Committee. In particular, the Committee thanks Christina Papp, Rita Lee, Cat Zaccardi, Deborah Edwards and Andie Markijohn for their dedication and expertise in producing an excellent product. The Committee also thanks Beach Advertising, Bynums Advertising, and Cobb and DaBaldo Printing Company for their assistance in proofreading and printing the report and supplementary materials.

In addition, the Committee thanks the many individuals who helped organize and conduct focus groups and roundtable discussions, including The Melior Group, Ann Begler, Lorraine Bittner, Jennifer Campbell, Robert Creo, Mary Cushing Doherty, Patricia Dubin, Terry Fromson, Mardi Harrison, Vicki Kramer, Joseph Lach, Sharon Lopez, Louis Rulli, Delilah Rumburg and the staff of the Pennsylvania Coalition Against Rape, and Caren Bloom.

The Committee is also indebted to the law firms of Ballard, Spahr, Andrews & Ingersoll and Blank, Rome, Comisky & McCauley in Philadelphia for graciously hosting the monthly Committee meetings. Special thanks to Duquesne University School of Law, Philadelphia Legal Services and Meyer, Darragh, Buckler, Bebenek & Eck in Pittsburgh for housing and assisting the Committee staff in numerous ways.

The wisdom of these many individuals and organizations helped produce a report that we hope will serve as a guide to fostering a court system that is as fair and equitable as possible. Without their support, the Committee's work would have been impossible.

INTRODUCTION

On October 15, 1999, the Supreme Court of Pennsylvania appointed the Committee on Racial and Gender Bias in the Justice System,[1] to undertake a study of the state court system to determine whether racial or gender bias plays a role in the justice system. Upon completion of the study, the Committee was instructed to present its findings and recommendations to the Court.

In order to discharge its mission, the Committee identified what it believed to be the key issues in its study. These included the needs of litigants with limited English proficiency; the lack of racial and ethnic diversity in the composition of juries; the employment and appointment processes of the courts; the treatment by the court system of survivors of domestic violence and sexual assault; racial, ethnic, and gender bias in the juvenile justice system; disparities in sentencing; the adequacy of representation of indigent criminal defendants; racial and ethnic disparities in the imposition of the death penalty; and selected issues in civil litigation and family law. The Committee set up a series of work groups comprised of distinguished representatives from across the state, including members of the bench and bar, educators, and advocates with expertise in the topics which the Committee selected for study. Each of the work groups was assigned the task of examining one of the discrete topics selected for study and implementing the research methodology formulated by the Committee. The methodology was chosen to ensure the broadest level of participation by all sectors of the community. The methods that were employed included the following:

1. PUBLIC HEARINGS—The Committee conducted public hearings in six locations across the Commonwealth. The hearings attracted scholars, advocates, court personnel, attorneys, judges, and members of the general public who offered accounts of their experiences with the justice system. The hearings were well-publicized and generated a total of 2,000 pages of testimony.
2. SURVEYS—With the assistance of experts, the Committee drafted and distributed surveys to court administrators, district attorneys, public defenders, community service agencies, and others in order to collect data from across the Commonwealth on the topics chosen for study. The response rate for most of the surveys was exceptionally high. The data yielded by the surveys was professionally analyzed and was used as a basis for the findings in the work groups' reports. The data was integral to the Committee's recommendations.

3. STATISTICAL STUDIES—The Committee engaged the services of statistical experts to conduct original research for several of the work groups. The topics of these studies included the racial and ethnic diversity of juries across the Commonwealth; the adequacy of indigent criminal defense services provided by public defender offices and court-appointed attorneys; and racial, ethnic, and gender disparities in sentencing. Comprehensive reports were prepared by the consultants which support the findings and recommendations. These reports are included in the appendices to the Committee report.
4. FOCUS GROUPS AND PERSONAL INTERVIEWS—The Committee engaged the services of two professional research consultants to conduct a series of focus group discussions and personal interviews with individuals who play important roles in the legal system across the Commonwealth. They helped to frame the issues for discussion and utilized social scientific protocol for these inquiries. The discussions focused on racial, ethnic, and gender bias in the courtroom. A total of 10 focus group sessions were conducted with attorneys and court personnel. Personal interviews were held with 18 judges and 10 litigants. The participants in the interviews and in the focus groups were primarily African American and white, with representation from the Latino and Asian American communities, and included both men and women.
5. ROUNDTABLE DISCUSSIONS—The Committee also conducted a series of roundtable discussions with experienced attorneys from around the Commonwealth to discuss bias issues in discrete areas of law, including employment law, family law, the juvenile dependency system, general civil litigation, and criminal sexual assault cases. Roundtable discussions were also held among users of the legal system, including victims of domestic violence. The sessions were led by experienced discussion facilitators. The invited participants came from all areas of the Commonwealth and represented a cross-section of racial and ethnic groups; they included both men and women, as well.
6. EXISTING STATISTICAL STUDIES—The Committee also reviewed several existing statistical studies on topics being examined by the work groups. The studies were conducted by distinguished researchers and have found wide acceptance in the legal and social sciences arenas. The topics ranged from the death penalty to court interpretation services.

7. OTHER STATE TASK FORCE REPORTS—In an effort to build upon the extensive research and study by other states and federal courts, the Committee examined reports published by other state and federal racial, ethnic, and gender bias task forces for information and recommendations pertinent to the topics studied by the Committee. The Committee also conducted extensive literature reviews on the topics under study, focusing on law reviews, law journals, and scholarly publications.

The Committee's task presented a unique challenge: In seeking to determine whether racial and gender bias permeate the court system, the Committee, of necessity, had to seek out and focus upon data and information that address race and gender explicitly. However, in some ways, this focus challenges the notion that "justice is blind." While the Committee initially struggled with this seeming dichotomy, it recognized that in some contexts a race-conscious or gender-conscious approach is needed, while in others, a race-neutral or gender-neutral approach is the way to eliminate bias. For example, if we are concerned about the racial makeup of jury pools, we need information about the racial makeup of the population summoned, the population responding to summonses, the pool that appears, and the panels that are selected. Yet collecting such information can be characterized as at odds with a "race-neutral" approach. The Committee has concluded that collecting this information, not just in the jury context, but in many others, is necessary to the work of eradicating bias. In other contexts, the Committee has proposed a race-neutral and gender-neutral approach as a means to eliminate bias, for example, in the use of statistical life and work expectancy tables for damages awards. The Committee's positions in these different settings are not inconsistent; rather, they reflect different modes of analysis for identifying and recommending solutions for eliminating bias present in the court system.

The Committee wishes to emphasize that it heard positive comments about how the Pennsylvania justice system functions. The full report describes these observations and highlights "best practices" by the courts in Pennsylvania and elsewhere. At the same time, the Committee's findings demonstrate that racial, ethnic, and gender bias does exist and that it infects the justice system at many key points in both overt and subtle ways. Even when controlling for other factors such as economic status, familial status, and geographic diversity, the studies demonstrate that racial, ethnic, and gender bias still emerge as significantly affecting the way an individual (be it a party, witness, litigant, lawyer, court employee, or potential juror) is treated.

As the Supreme Court itself recognized in commissioning and appointing this Committee, any such bias is intolerable and must be eliminated. The courts are the institutions in which all citizens should expect to be treated with equality, fairness, and respect. In order to live up to this ideal, Pennsylvania's courts must undertake reforms. Accordingly, the Committee identifies in the report its findings and its recommendations for change. These findings and recommendations are designed to respond to the concerns articulated to the Committee and to highlight areas of the justice system in need of improvement.

In formulating the recommendations, the Committee acknowledges that the implementation of some of them is likely to be costly. Nevertheless, the Committee strongly believes that they represent important steps towards achieving a bias-free justice system.

While the findings and recommendations are responsive to the Court's charge, the Committee also believes that the work of the Court on these matters should continue. There is an obvious need for additional data on some issues, and in other areas, a more systematic effort should be undertaken to establish a baseline and a system for monitoring progress. Data collection should be an ongoing activity of the Court if bias is to be addressed effectively. The Committee, therefore, respectfully recommends that the Court consider appointing an implementation committee to accomplish its goals of fairness and equality in the courts.[2]

ENDNOTES

[1] The members of the Committee include the following:
Nicholas P. Cafardi, Chair
Honorable Ida K. Chen
Thomas L. Cooper, Esquire
André L. Dennis, Esquire
Honorable Nelson A. Diaz
Phoebe A. Haddon, Esquire
Roberta D. Liebenberg, Esquire
Charisse R. Lillie, Esquire
Lynn A. Marks, Esquire
Burton D. Morris, Esquire
Monsignor David Rubino

[2] During the study, the Committee heard concerns regarding bias against those with disabilities and gay, lesbian, bisexual, and transgendered individuals. The Committee determined that bias against people in these categories was beyond the scope of its charge. Nevertheless, the Committee suggests that the Court consider simultaneously addressing the needs of these groups, in light of the similarity of issues and solutions in the context of race, ethnicity, and gender.

1 LITIGANTS WITH LIMITED ENGLISH PROFICIENCY

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INTRODUCTION

Due process is a core value of the American judicial system, ensuring that every litigant and criminal defendant receives a fair hearing that is based on the merits of his or her case and presided over by an impartial judge. No one should be put at a disadvantage in court by reason of race, ethnicity, or gender. Yet due process, along with the basic fairness of the Pennsylvania court system is jeopardized if litigants with limited English proficiency (LEP) are unable to have access to competent interpreters and other language assistance.[1]

The Census Bureau estimates that more than 970,000 persons over age 4 in Pennsylvania speak a language other than English at home and that nearly 370,000… do not speak English "very well."

Every day, LEP persons appear as parties and witnesses in Pennsylvania court proceedings or call upon the courts for help. These persons may not be able to read or comprehend the court papers given to them. They may not be able to engage in more than superficial conversation with court staff. They may struggle to present their claims or defenses without a sound understanding of the English language or, in many cases, American legal culture. While interpreters are generally provided to LEP criminal defendants, the interpreters are not certified by the Commonwealth and may not be qualified to interpret court proceedings. In civil cases, LEP parties often must either fend for themselves or rely upon unskilled and untrained friends or relatives who are struggling to understand and explain what is being said.

Increases in the number and proportion of foreign-born U.S. residents in the past two decades suggest that ethnic, cultural, and linguistic diversity will continue to challenge the courts. The Commonwealth now has substantial communities of recent immigrants. Latinos are the largest group of people with limited English proficiency. Puerto Ricans began arriving in the 1920s, followed by people from Mexico, El Salvador, Guatemala, the Dominican Republic, Venezuela, Colombia, and elsewhere. The Census Bureau estimates that more than 970,000 persons over age 4 in Pennsylvania speak a language other than English at home and that nearly 370,000 of these individuals do not speak English "very well."[2] As a consequence, Pennsylvania courts in recent years have requested oral

language interpretation services in more than 50 different languages and dialects.[3] Upgrading the capacity of the Pennsylvania judicial system to provide justice for all, regardless of English language ability, should be a priority for the Commonwealth.

Focus of Inquiry

The Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System (Committee) decided early in its deliberations to focus on several of the following issues involving LEP litigants:

- Examining the scope of responsibility of courts and administrative agencies to provide oral interpretation services to persons in a variety of judicial and administrative proceedings. In addition to providing interpretation services in formal administrative hearings and criminal defense proceedings, the courts must consider whether to provide interpreters to people appearing as witnesses in criminal cases; witnesses in civil cases; parties in civil cases; and jurors. Also, interpretation services may be required by offenders who are ordered into court supervision or court programs.
- Determining the necessity of adopting a system for certification of competency in oral court interpretation.
- Identifying practical procedures for establishing systems for certification of competency in oral court interpretation, including interim transitional procedures.
- Identifying barriers to the availability of qualified oral language interpreters and means for overcoming those barriers.
- Determining the necessity for written translation of documents and establishing procedures for providing accurate translations.
- Identifying other issues to be addressed, including the impact of cultural issues within LEP communities and other immigrant, refugee, and migrant communities.
- Identifying the administrative mechanisms for accomplishing these goals.

Specific Research Methods

The Committee sought data and guidance through four primary avenues of inquiry: 1) surveys of community agencies and court administrators; 2) testimony from the six public hearings it conducted around the Commonwealth; 3) the personal professional experiences of The Litigants Work Group members;[4] 4) the experiences of other states and published literature and studies;[5] and 5) an analysis of pertinent law.

SYNOPSIS OF FINDINGS

As immigrant, migrant, and refugee populations grow in many Pennsylvania counties, fair access to the judicial system remains a significant problem for those with language and cultural differences. Despite the obvious need for culturally sensitive oral interpretation and written translation assistance to LEP persons, Pennsylvania has no statewide system for providing interpreter services in court proceedings. Further, Pennsylvania has no system for certifying the competence of interpreters in any language, including those languages for which court interpreter certification programs have been established in neighboring states and the federal courts. The absence of both undermines the ability of the Pennsylvania court system to determine facts accurately and to dispense justice fairly.

Many Pennsylvania courts provide interpreters only on an *ad hoc* basis, allowing untrained and incompetent interpreters to translate court proceedings. Many individuals are pressed into service, including relatives and friends of people in court proceedings. Their proficiency in a language other than English, however, does not mean they have the skills and training to work as interpreters. Pennsylvania has no system for training judges, court officials, or attorneys in issues related to utilization of interpreters. Only when an LEP person is a defendant in a criminal case do the Pennsylvania courts consistently recognize an obligation or duty to provide interpretation services. Many litigants, particularly in civil matters, are unable to obtain language assistance. The inadequacy of the services clearly hinders courts in their ability to adjudicate disputes justly.

Pennsylvania's First Judicial District in Philadelphia County has taken a lead role in addressing these problems by initiating a formal court interpreter system. Although Philadelphia County has not yet established certification procedures, it has developed a model that may prove helpful elsewhere in the Commonwealth. Philadelphia's system is described in more detail later in this chapter.

LEGAL ANALYSIS[6]

When people are unable to comprehend or participate fully in court proceedings in which they are parties, fundamental notions of justice and fairness are called into question. Substantial legal authority exists to support the proposition that the U.S. Constitution, and the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq*., obligate the states to provide comprehensive language services to make the court system accessible to LEP persons. This obligation is particularly compelling when LEP individuals are forced to participate in court proceedings.

The well-established rights of a criminal defendant to a fair trial may be compromised when a court conducts proceedings in a language not well-understood by the defendant. The right to an interpreter in criminal matters is based upon the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution. If the state fails to provide an interpreter when one is needed, the situation jeopardizes the broad Fifth Amendment right not to be deprived of life or liberty without due process of law; the more specific Sixth Amendment rights of a criminal defendant to counsel, to a speedy trial, to be informed of the charges against him, and to confront adverse witnesses; and the Fourteenth Amendment rights to due process and equal protection of the law. In concluding that failure to provide an interpreter undermines the rights of a defendant to confront witnesses and to testify on his own behalf, for example, the First Circuit noted that "no defendant should face the Kafkaesque specter of an incomprehensible ritual which may terminate in punishment." *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973). Indeed, the Pennsylvania Supreme Court previously has recognized the importance of interpreters. *See Commonwealth v. Pana*, 469 Pa. 43, 364 A.2d 895 (1976). (The conviction was reversed after the trial judge improperly refused to permit the defendant to testify in Spanish through an interpreter, thereby interfering with his right to testify.)

Language issues arise in various ways throughout the criminal process. The right to counsel may be denied when a defendant and his or her counsel cannot communicate clearly and lack an interpreter to bridge language differences. The difficulty may begin at the time that counsel is appointed or retained, and may continue throughout the pretrial, trial, and post-trial process. When a written translation of the charging documents has not been made, the defendant may not be adequately informed of the charges against him and may thus be unable to participate in his own defense. *United States*

v. Mosquera, 816 F.Supp. 168 (E.D.N.Y. 1993). Also, a defendant who is not provided with simultaneous interpretation of witness testimony during trial may lose the right to cross-examine the witness effectively. Whenever language services are needed, the failure to provide interpretation or translation by individuals with sufficient language skills and training may create an issue as to whether the right has been adequately protected.

The Federal Court Interpreters Act, 28 U.S.C. §1827, mandates for all federal criminal proceedings the use of certified or otherwise qualified interpreters for people who primarily speak a language other than English. Many states have enacted similar statutes, rules, or state constitutional amendments mandating the appointment of court interpreters for LEP defendants in criminal cases.

Constitutional principles can also apply to civil and administrative proceedings, although precedent in these areas is less firmly established than in criminal cases. Fundamental due process and equal protection rights grounded in the Fifth and Fourteenth Amendments are implicated when an individual is threatened with loss of property interests in court, or is denied access to court for enforcement of legal rights on the grounds of his or her ability to speak or write well in English. (*See* i.e., *Gonzalez v. Commonwealth, Unemployment Comp. Bd. of Review*, 39 Pa. Cmwlth. 70, 395 A.2d 292 (1978).) (The dissent found that failure to provide simultaneous interpretation of adverse witness testimony during an administrative hearing deprived claimant of equal protection and due process.) Non-criminal proceedings can adjudicate critical legal matters such as protection from abuse, child custody, support, and divorce; dependency, termination of parental rights, and adoption; eviction and housing or health code enforcement; mortgage foreclosure; and eligibility for unemployment compensation, worker's compensation, mortgage assistance, and welfare benefits. Claims for damages represent potential gain or loss of money, property, and assets. Concerns should be heightened when an LEP defendant is involuntarily summoned to court and may suffer loss of significant property or other interests. Fundamental fairness suggests that when important interests are at stake, the court should level the playing field, at least to the extent of permitting both sides to understand and participate in proceedings without regard to English language ability.

In 1997, the American Bar Association also adopted a resolution that "recommends that all courts be provided with qualified language interpreters in order that parties and witnesses…may fully and fairly participate in court proceedings."

—ABA Resolution, Rep. No 109 (adopted Aug. 1997)

Some jurisdictions have mandated the provision of interpreters for LEP litigants in civil court proceedings. For example, interpreters are required in federal civil proceedings in which the United States is the plaintiff, including bankruptcy matters. 28 U.S.C. § 1827(d). A growing number of states also mandate by statute or by court rule that interpreters be provided in certain civil cases. Cal. Code Civ. Proc. §116.550; Ind. Code Ann. § 34-1-14-3 (1998); KS ST § 60-243 (2000); Mass. Ann. Laws ch. 221, §92 (2001); Minn. Stat. §546.42 (1996); Or. Rev. Code § 45.275 (1996); Utah Code of Judicial Administration Rule 3-306 §12(A); Va. Code Ann. § 8.01-384.1:1 and Wash. Rev. Code § 2.43.02 (1996). In 1997, the American Bar Association also adopted a resolution that "recommends that all courts be provided with qualified language interpreters in order that parties and witnesses with no or limited command of English…may fully and fairly participate in court proceedings." ABA Resolution, Rep. No 109 (adopted Aug. 1997). The failure of courts and administrative agencies to provide qualified interpreters to persons with limited English proficiency can also violate federal civil rights laws. Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, states: "No person in the United States shall on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Language ability has been recognized as a proxy for national origin in discrimination cases. (*See* i.e., *Gutierrez v. Municipal Court of S.E. Judicial District*, 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).) Regulations implementing Title VI bar national origin discrimination including the unintended disparate impact of seemingly neutral policies. *Lau v. Nichols*, 414 U.S. 563 (1974) (Failure to provide special language instruction to Chinese students violates Title VI regulations.)

In 2000, all federal departments and agencies were ordered by the President to develop policy guidances to improve access by LEP persons to federally funded services. Executive Order 13166, 65 F.R. 50121 (Aug. 16, 2000).[7] The guidances, which continue to be published by federal departments and agencies, impose responsibility upon state recipients of federal funds to ensure that LEP persons have meaningful access to services and benefits. Funded entities must develop and implement comprehensive policies for the provision of language assistance at no charge to the LEP individual.

Pennsylvania courts receive from the United States Department of Health and Human Services (HHS) funds relating to the collection of child support, and may also receive funds from the Department of Justice and other federal agencies and programs. Pennsylvania courts receiving such funds are therefore required to comply with the applicable department guidances.[8]

Many state agencies receive federal funds subject to the requirements of Title VI. The agencies also conduct formal hearings which result in decisions that are reviewed by the Commonwealth Court on the record made therein. Among those agencies are the Pennsylvania Department of Labor and Industry, which receives extensive funding from the U.S. Departments of Labor and HHS, including funding that is the basis of operations of the Unemployment Insurance Compensation system, the Employment Service and the Bureau of Disability Determination. Since Unemployment Compensation Insurance administrative appeals are reviewed by the Commonwealth Court on the record made before the Unemployment Insurance Compensation Appeals Board, they too are subject to Title VI requirements.[9] Similarly, the Department of Public Welfare receives HHS funding and is subject to Title VI requirements.

To the extent that the state courts and agencies that conduct administrative hearings are recipients of federal funds, Title VI mandates that broad policies be instituted to ensure that the proceedings are fully accessible to LEP persons. Considerations regarding language-based discrimination apply equally to questions of providing access to those who are hearing- or vision-impaired. These requirements, however, arise under the Americans with Disabilities Act, 42 U.S.C.§12101 *et. seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

RESEARCH METHODOLOGY

The Committee sought quantitative data about the need for interpreter services in Pennsylvania through three survey instruments. The first, the Community Agency Survey, was drafted by the Committee and distributed in 2001 to community service agencies across the Commonwealth. The second survey was prepared and circulated in 2000 among all Court of Common Pleas Judicial District administrators by the Pennsylvania Association of Court Management. The third survey, the Philadelphia Court Interpreter Services Study, was conducted by the National Center for State Courts and distributed to Philadelphia County court administrators and personnel in 1995.

THE COMMUNITY AGENCY SURVEY

The Committee's initial source of survey data was its Community Agency Survey, a questionnaire that asked local community agencies with LEP clients to describe the experiences of their staff and clients concerning the need for interpreters in the Pennsylvania court system. The survey was distributed to 157 agencies, of which 41 responded. A large majority of the respondents were from the central and southeastern part of the Commonwealth, where most of the LEP population is located. The responding community agencies surveyed are located in 13 Pennsylvania counties, but serve at least 24 counties. Many of the agencies are headquartered in either Harrisburg or Philadelphia.

Participants in the Community Agency Survey were asked to address a wide range of language and interpretation issues. The survey requested that they list languages spoken by their clients and the languages for which there was the most frequent need for interpretation. Agencies were then asked to address how the courts meet their clients' interpretation needs; the general availability of language services in their area; and the arrangements they make to address the needs. Questions also covered the role that the participating agencies played in providing interpretation or translation services, and the compensation supplied for those services. Finally, the survey addressed translation services and provided an opportunity for participants to suggest methods of addressing deficiencies in the system.

Respondents reported that Spanish, Vietnamese, and Russian were the languages for which interpreter services were most frequently requested.

Eight other languages were reported by at least 10 percent of the respondents: Cambodian, Korean, Arabic, Cantonese, Haitian Creole, French, Mandarin, and Laotian.[10]

The survey demonstrated the extent to which LEP litigants are relying upon informal sources of language services:

TABLE 1
(Q1) Who is meeting the need for interpreter services?
(check all that apply)

Arrangement	Frequency of Response	Percent of Respondents
Court-provided professional interpreter	17	41.5%
Court administrative staff	1	2.4
Litigant-provided professional interpreter	4	9.8
Community agency	25	61.0
Family member or friend	29	70.7

Other arrangements include using an interpreter phone service, volunteers, community people, and a courthouse janitor.

In a related question, the survey asked what arrangements were made when the court did not provide interpreters. The most common arrangement reported was for the community agency to provide interpretation services. The survey found agencies enlisting interpreters from any source available. Only two agencies hired professional interpreters. The majority of respondents did not know how or where to request interpreter services. Nearly 15 percent reported experience with state courts or agencies that refused to provide a court interpreter. Nine of the agencies, or 22 percent, said their clients had had contact with courts or agencies that did not provide translation of key written information.

Among the responses received were general observations that many LEP persons perceive a language bias in the courts and feel intimidated because their English language skills are poor or non-existent. This was reported by MidPenn Legal Services to be "very true at the district justice level and the administrative court level."[11]

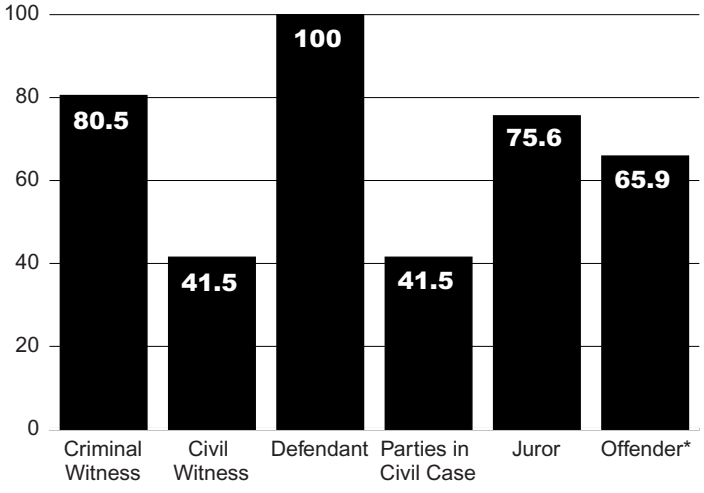
PENNSYLVANIA ASSOCIATION OF COURT MANAGEMENT RESEARCH, PLANNING & DEVELOPMENT COMMITTEE COURT INTERPRETER AND TRANSLATOR SURVEY

In 2000, the Pennsylvania Association of Court Management's Research, Planning & Development Committee conducted the Court Interpreter and Translator Survey, the results of which were reviewed by the Committee. A total of 41 of the 61 Commonwealth judicial districts responded to this survey. It addressed the following issues: the responsibility of the court to provide language and sign interpreters; the availability of interpreters; interpreter qualifications, including testing and certification; and interpreter compensation.

Participants were also asked to discuss the use of technology in their provision of interpreters, and to voice an opinion on whether Pennsylvania should become a member of the Consortium for State Court Interpreter Certification.

The survey found fairly substantial support among court administrators for the notion that the court should provide interpreter services:

TABLE 2
(Q1) Percent of respondents that believe the court should provide language interpreters by situation



*Ordered to Court Supervision/Programs

Respondents were then asked to indicate the availability of interpreters in their respective judicial districts and their needs for interpreters in 2000. Significantly, nearly 20 percent of the responding court administrators indicated that the availability of interpreters was a "major problem" and an additional 60 percent indicated that it had been at least a "minor problem" for them. While the First Judicial District in Philadelphia indicated that it generally did not have problems except for certain languages, that office noted that problems could arise from an immediate mandate for certified interpreters.

Some respondents indicated the languages for which their court used interpreters in 2000, and some trends did emerge from the data. In general, Spanish was the language generating the greatest need for interpreters (81 percent of the responding districts). The next most frequent need was for sign language interpreters (73 percent). Eleven different languages were cited by at least 10 percent of the court administrators for which interpreters were needed.[12]

A significant percentage, or 32 percent (13 of 41), of the respondents reported that their courts had video conferencing equipment available for video interpreting, while fewer than 15 percent reported use of an audio interpreting service. One additional district had the video conferencing technology, but did not use it for interpretation.

Finally, respondents were asked whether Pennsylvania should join the National Consortium for State Court Interpreter Certification (consortium). Fifty-nine percent of respondents said they needed more information about the consortium before they were able to answer the question, suggesting a lack of expertise among local administrators in issues of interpreting. Thirty-four percent favored joining, while only two respondents said Pennsylvania should not join the consortium.

PHILADELPHIA COURT INTERPRETER SERVICES STUDY

The Committee also reviewed the 1995 Philadelphia Court Interpreter Services Study, conducted by the National Center for State Courts (NCSC). The study addressed the qualifications required for professional interpreters; qualifications for contract interpreters; program management; and whether or not the court would benefit from a review of its rules and practices related to the use of interpreters. Although the focus of the

study was the Philadelphia court interpreter system, the results are relevant to the general issues being examined by the Committee.

The NCSC administered the New Jersey Screening Test for Interpreting Proficiency to nine Spanish staff interpreters in Philadelphia. Seven passed the exam. The test results suggested the strengths and weaknesses of the tests currently in use in Philadelphia. Five of the staff interpreters tested at or above the 98th percentile established among those who have taken the exam in New Jersey, but two of Philadelphia's interpreters failed. The study recommended that Philadelphia consider joining the consortium and using standardized tests for interpreter applicants. The study also found that the pay levels for staff interpreters were inadequate; they were paid far less than Philadelphia court reporters and interpreters working in New Jersey. The NCSC recommended that the court raise interpreter salaries at least to the level of court reporters as soon as possible.

NCSC also found that contracted interpreters for languages other than Spanish were not formally tested, and some agencies did not provide training. According to the study, "Experience in other states and local courts suggests that without a program of testing or other meaningful screening, a majority of the interpreters who are used in courts are not qualified for court interpreting."[13] NCSC recommended using salaried staff interpreters in languages other than Spanish, depending on the volume of work. Additionally, NCSC recommended screening of agency interpreters to improve their skill levels.

The study also recommended changes in the management of interpreter services, which were found to be fragmented and without adequate coordination, data gathering, and program leadership. To improve operations and streamline services, NCSC proposed the creation of a centralized office covering all divisions of the Philadelphia County court system, led by a senior manager who would oversee the supervising interpreter, formulate policy, and establish data gathering and evaluation systems.

Despite the many suggestions in the report, the study noted that the interpreting services provided to Spanish speakers in Philadelphia County are generally of high quality, especially when compared to many other major metropolitan areas.

In particular, Philadelphia County has conducted training of court interpreters, and has produced training materials for a court interpreter orientation seminar as well as an interpreter's manual for domestic violence cases entitled *Interpreters Manual for Courtroom #3—Abuse Court*. Additionally, in a program called Racial, Ethnic, and Gender Fairness in the Courts, supporting materials addressing the needs of LEP litigants were developed and presented by the Philadelphia Court of Common Pleas to judges and their staffs.

Philadelphia County employs eight interpreters, all of whom work full-time for the court. Of the eight, Family Division employs two full-time interpreters and provides Spanish translations of court documents. Municipal Court employs two interpreters who work exclusively for that division, and there are four full-time interpreters who work for the Criminal Division. Philadelphia County also regularly collects court data that include a listing of the languages for which interpreters are requested each year; the frequency with which interpretation for each language is requested; a log of requests for interpreters; a listing of interpreter agencies used by the court; a listing of costs for hearings for which interpreters are provided; and an annual report submitted by the family court interpreters employed by the court.

PUBLIC HEARING TESTIMONY

The Committee heard about the experiences and concerns of LEP litigants at the six public hearings it conducted in 2000 and 2001 throughout Pennsylvania. Among those testifying at the hearings were academics and experts who have studied the issue; professionals who work with and advocate for these individuals; and average citizens who shared their personal experiences and suggestions for addressing deficiencies in the system. For the most part, the testimony consisted of anecdotal evidence about current deficiencies in interpretation services.

The main issues raised by witnesses included the following:

LACK OF STANDARDIZED MEANS FOR PROVISION OF INTERPRETATION SERVICES

Courts in Pennsylvania have no standardized means for providing interpretation or translation services. Some courts use agencies, some appoint interpreters on an *ad hoc* basis, and some provide no interpretation services at all. Relatives and friends of the parties are sometimes asked to translate court proceedings, and advocates and observers have reported being pressed into service as interpreters by the court. An advocate from Harrisburg testified that she attends spousal abuse hearings with her clients to provide emotional support, and that while present at such hearings, she has been asked to interpret for the accused as well. “I feel very uncomfortable doing this, because my presence at the court is to support my client and to help him or her with his or her needs,” the advocate said, adding that she felt it was both unethical and a conflict of interest for her to perform this service.[14] The problem of access to competent interpreter services is especially pronounced in juvenile court, where the child, who is the defendant, is often placed in the position of interpreting the proceedings for his or her parents. In addition to the obvious potential for a conflict of interest, the use of a bilingual child as an interpreter can be detrimental to both the defendant and to the family as a unit. LEP litigants are also affected by monetary considerations because interpreter services are too expensive for most of them to afford.

LACK OF STANDARDS FOR INTERPRETER QUALIFICATIONS

Pennsylvania courts do not have set standards by which to evaluate interpreters' qualifications.[15] In general, the pay scale in Pennsylvania's court system is inadequate to attract and retain well-trained and qualified people. Further, because the courts do not pay travel expenses, agencies are unable to send experienced interpreters to suburban and rural counties. The practice of using unskilled, poorly qualified, and uncompensated interpreters can easily lead to misinformed juries and judges when the interpreter misstates or misrepresents what the litigant has stated. Such misrepresentations can significantly affect the outcome of a trial. The problem is compounded by the fact that there is no avenue by which LEP litigants can object to the adequacy of the interpretation services.

INTERPRETATION AND BILINGUAL STAFFING NEED TO BE ENHANCED AT THE INITIAL CONTACT WITH THE SYSTEM

Most LEP litigants first come into contact with the court system through court staff, process servers, or, in criminal cases, police. Each of these encounters generally occurs only in English. Indeed, at every stage of the justice system, LEP persons encounter court staff who are able to communicate only in English. The procession of English-speaking intake workers, secretaries, attorneys, and judges may leave LEP participants in the justice system unable to understand the proceedings. The language problems resulting from the predominance of monolingual court staff is most pronounced with Spanish-speaking parties. Given the status of Latinos as the fastest growing population in the U.S., projected to be one-fifth of the population by 2025, the courts should give priority to the hiring of bilingual, bicultural staff. Such staff are able to serve LEP parties efficiently by delivering services in Spanish and other languages without the need for an interpreter.

LEP litigants may need both interpretation and documentary translation, which are distinctly different services. Anna Arias, an advocate in Wilkes-Barre, explained: "In Pennsylvania, the role of district magistrate is especially important because it is the entry point in what can become a long, confusing, and sometimes terrifying journey through the criminal justice system for recent immigrants who are unfamiliar with American laws."[16] Arias went on to tell the story of a young adult Latino male

arrested on a drug charge who had no interpreter present during police questioning following his arrest or at the magistrate hearing. Arias, who had been called to interpret but was detained at another hearing, testified:

> "I arrived during the hearing. As the defendant was being led out of the courtroom, he asked me in Spanish to explain what had just happened. The police officer told me not to speak to the defendant. I told the police officer that the defendant didn't know what was going on, and I wanted merely to explain why he was being taken back to jail. The policeman said, 'Let his attorney explain.' His attorney does not speak Spanish."[17]

District magistrates need information and training about the threats to civil liberties that stem from poor enforcement decisions—and in extreme cases, fatally flawed prosecutions—that end up in their courts. At a minimum, a commitment to providing interpreter service at all levels is a necessary condition for sorting out such cases involving LEP persons.

NEED FOR JUDICIARY TRAINING

"I later heard from another colleague that the judge had a hard time understanding my client…And because he couldn't understand her, he decided that her claim did not have enough merit to be granted a PFA."

—Attorney Rebecca Ardoline

As a general rule, judges lack the training necessary to distinguish between litigants who understand rudimentary English and those who are truly proficient in the language. As a result, a judge may conclude that a litigant does not need an interpreter because, for example, she can respond appropriately when asked to state her name and address. At the State College public hearing, an advocate told the story of a Korean client who was denied a protection from abuse (PFA) order against her white, native-born American husband. At her PFA hearing, the woman testified that her husband had threatened to kill her, that she was afraid of him because he had been in the military and had expertise in firearms, and that he controlled the family through his control of their finances. The judge denied the PFA but granted some economic relief consistent with a pending divorce. The advocate remarked:

> "I later heard from another colleague that the judge had a hard time understanding my client. During the hearing he did not ask for clarification. He did not suggest that my client testify via a translator. And because he couldn't understand her, he decided that her claim did not have enough merit to be granted a PFA."[18]

Judges and court staff should receive training in the need for, and effective and proper use of, interpreters who can provide the oral and written assistance that a non-native English speaker may need in order to negotiate the system successfully and fairly. There have been few efforts by the courts to have important legal notices translated into languages other than English. Dauphin County has a few notices available in Spanish. At the time of the survey, Philadelphia County had only one translated document available in Spanish, the guilty plea colloquy.

RAPID GROWTH OF PENNSYLVANIA'S NON-ENGLISH SPEAKING POPULATION

Paul Uyehara of the Language Access Project, operated by Philadelphia Community Legal Services, testified to the recent large increase in the Asian ethnic population in Pennsylvania, many of whom do not speak English proficiently. Uyehara also pointed out that in Pennsylvania, more than half of the Asian American population are not native English speakers.[19] Most social workers and attorneys in Pennsylvania are not familiar with the cultural background of Asian Americans, moreover, so there is a built-in barrier to effective representation.[20]

Counties in Northeastern Pennsylvania have experienced rapid growth in Latino population, and Latinos overall are the fastest growing ethnic population in the Commonwealth, increasing 69.6 percent between 1990 and 2000, compared with 3.3 percent for the general population.[21] Each August, a multimillion-dollar tomato harvest draws several hundred Spanish-speaking migrant farmworkers to Northeastern Pennsylvania. According to the latest census, the Latino population in Luzerne County has grown 84 percent since 1990, exceeding the Commonwealth's rate of increase. Wilkes-Barre's Latino population has almost doubled while Hazelton's has increased almost fivefold. Lackawanna, Monroe, and Columbia counties show similar trends. The numbers of Latino immigrants from South and Central America and the Caribbean have all increased, introducing dialects and cultures that differ from those of the established Puerto Rican population.

CULTURAL DIFFERENCES WITHIN MINORITY COMMUNITIES

> *"It is not enough for a witness to have their testimony translated, especially if they're a party in a case. They have to understand what is going on around them."*
>
> —Attorney Arthur Read

Finally, there are substantial cultural differences between different immigrant, migrant, and refugee communities and the dominant culture. These differences can severely interfere with the effectiveness of purely literal interpretation or translation and with an individual's comprehension of the legal, judicial, or administrative processes at work in his or her case. As Arthur Read, general counsel for Friends of Farmworkers, said at the Philadelphia public hearing, "It is not enough for a witness to have their testimony translated, especially if they're a party in a case. They have to understand what is going on around them."[22] A related issue is that attorneys and the courts do not provide sufficient time for LEP litigants to comprehend the proceedings, leaving the litigants poorly equipped to make informed decisions.

OTHER STATE SYSTEMS AND THE STATE COURT INTERPRETER CERTIFICATION CONSORTIUM

The scattered and inadequate provision of interpreter services for LEP litigants in Pennsylvania today mirrors the situation of LEP litigants in other states in the early 1990s. As recently as 1994, few states had comprehensive statewide mechanisms for ensuring that interpreters possessed the minimum skills required for interpreting adequately in a legal setting. Due in part to the lack of financial resources, most state court systems did not respond to problems created by inadequate language interpretation.

Since the mid-1990s, this situation has changed markedly. In 1995, after extensively studying the problems of LEP litigants, the National Center for State Courts established the State Court Interpreter Certification Consortium, with initial participation by the states of Minnesota, New Jersey, Oregon, and Washington. The consortium was formed to respond to the findings by many state commissions, studies, and other investigations that the needs of LEP litigants were not being met in state courts and that the litigants' rights to equal justice were being severely limited. The consortium also became a means for states to share expertise and the expense associated with developing and administering testing and certification programs for interpreters.[23] Establishment of the consortium was one of four pressing initiatives identified in the NCSC study, along with interpreter training, referral databases, and judicial education.

A total of 29 states had joined the consortium by September 2002.[24] The members have interpreter programs containing some or all of the following components:

- Adoption of the Code of Professional Conduct for Interpreters;
- Creation of a court interpreter advisory committee or task force;
- Consortium membership;
- Employment of state office program personnel;
- Adoption of state supreme court rules or administrative orders governing interpreter qualifications; and
- Implementation of regular statewide orientation and training programs for interpreters.

Philadelphia remains the only Pennsylvania county that attempts to provide interpreter services to courts in a systematic manner. Interpreter certification and training—two key components in an interpreter system—do not exist in the Commonwealth.

Given the clear need for a statewide system of providing certified interpretation services, the multi-state consortium is one avenue for Pennsylvania to pursue in attempting to meet its needs. Although there is a fee for membership in the consortium, the cost is less than the Commonwealth would spend to create its own certification and training program for interpreters. Membership in the consortium provides testing in 11 languages; training for interpreters employed by the state court system; a standard of test validity and reliability to protect the courts from legal challenge; test credibility; reciprocity between states; test administration innovations; and comprehensive interstate networking.

Some states that have yet to implement interpreter certification programs have nonetheless recognized the need for statewide regulations to ensure consistency in interpreter qualifications. For example, while legislation in Florida to create a statewide certification program is still pending, the state adheres to NCSC procedures and administers the NCSC examination.[25] Mississippi, which has no program in place, has pending legislation that would provide for interpreters in all state courts, and would regulate the certification of the interpreters.[26]

GENERAL FINDINGS

After reviewing relevant testimony, research findings, and survey data, the Committee found fundamental statewide deficiencies in the treatment of LEP litigants. These deficiencies undermine the ability of the court system to determine the facts accurately and to dispense justice fairly. Key findings include:

- Some courts are allowing cases involving LEP parties, including criminal defendants, to proceed without interpreters.
- Some courts routinely allow untrained, non-professional individuals, including relatives and friends, to act as interpreters.
- Paid court interpreters are permitted to interpret without any demonstrated competency, especially when they are working under contract.
- The ability of the court system to determine facts and dispense justice is compromised by inadequate language services.
- The lack of standards in Pennsylvania for the use of interpreters and for determining interpreter competency compounds the problem of providing access to justice for LEP persons.

SOME COURTS ARE ALLOWING CASES INVOLVING LEP PARTIES, INCLUDING CRIMINAL DEFENDANTS, TO PROCEED WITHOUT INTERPRETERS.

Civil and criminal cases are permitted to proceed without interpreters for parties who cannot participate because of their limited English proficiency. Proceedings sometimes go forward even when it is apparent that the LEP party needs or has requested an interpreter. Fifteen percent of community agencies surveyed by the Committee reported clients being refused an interpreter in a court proceeding. Two witnesses recounted instances in juvenile court proceedings in which the parents were forced to rely upon interpretation by the juvenile defendant. Another witness observed an arraignment that was conducted without an interpreter, in which a police officer, following uninterpreted questioning of the defendant, presented inaccurate and prejudicial testimony to which the defendant could not respond. Judges, noting a person's rudimentary English skills, may improperly fail to appoint an interpreter even though the person is unable to understand or participate in the proceeding without an interpreter.

The court system appears to recognize the problem, but often does not provide assistance to language minorities. All of the judicial districts responding to the State Association of Court Management survey agreed that the courts should provide interpreters to criminal defendants, and about 40 percent thought interpreters should also be provided in civil cases. The survey, however, did not determine the extent to which courts actually provide services. In Philadelphia, for example, the courts provide interpreters for criminal defendants and for Family Court matters, but not for civil matters. The community agency and court administrator surveys suggest that interpreters are generally not being provided around the state in civil cases.

Translations of many essential documents, such as complaints and waiver forms, are not available in Pennsylvania, and there are no document translations into languages other than Spanish. Individuals who receive the documents may rely upon family or friends for translation, or upon brief oral summaries that may be incomplete or inaccurate.

SOME COURTS ROUTINELY ALLOW UNTRAINED, NON-PROFESSIONAL INDIVIDUALS, INCLUDING RELATIVES AND FRIENDS, TO ACT AS INTERPRETERS.

Several bilingual advocates who were in court to serve as witnesses complained that judges had drafted them to serve as interpreters, despite their apparent involvement in the case and their lack of specialized training.

Since many courts do not provide professional interpreters, LEP litigants are often forced to rely upon any readily available person as an interpreter. Community agencies responding to the Committee survey reported that family and friends are the most likely source of interpreters, followed by the agencies and the courts. Such people often lack training in interpretation for court hearings, and they may be less than fluent in one or both languages. Several bilingual advocates who were in court to serve as witnesses complained that judges had drafted them to serve as interpreters, despite their apparent involvement in the case and their lack of specialized training.

When unskilled interpreters appear in court, the LEP party is likely to comprehend only a part of what is occurring. The interpreter may fail to interpret some portion of the case, may fail to summarize what is being said, or may interpret erroneously. The interpreter may give legal advice to the litigant, answer on his or her behalf or change the meaning of what he or she has said.

Judges and attorneys who are unfamiliar with the methods used for interpreting are generally unable to identify shortcomings in, or the accuracy of, an interpreter's performance. Interpreting techniques are not difficult to understand, but to most untrained people they are neither natural nor intuitive. Untrained participants in an interpreted dialogue, like untrained interpreters, tend to make the same errors. Untrained judges and attorneys also do not intuitively grasp that even a fully bilingual person cannot interpret well without special training.

PAID COURT INTERPRETERS ARE PERMITTED TO INTERPRET WITHOUT ANY DEMONSTRATED COMPETENCY, ESPECIALLY WHEN THEY ARE WORKING UNDER CONTRACT.

Courts may hire staff interpreters to handle high-volume languages such as Spanish. In Philadelphia, as mentioned above, two of the seven Spanish staff interpreters had less than adequate scores on a screening exam, while the others scored extremely well. The test results reflected both the strength and weakness of Philadelphia's screening process for staff interpreters.

Contracted interpreters are often used in court for less familiar languages or in rural counties. Frequently, these interpreters are subcontractors or employees of interpreting agencies. The interpreters tend to be tested according to what one court interpreter administrator calls the "appearance standard," meaning the court is satisfied when an interpreter: 1) is available; 2) shows up on time; 3) is appropriately dressed and appears professional; 4) appears to be bilingual; and 5) elicits no complaints.[27] The NCSC Philadelphia study further noted that the court did not test or screen contract interpreters, but instead relied on the interpreting agencies to assure adequate skills and training. Based on its experience, NCSC staff noted that without careful testing and screening, most agency interpreters are not qualified to interpret. More than one witness testifying before the Committee complained of interpreters lacking the fluency required for

court work, or lacking knowledge of proper techniques. Incompetent interpreters may "lose" or distort important evidence, and they may fail to communicate to an LEP person what is happening in the proceeding.

THE ABILITY OF THE COURT SYSTEM TO DETERMINE FACTS AND DISPENSE JUSTICE IS COMPROMISED BY INADEQUATE LANGUAGE SERVICES.

Courts and juries in cases involving untrained interpreters routinely receive inaccurate or incomplete testimonial evidence. In such cases, many litigants and witnesses may fail to comprehend questions fully, and may be unable to communicate fully in English what they know. When parties fail to understand the testimony of a witness, they may be unable to assist counsel in effective cross-examination.

Determining the facts is a critical function of any trial court or administrative hearing, and the current system of interpreting undermines the court's capability in this area. Whether the factfinder is a judge or jury, inaccurate renditions of testimony threaten the integrity of the proceeding. In this regard, many observers do not understand that poorly interpreted witness testimony is similar to hearsay testimony. Professional interpreters adhere to the standard of consecutive interpreting: add nothing, change nothing, omit nothing. Untrained interpreters, on the other hand, tend to summarize questions and answers, respond for the witness, and gloss over nuances in language that may be critical to the evidence. Interpreters may also make simple errors in phrasing or word choice because of an inadequate command of one or both languages. When the factfinders, in turn, misunderstand the interpreters, a second layer of distortion can occur. On another level, an interpreter's skill and appearance may influence subtle credibility determinations made by the factfinder. Intonation, hesitation, emotion, eye contact, and deference may all contribute to the appearance of honesty or deceit.

THE LACK OF STANDARDS IN PENNSYLVANIA FOR THE USE OF INTERPRETERS AND FOR DETERMINING INTERPRETER COMPETENCY COMPOUNDS THE PROBLEM OF PROVIDING ACCESS TO JUSTICE FOR LEP PERSONS.

Deficiencies in court language services exist across the Commonwealth. No jurisdiction is adequately meeting the need for interpreters, and the standard of work performed in all jurisdictions reflects the lack of uniform standards, training, and testing. This situation persists despite a growing national consensus on the need for court interpreting that has already placed Pennsylvania in a shrinking minority of states.

The court system would benefit greatly from the development of statewide standards for performance and certification of court interpreters and from training for judges and court staff on working with LEP parties. Standards and protocols and model codes are readily available.

Certification exams, which are extremely expensive to design and validate, are available to members of the State Court Interpreter Certification Consortium, and other states have developed protocols to screen interpreters in languages for which certification exams have not yet been developed.

Court administrators suggested in the survey that they are receptive to the development of uniform standards. More than 50 percent said they preferred statewide testing and certification of interpreters rather than local or regional control. More than 33 percent favored joining the consortium, while 59 percent wanted more information before deciding.

Pennsylvania, unlike many states, has no ethical standards for court interpreters. The Commonwealth could adopt a model ethical code that is in use elsewhere, incorporating sections on testing for interpreters, training in ethics, and rule enforcement.

Training for interpreters and those who work with them is a critical component of a court interpreter system. Judges need to learn how to determine if an interpreter is needed, how to establish the competence of the interpreter, and how to supervise the interpreter in the court system. Lawyers, likewise, can benefit from instruction in working with interpreters. Justice would be served if training were mandatory for the bench and the bar.

RECOMMENDATIONS

In formulating the following recommendations, the Committee acknowledges that the implementation of these recommendations is likely to be costly. Nonetheless, they are essential to providing equal access to justice to LEP individuals.

TO THE SUPREME COURT OF PENNSYLVANIA

The Committee recommends that the Court: [28]

1. Establish for all courts of the Commonwealth of Pennsylvania a policy that all persons, including parties to judicial proceedings, witnesses appearing therein, victims in criminal proceedings, and members of the public seeking information from offices of the courts, shall have equal access to justice in the judicial system of Pennsylvania without regard to their English language proficiency.[29]
2. Require that all courts provide qualified interpreters to litigants at no charge, in order that LEP parties and witnesses may fully and fairly participate in court proceedings and obtain reasonable access to the court system.
3. Require that the courts translate forms and other documents to the extent necessary to provide access to the court system to those unable to read English.
4. Require that all court interpreters obtain certification pursuant to a recognized statewide certification program, maintain their proficiency through continuing education, and adhere to standards of professional conduct.
5. Require the adoption of a code of professional responsibility for judicial interpreters together with mechanisms to assure that all interpreters are familiar with the code and are subject to discipline for any violation.
6. Establish within the Administrative Office of the Pennsylvania Courts (AOPC) a Language Services Office,[30] similar to those established by other states, staffed by professional administrative personnel experienced with issues related to court interpretation and translation, and funded sufficiently to carry out its mission. (Please refer to Endnote 30 at the end of this chapter for a full listing of suggested services to be provided by a Language Services Office.)

ENDNOTES

[1] "Limited English proficient" is a term generally used to encompass persons who are "non-English speaking" as well as persons who do not speak English with sufficient fluency to function effectively in a particular setting without oral interpretation or written translation assistance.

[2] Of the 368,257 persons age 5 and over who do not speak English very well, 140,502 are Spanish-speaking and 76,183 are Asian and Pacific Islanders, according to Census 2000 figures. Census 2000, Table DP-2. Profile of Selected Social Characteristics, 2000. Geographic area: Pennsylvania.

DP-2. Profile of Selected Social Characteristics: 2000 Language Spoken At Home: Pop. 5 years and over

Data Set: Census 2000 Supplementary Survey Summary Tables	Estimate	Percentage
Geographic Area: Pennsylvania: Population 5 years and over	11,555,538	100.0%
English only	10,583,054	91.6%
Language other than English	972,484	8.4%
Speak English less than "very well"	368,257	3.2%
Spanish	356,754	3.1%
Speak English less than "very well"	140,502	1.2%
Other Indo-European languages	428,122	3.7%
Speak English less than "very well"	138,542	1.2%
Asian and Pacific Islander languages	143,955	1.2%
Speak English less than "very well"	76,183	0.7%
Other languages	57,990	0.5%
Speak English less than "very well"	14,041	0.1%

U.S. Census Bureau, Census 2000, (December 2000) <http://factfinder.census.gov/servlet/QTTable?ds_name=DEC 2000 SF3 U&geo id=04000US42&qr_name= DEC 2000 SF3 U DP2>

[3] In the first seven months of calendar year 2001, the First Judicial District of Pennsylvania (Philadelphia County) received requests for language interpretation services in 35 different languages and dialects. In addition to requests for services from eight full-time Spanish language interpreters, the First Judicial District reported that of its remaining requests for interpretation services: 30 percent were for Asian languages and dialects; 25 percent were for Russian and Slavic languages and dialects; 18 percent were for sign language (including American and Spanish sign); 15 percent were for European languages and dialect; 5 percent were for Middle Eastern languages and dialects; up to 2 percent were for African languages; and 5 percent were for other languages or dialects only infrequently requested. Source: First Judicial District of Pennsylvania.

In calendar year 2000, the First Judicial District of Pennsylvania (Philadelphia County) received requests for interpreters in 57 different languages and dialects. These were identified as:

#	Language	#	Language	#	Language
1	Albanian	20	Haitian Creole	39	Romanian
2	Amharic: (Ethiopian)	21	Harbin	40	Russian
3	Arabic	22	Hebrew	41	Sign
4	Bangladesh	23	Hindi	42	Singhalese
5	Beijing	24	Hmong	43	Slovakian
6	Bosnian	25	Indian	44	Somalian
7	Cambodian	26	Italian	45	Sonike
8	Cantonese Chinese	27	Japanese	46	Spanish
9	Czechoslovakian	28	Korean	47	Syrian
10	Creole	29	Laotian	48	Taiwanese
11	Farsi	30	Malayalam	49	Tagalog
12	French	31	Mali-Solinga	50	Tigrina
13	Fuzhou	32	Mandarin Chinese	51	Tinera
14	Fukanese	33	Pakistani	52	Turkish
15	Fulani	34	Pashto	53	Ukrainian
16	Georgian	35	Persian	54	Urdu
17	German	36	Polish	55	Vietnamese
18	Ghandi	37	Portuguese	56	West African
19	Greek	38	Punjabi	57	West Indian

First Judicial District of the Court of Common Pleas response to Pennsylvania Association of Court Management, Court Interpreter and Translator Survey.

Other Judicial Districts of the Court of Common Pleas, responding to Pennsylvania Association Of Court Management, Court Interpreter And Translator Survey indicated the following additional languages not identified by the First Judicial District: Croatian and Serbian (three judicial districts); Egyptian (Arabic) and Thai (Monroe County).

[4] Each of the Work Group members has extensive experience working with litigants with limited English proficiency. Their experiences range from directing an interpreting services agency to providing legal representation on a daily basis to litigants with limited English proficiency.

[5] A bibliography of published material relevant to the issues studied by the Committee can be found at Appendix Vol. I.

[6] The Committee relied heavily upon Kathleen M. Sullivan, *A Judge's Handbook on Immigration Law and Related Materials* (Chicago: American Bar Association 2001), particularly Chapter 14 therein, "Court Interpreters: Appointment, Qualification and Effective Utilization," as updated by Sarah Paoletti, Esq., Friends of Farmworkers, Inc.

[7] Executive Order 13166, 65 F.R. 50121 (August 16, 2000) <http://www.usdoj.gov/crt/cor/Pubs/eolep>.

[8] 67 F.R. 4968 (February 1, 2002) <http:www.hhs.gov/ocr/>.

HHS's Office for Civil Rights notes:

Title VI prohibits discrimination in any program or activity that receives Federal financial assistance. What constitutes a program or activity covered by Title VI was clarified by Congress in 1988, when the Civil Rights Restoration Act of 1987 (CRRA) was enacted. The CRRA provides that, in most cases, when a recipient/covered entity receives federal financial assistance for a particular program or activity, all operations of the recipient/covered entity are covered by Title VI,

not just the part of the program that uses the federal assistance. Thus, all parts of the recipient's operations would be covered by Title VI, even if the federal assistance is used only by one part.

U.S. Department of Health and Human Services, Office for Civil Rights, Policy Guidance Title VI Prohibition Against National Origin Discrimination As It Affects Persons With Limited English Proficiency, Part C.1. (September 1, 2000). *See* extensive discussion at Part B thereof as to the legal authority under Title VI for the HHS guidance.

Department of Justice Republished Guidance, 67 F.R. 41455 (June 12, 2002).

[9] The Department of Labor LEP Policy Guidance, 66 F.R. 4596 (January 16, 2001) <http://www.usdoj.gov/crt/cor/lep/dollep.htm>.

[10] Other languages identified and the percentage of responding agencies identifying them included:

Language	**% of Respondents**
Spanish	78%
Vietnamese	44%
Russian	43%
Cambodian	27%
Korean	22%
Arabic	17%
Chinese - Cantonese	17%
Haitian Creole	17%
French	15%
Chinese - Mandarin	12%
Laotian	10%
Chinese – Fuzhou	7%
Amharic (Ethiopian)	7%
Portuguese	7%
Hindi	2%

Some respondents provided other detailed information about language needs identified in their work. Other languages reported: Ukrainian (2), Khmer (1), Serbo-Croat (1), Bosnian (1), Albanian (1), Pashto and Farsi (1), Lingala (1), Swahili (1), Romanian (1), Hmong (1), Tigrina (1), Dinka (1), and Huen

[11] MidPenn Legal Services, Lancaster Office, Response to a Community Agency Survey, 8.

[12] The breakdown of the languages for which interpreters were identified as needed is:

Language	% of Respondents
Spanish	81%
Sign	73%
Russian	37%
Vietnamese	29%
Other Asian	24%
Polish	22%
Arabic	15%
Korean	15%
Cantonese – Chinese	15%
French	12%
German	10%
Croatian	7%
Italian	7%
Serbian	7%
Other Eastern European	7%
Haitian Creole	5%
Czechoslovakian	5%
Laotian	2%

[13] National Center for State Courts, Philadelphia Court Interpreter Services Study, p. 14 (1995).

[14] Testimony of Ho-Thanh Nguyen, Harrisburg Public Hearing Transcript, pp. 121–22.

[15] Pennsylvania Association of Court Management-Research, Planning & Development Committee, Court Interpreter and Translator Survey, Appendix Vol. I.

[16] Written testimony of Anna Arias, Wilkes-Barre Public Hearing Transcript, p. 2.

[17] *Id.*

[18] Testimony of Rebecca Ardoline, State College Public Hearing Transcript, p. 81.

[19] Testimony of Paul Uyehara, Philadelphia Public Hearing Transcript, p. 235.

[20] Testimony of Im Ja P. Choi, Philadelphia Public Hearing Transcript, p.131.

[21] U.S. Census Bureau, Census of Population, *Profile of General Demographics for Pennsylvania:* (1990) & (2000).

[22] Testimony of Arthur N. Read, Philadelphia Public Hearing Transcript, p. 139.

[23] Madelyn Herman & William Hewitt, *The National Center for State Courts and The Consortium for State Court Interpreter Certification Program,* American Translator's Association Chronicle, 35–37, October 2001.

[24] The states belonging to the consortium are Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois/Cook County, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.

[25] Louise Story, *Interpreters Balance Scales, Court Interpreters Make Sure Everyone is Heard, and Demand for their Services is Growing,* Osceola Sentinel, July 2, 2001.

[26] H.R. 718, 2002 Regular Session (Miss. 2002).

[27] National Center for State Courts, Philadelphia Court Interpreter Services Study, Translating and Bilingual Services Section of the Administrative Office of New Jersey Courts, Robert Joe Lee, Director of Court Interpreting, pp. 16–17.

[28] In its comments to the proposed Rule of Court Administration relating to Equal Access to Justice in the Courts of the Commonwealth of Pennsylvania, the Supreme Court of Pennsylvania should note that it anticipates that in implementation of that Rule, courts will utilize the guidance which has been provided under Title VI of the Civil Rights Act of 1964 relating to National Origin Discrimination Against Persons With Limited English Proficiency pursuant to United States Presidential Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency."

[29] The Committee notes that during the study, similar concerns were raised regarding the needs of the hearing impaired. The Committee determined that the needs of the hearing impaired were beyond the scope of its study but urges the Court to consider addressing the needs of the hearing impaired and citizens with limited English proficiency at the same time since they involve similar issues and solutions.

[30] The Language Services Office shall be responsible for:

a) Enrolling the Pennsylvania Unified Judicial System as a member of the State Court Interpreter Certification Consortium of the National Center for State Courts;

b) Establishing procedures for the employment, training, compensation, qualification, and approval of staff and contracted court interpreters during the transition to statewide certification standards;

c) Creating a comprehensive statewide system to assure qualified judicial interpreters, including:

   i) Adopting standards for the skills and qualifications required for different levels of expertise of interpreters as well as job descriptions for interpreters and supervisors;

   ii) Assessing the need for and implementing orientation training, certification training, and continuing professional education;

   iii) Overseeing the administration of consortium certification exams in available languages needed by the courts; and developing testing protocols for languages for which consortium exams are not developed;

   iv) Determining the advisability of and standards for certifying knowledge of the Code of Professional Responsibility for Judicial Interpreters; and

   v) Developing guidelines for compensation scales for staff and contracted interpreters at various levels of proficiency and experience.

d) Creating and managing a statewide administrative system for interpreting, including:

   i) Recruiting and hiring staff interpreters and contracted interpreters;

   ii) Creating a system to assign interpreters efficiently, as needed, to proceedings across the state to assure maximum use of the most qualified interpreters and the avoidance of delay for the courts, the litigants, and the interpreters;

   iii) Supervising the work of interpreters to maintain quality and professionalism; and

   iv) Gathering and analyzing data on the need for, use of, and cost of the interpreter program, and making recommendations for improvement of the system.

e) Developing protocols for the use of interpreters in courts and courthouses, including:

   i) Adopting a bench guide for judges to consult in the proper utilization and supervision of interpreters in judicial proceedings, including standard *voir dire* questions for court interpreters and for witnesses and/or litigants to determine whether appointment of an interpreter is necessary;

ii) Adopting standards for such matters as the techniques to be used by interpreters; the correction of interpreter errors and objecting interpretation; and avoidance of interpreter fatigue;

iii) Consistent with published Title VI guidances, identifying those vital written documents, forms, posted notices, and signs utilized by the courts that should be required to be translated to other languages and into which other languages such written materials should be translated;

iv) Developing a system to create reviewable interpreting records, including (1) appropriate tape recording of witnesses and interpreters and the proceedings to the extent feasible, so as to have a complete record for judicial review and challenges to the adequacy of interpretation; and (2) video recording of the witness and interpreter where sign language interpretation or other assistance to hearing impaired persons is provided;

v) Developing policies and procedures for the use of video telephone conferencing systems for court interpretation when qualified on-site interpreters are not available, assuring with those policies that video interpreters are qualified;

vi) Determining means to provide meaningful access to LEP persons who are *pro se* litigants; and

vii) Adopting procedures to assure that language services are provided to assist court-appointed counsel in communicating with LEP clients in criminal and other matters.

f) Promoting increased hiring of bilingual and bicultural court staff able to deliver services to LEP parties without the need for an interpreter, including development of job descriptions for bilingual positions, providing fiscal support for upgrading skills of existing bilingual employees, and recommending practices to facilitate recruitment and retention of bilingual staff.

g) Working with continuing legal education providers and the administrative office of the Pennsylvania Courts to develop training and educational systems for attorneys, judges, court administrators, and others as to issues relating to the equal access to justice for LEP persons and for the utilization of court interpreters.

h) Engaging in study of other issues relating to providing equal access to LEP litigants and making further recommendations in such areas as:

i) Assessing how the cultural norms of immigrant communities may adversely impact their ability to obtain equal justice in the judicial system and what remedial action is appropriate;

ii) Determining how foreign-born litigants' immigration status may affect their rights to equal access to justice in Pennsylvania judicial proceedings and how the adverse aspects of such impact may be minimized; and

iii) Establishing mechanisms for providing members of LEP immigrant communities with accurate information about their legal rights and options open to them, which could include an explanation of the possibility of free or *pro bono* representation, lists of competent referrals for different kinds of translation or other services, and types of problems which can be addressed through the legal system.

i) Ensuring that all Pennsylvania courts and Commonwealth administrative departments or agencies which conduct hearings that are subject to judicial review on the record also develop procedures to comply with Title VI of the Civil Rights Act of 1964 and its implementing regulations.

2 RACIAL AND ETHNIC BIAS IN JURY SELECTION

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INTRODUCTION

When the authors of the Bill of Rights wrote into the Sixth Amendment "the right to a speedy and public trial, by an impartial jury of the state and district," they did not specify the nature of an impartial jury. The states and districts were left to grapple with that definition as they set standards and procedures for selecting juries. Since the early days of the republic, jury service has remained a mark of citizenship and a touchstone of civic duty. "Aside from paying taxes or registering with the Selective Service, it is the only public service that is presently compulsory in American society," writes legal policy analyst Evan R. Seamone.[1] Indeed, for those who are called, jury service can be what Thomas Jefferson referred to as "the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution."[2] For those who are not called or cannot serve, however, jury duty can serve as a reminder that states and districts have, at times, denied their citizens certain rights and responsibilities of citizenship.

Today, the nature of the "impartial jury" remains a subject of debate in Pennsylvania, both inside and outside the court system. In a pluralistic society, what does an impartial jury look like? Do we achieve impartiality by insisting on random selection of juries from a large jury pool, regardless of race or ethnicity? Do we achieve impartiality by choosing juries that look like representative samples of their communities?

The questions are not abstract and academic. "Are we impartial here?" is a question that arises when a person of color looks across the courtroom to see an all-white jury. The person of color may be a plaintiff or defendant, prosecutor or defense attorney, witness or judge wondering how and why the jury came to have so many people from Column A and none from Columns B, C, D, and E. The person may wonder if a jury can be impartial when its selection appears to have been otherwise.

The issue of racial composition of juries raises questions of public confidence in the courts and their ability to judge all citizens impartially. With Jefferson's anchor in mind, this chapter examines how the Pennsylvania courts include and exclude citizens of the Commonwealth at each step of the jury selection process.

Focus of Inquiry

In its study on Racial and Ethnic Bias in Jury Selection, the Committee sought to determine whether minorities are substantially underrepresented on juries in the Commonwealth, and, if so, to identify the causes of any underrepresentation.

Sources of Information

The Committee obtained its data from four primary sources: 1) a survey of all jury commissioners in the Commonwealth followed by a statistical analysis of juror records in four representative counties in the Commonwealth; 2) a statistical analysis of jurors selected for jury duty in Allegheny County; 3) testimony from six public hearings and roundtable discussions held throughout the Commonwealth; and 4) scholarly articles[3] and findings from other state task force reports.

SYNOPSIS OF FINDINGS

Overall, the Committee determined through its analytical study and public hearing testimony of jury commissioners that most jurisdictions in Pennsylvania pay little heed to the racial composition of juries. Pressed for an explanation, court administrators say that taking the race of prospective jurors into account would be improper, illegal, or even unconstitutional. An examination of the current policies of constructing lists of potential jurors and choosing juries suggests that the policies, whatever their rationale, fail at each step of the process to include a representative number of minorities. In at least one large county[4] in Pennsylvania, people in predominantly African American and Latino neighborhoods receive fewer summonses for jury duty, and the number of potential jurors consequently declines because of difficulties with transportation, childcare, and work rules that discourage jury participation by hourly employees. When potential minority jurors do appear at the courthouse, in many jurisdictions they are more likely than white jurors to be dismissed through the exercise of peremptory challenges by prosecutors and/or defense attorneys tacitly exhibiting their belief that a juror's race may predispose him or her toward conviction or acquittal of a defendant.

Efforts to increase jury participation by minorities also have been hampered by a lack of reliable data about the racial composition of jury pools and actual juries. Although more than half of the court administrators surveyed by the Committee reported keeping information about the ages and places of residence of potential jurors, there were no comparable data regarding race. Among the databases from which names of potential jurors are drawn generally, there is no question about race on driver's license forms, and the question is optional on voter registration forms.[5] Potential jurors are asked their race on the Jury Information Questionnaire (JIQ), which is mandated for use in the Commonwealth's criminal process and is also used by many counties for all potential jurors. Information on the form is confidential, however, and its use is limited to jury selection. Pennsylvania courts thus compile little or no accessible data on the race of jury pool members. Some court administrators contend that such record-keeping would be an impermissible form of racial profiling. The lack of such records, however, has consistently hampered attempts to determine the degree to which racial and ethnic minorities are underrepresented in jury pools and actual juries.

The Pennsylvania Legislature has recently directed its attention to the issue of the racial composition of juries. Spurred by news stories in several newspapers across the Commonwealth,[6] community groups have called for changes in the system, and the state Senate Judiciary Committee recently authorized an investigation of racial representation on juries in the Commonwealth.

RESEARCH METHODOLOGY

TAYLOR STUDY OF MINORITY PARTICIPATION IN JURY SERVICE

The Committee engaged the services of Ralph Taylor, chair of the Department of Criminal Justice at Temple University, to conduct a two-part analysis of minority participation in jury service in Pennsylvania. The research team also included Lillian Dote and Jerry Ratcliffe, both from Temple University.

The study was completed in two phases. Phase I, completed in August 2001, examined the initial stage of juror processing, in which the courts construct and maintain master lists of potential jurors. All jury commissioners in every courthouse in the Commonwealth were asked to complete a survey reporting on their processes. Phase II of the study focused on four representative counties in the Commonwealth, and was completed in June 2002. It geocoded address information of contacted potential jurors, and examined the connection between the fabric of the micro-neighborhood and the outcome of the contact attempt. In effect, it was an examination of the "middle stages" of potential juror processing, taking place between initial contact and showing up at the courthouse. The outcome of interest was "yield," defined as the total number of jurors who actually show up at the courthouse on service day, out of all potential jurors contacted in a neighborhood.

PHASE 1: METHODOLOGY AND FINDINGS

The Phase I study, entitled *Understanding the Juror Selection Processes Through Jury Documents and Administrator Surveys: Exploring Implications for Under-Representation of Populations of Color,*[7] was undertaken to develop a statewide picture of current jury selection processes. In June 2001, court administrators from each county were contacted and asked to produce copies of the jury summoning documents used by each court. The documents included the pre-qualifying questionnaire, the summons, and the JIQ. Two weeks later, the project staff mailed questionnaires to the court administrators. A total of 48 counties submitted copies of their jury summoning documents and 46 submitted complete surveys in time to be included in the analyses. Seven of the administrators, however, cover two counties each, which means jury summoning documents were collected for 55 of the Commonwealth's 67 counties.

Pre-Survey Documentary Data

Models of Jury Summoning

The study identified six different models of jury summoning that were being employed by Pennsylvania counties.

- Model A uses separate qualification and summoning processes. Citizens who return a pre-qualifying questionnaire are either sent a letter excusing/disqualifying them for service, or they are sent a summons to report on a certain date for the array. On that day potential jurors complete the JIQ.
- Model B combines the qualification and summoning processes. The first mailing contains both the pre-qualifying questionnaire and the summons. After returning the pre-qualifying questionnaire, some citizens are notified by postcard that they have been excused or disqualified. The others appear on the summons date and complete the JIQ.
- Model C begins with an initial mailing that contains the summons, the pre-qualifying questionnaire and the JIQ. It is identical to Model B except that potential jurors complete the JIQ before arriving at the courthouse.
- Model D uses two mailings. The first contains the pre-qualifying questionnaire. Potential jurors who are neither excused nor disqualified receive a second mailing with the summons and the JIQ.
- Model E begins with a first mailing that includes both the pre-qualifying questionnaire and the JIQ. Those who are excused or disqualified are notified by postcard; the others receive a summons as the second mailing.

The survey showed Model B was used most widely, with at least 19 counties mailing the summons and pre-qualifying questionnaire at the same time.

Format of Juror Documents

In examining the jury documents, the researchers noted the summons format varied widely from county to county. Whether the summons was a postcard, letter, or a tear-apart, computer-generated form, it specified a date and time for the citizen to report to a courthouse.

The researchers found that pre-qualifying questionnaires covered standard questions about citizenship, criminal convictions, English aptitude, military service, and previous jury service, although the questions were often posed in different ways. The greatest variations occurred in the sections on

criminal history. In addition to listing convictions, potential jurors in most counties were asked to explain the convictions and, in at least one case, to give detailed information. In addition, the survey found different ways of handling Driving Under the Influence (DUI) convictions; some counties asked expressly about DUI and some precluded it, while still others failed to specify whether DUI convictions should be listed. All counties followed the Supreme Court of Pennsylvania rule of excluding citizens who had served on a jury within the past three years. Finally, several counties asked for additional information in the pre-qualifying questionnaire, such as the name of the citizen's municipality, phone number, spouse's name, marital status, maiden name, name from a previous marriage, and other names used in the past.

The survey confirmed that counties were using the JIQ that the Supreme Court of Pennsylvania mandates for use in the criminal process. Many counties used the JIQ for all potential jurors in civil and criminal courts, although some counties used a modified version for civil court. The JIQ asks for the citizen's name, residence, marital status, race, occupation, previous occupations, number of children, level of education, previous jury service, and disabilities. The JIQ asks additional questions about personal background and beliefs, such as whether the potential juror has been the victim of a crime; has beliefs that would prevent him or her from sitting in judgment; or would have problems in following the court's instruction. The questionnaire is confidential and cannot be used for purposes other than jury selection.

Time Commitment and Compensation for Jury Service

The researchers found differences among counties with regard to the time commitment required for the array (i.e., jury selection process) and the trial term. The array is generally limited to one day, although several counties require potential jurors to serve for two days or as long as one week. Those who are selected for jury service, however, may be required to serve for as long as several months. For example, at the array, in a few jurisdictions, a citizen can be selected for several trials that will occur over the course of a two-month trial term; the citizen then will be required to report to the courthouse for the actual trials.

The study notes that some counties use a "one day, one trial" system that selects jurors who serve either on one jury for the duration of the trial or serve for one day. Anyone not selected at the array is sent home at the end

of the day. Other counties use a "date certain" system in which jurors chosen at the array are notified in advance of the trial start date, ending date, and length. In Clearfield County, which follows the "date certain" model, it is not unusual for citizens to serve on more than one trial during the two-month period.

The survey showed that counties varied in their descriptions of the time commitment required for jury service, and some fail to distinguish in their correspondence between the array service and the trial term. Many say "the term of service is usually one week" without going into further detail.

The study also noted the payment for jury service, which is set by state statute at $9 per day for the first three days of service and $25 per day thereafter. Some counties reimbursed potential jurors for travel between their homes and the courthouse, at a standard rate of 17 cents per mile.

Persons with disabilities will generally find no information about accommodations in the information supplied by the courts, although a few counties asked persons with disabilities to notify the courthouse before reporting. Childcare services were mentioned only by Montgomery County, which operates a free, licensed drop-in center across the street from the courthouse.

Administrator Survey Data

Source lists

The court administrators and jury commissioners responding to the survey cited at least nine different types of sources that were used to create their pools of potential jurors. A total of 28 counties used lists of registered voters, and 16 counties did not. Other sources used by the counties were driver's license lists (23 counties), taxpaying property owner lists (13), occupational tax lists (five), telephone directories (four), per capita tax lists (four), community organization lists (two), high school graduates (one), and city earned income tax list (one). Two separate lists were used by 29 counties. Two counties used four lists, four counties used a single list, and two counties reported using no lists at all.

Among the counties using lists of registered voters, 26 of the 28 updated their lists at least once per year. Regardless of which lists they used, more than half of all respondents reported updating their lists at least once per year. In general, urban counties and large suburban counties were most

likely to rely on lists of voters and licensed drivers, while rural counties often relied on a jurisdiction-specific source such as a per capita tax list or occupational tax list. Adams, Bradford, Clarion, Indiana, Jefferson, Mifflin, Perry, and York counties all reported using either a per capita tax list or occupational tax list. As one respondent noted: "The per-capita tax list is all-inclusive without regard to race, religion, whether or not they are property owners or registered voters."[8]

Administrators differed in their assessments of driver's license lists, which were generally regarded as up-to-date. One respondent said the lists were more current and reliable than voter registration lists, but still contained many old addresses; merging the two lists was therefore the way to obtain a representative list, in that administrator's view.

The researchers learned that most counties kept information about summoned jurors' ages and geographic locations, and some kept information about gender, occupation, race, marital status, number of children, education, employment, and status as a motor vehicle operator. Few counties, however, reported reviewing the information regularly.

The survey showed that, as recalled by administrators, a typical county issues summonses to about 3,000 jurors per year. The number of summonses ranged from about 600 in Clinton and Potter counties to an estimated 286,500 in Philadelphia County.

Excusals, disqualifications and no-shows

In studying excusals, the researchers on the survey listed 14 common reasons for excusing potential jurors on the survey and asked whether each of the excuses was accepted as valid. The responses showed more than 90 percent of the counties excused potential jurors for family responsibilities (childcare or eldercare); for physical, mental, or medical conditions; for military service or student status outside the area; and for being out of the area temporarily.

Among the other reasons, 87 percent of the responding counties accepted economic hardship as a valid excuse, while 67 percent accepted employer hardship and 57 accepted "extreme inconvenience." Being employed in law enforcement was a valid excuse in 36 percent of the responding counties, while being employed as a doctor or dentist was accepted as an excuse in 48 percent of the counties.

Excusals were granted for periods as short as a year or less, or as long as five years. Several counties listed reasons for permanent disqualification from jury service. The reasons included incarceration, advanced age, illiteracy, and non-citizen status.

By comparing counties' estimates of their excusals with the numbers of citizens finally chosen for juries, the researchers were able to calculate the percentage of summoned jurors who were excused in each county. The rate was lowest in Allegheny County, which excused only 7.95 percent of those summoned. Bucks County had the highest rate, excusing 59 percent.

The researchers also asked counties to estimate the numbers of "no-show" potential jurors who failed to appear on the summons date. The median number per county was 92 "no-shows" per year, and in several rural counties there were fewer than 10. Calculations based on the counties' sometimes rough estimates of "no-shows" indicated a median statewide range between 2.5 and 4.2 percent, depending on the way the calculation was performed.

The counties reported a set of divergent responses to the "no-shows," ranging from friendly letters and phone calls to scheduling contempt of court hearings. Nearly half of the counties reported sanctioning potential jurors for failing to appear for jury duty. The sanctions included fines, community service sentences, and, in one case, a sentence of two days in jail.

Incentives for jury service were also covered by the study, which asked whether the court system had supplied discounted parking, free parking, free public transportation, free meals, vouchers for childcare, on-site childcare, or vouchers for local businesses and restaurants. Among the respondents, 74 percent had supplied free parking and 27 percent had supplied free meals. In none of the other categories did as many as 5 percent answer "yes."

Racial proportionality

In another area of the study, the researchers asked administrators to break down the numbers of summoned and serving jurors by race. Only nine of the respondents supplied numbers, and another 17 provided percentages; virtually all of the figures were estimates. Comparing the estimated racial breakdown of summoned jurors with the racial breakdown of the county population as a whole, the survey found roughly proportional

representation in most counties. White jurors appeared to be underrepresented in three of the reporting counties, although the researchers cautioned that the result may have been based on inaccurate estimates.

Using 1999 census estimates, the researchers noted that Pennsylvania had only five counties with non-white populations of 10 percent or more—Philadelphia and Allegheny; Montgomery and Delaware in suburban Philadelphia; and Dauphin, which includes Harrisburg. Ten counties had non-white populations between 5 and 10 percent, leaving the remaining 45 counties with non-white populations of less than 5 percent.

"The distribution of populations of color across the various administrative units creates several challenges for achieving racially-balanced juries throughout the Commonwealth," the Phase I report said. "In about two-thirds of the counties, achieving racial balance means locating 'rare' individuals—non-white jurors—in a population that is generally small."[9]

Conclusions

The Phase I report suggested a variety of factors that "may have implications for underrepresentation of persons of color on juries."[10] The report explains, however, that information about the race of potential jurors "does not appear to be available from the counties," which prevented the researchers from making a more definitive assessment of the implications. "It is not known at this time if these implications warrant concern because we cannot document whether these features do in fact influence potential underrepresentation," the report said.[11] That said, the implications were:

- Low minority population across counties. Populations of color constitute a sizable fraction of the population in only 15 of the 67 counties, as explained above.[12] In the remaining counties, it is a challenge to locate minorities to serve on juries.
- Counties follow one of several different models in summoning potential jurors; among the variations are processes that could have implications for underrepresentation.
- Variations in juror summoning lead time, which the study defines as "the amount of time between initial contact with a potential juror and that juror actually being due in the courthouse to serve as a juror."[13] The survey documented variations from county to county. Increased lead

time may make underrepresentation of persons of color more likely, based on the assumptions that lower-income households include a disproportionately high number of households of color and a disproportionately low number of homeowners. People who do not own their own homes are more likely to move, and more likely to move frequently, making them harder as a group to track over time.

- Variations in time served. Some counties require more extensive jury service than others. More extensive service creates greater hardship for low-income wage earners who are more likely to depend upon hourly wages. Given that income lost for jury service may constitute a large share of household income in low-income households, those households may seek to avoid jury service, especially if the service period is long.
- Lists used and frequency of updating. The type of list in use may result in underrepresentation of people of color, although previous studies suggest that all lists do this to a roughly comparable extent. The less frequently the lists are updated, however, the more likely they are to lose track of lower-income, more mobile households, who are also more likely to be populations of color.

The report concludes: "Most importantly, the information gathered confirms the Committee's suspicion that little data are available on race, that counties generally do not compile juror attributes and, if they do compile them, they very rarely examine these data. Because we have no data on race of jurors summoned, it is not possible to know at this time [during Phase I of the study] how significant the underrepresentation problem is."[14]

PHASE II: METHODOLOGY AND FINDINGS

The Phase II report, issued in June 2002 and entitled *Potential Underrepresentation by Race and Class in the Middle Stages of Juror Selection in the Commonwealth of Pennsylvania: A Located Analysis*,[15] was undertaken to examine minority underrepresentation in the middle stages of the jury selection process.

"The stage for this investigation was set last summer after we surveyed Pennsylvania jury administrators and commissioners," the Phase II report explains. "We learned that exceedingly few counties kept data on juror race. We also learned that excusal rates, and the structure of the juror summoning process, as well as the types of lists used, varied across counties. From that work we drew two conclusions: First, we were not going to be able to learn about representativeness of jurors at the middle stages of selection processes from archival data available at the courthouses; second, given how various counties structured the selection process, there certainly was the potential for jurors to be underrepresented along race or economic lines in the middle stages of juror processing."[16]

For purposes of the study, the "middle stages" of the juror selection process begin with the court's initial attempt, usually by mail, to contact the potential juror. The middle stages continue until the potential juror arrives at the courthouse on the day of service. In this context, the relevant stages of the process include the potential juror's:

- responding or not responding to the summons or requests for information;
- being classified as a qualified or eligible juror, or being disqualified;
- requesting or not requesting an excusal;
- having or not having the request for excusal granted;
- being released from anticipated duty (surplused) because of an oversupply of potential jurors; and
- actually appearing at the courthouse on the day of service, after being qualified and not excused and not surplused.

The Phase II report examined whether a potential juror's "micro-neighborhood" of residence—a four-block area that will be further explained below—influences the outcome of the potential juror's contact with the court. To investigate that central question, the researchers chose a sample of

four Pennsylvania counties—Allegheny, Lehigh, Montgomery, and Philadelphia—that stood as a representative cross-section of the Commonwealth's minority population. The data were analyzed using multilevel models, which also will be explained below.

Focus of Phase II

During Phase I of the study, the researchers were able to calculate each county's "yield" of jurors; that is, the number of potential jurors from the contacted list who appeared for service as requested by the court. According to the report, there were many reasons that a potential juror might not appear for jury service. The most common were:

- The initial contact did not reach the intended party;
- The person failed to respond to the initial contact;
- The person failed to qualify as a juror;
- The person sought, and was granted, an excusal;
- The person was surplused by the system prior to service day, due to a lower than anticipated caseload; and
- The person was unable or unwilling to appear on the service day.

By examining the middle stages of potential juror processing, the researchers set out to compare any differences between the group initially contacted about jury duty and the group that finally appeared at the courthouse to begin jury service. One focus of the inquiry was to determine whether potential jurors were more likely to drop out of the process—or be dropped out of it—if they resided in a primarily African American neighborhood, in a primarily Latino neighborhood, or in a neighborhood with a relatively low average income or socioeconomic status.

The researchers noted that the starting point of the study was the group of potential jurors who were initially summoned or contacted by the court. Phase II of the study did not take into consideration what happened prior to the initial contact attempt—i.e., how the list was constructed—nor did it examine what happened during *voir dire* and the later stages of the juror selection process. Stated differently, if underrepresentation by race or income is introduced during the middle stages, it is not known if that underrepresentation is counterbalanced or amplified in the last stages of juror processing, taking place in the courthouse itself. But, it is known that if underrepresentation does surface in the middle stages, it was introduced

at those stages, and cannot be attributed to earlier selection processes, such as list construction.[17]

To model potential juror dropout at each point in the middle stages of processing, the researchers needed precise data about people who were contacted but failed to appear, or were dismissed as ineligible for service, or were excused. Although jurisdictions kept track of the outcome of each potential juror contact attempt, this was a variable process from jurisdiction to jurisdiction. Different codes and postponement and excusal policies were used. Jurisdictions also did not have information about the potential juror's race and income level. What the researchers elected to do was to locate each potential juror, based on the address provided, and use the attributes of his or her micro-neighborhood as a "proxy" for the potential juror's immediate social context.[18]

Key features of the analytic approach

In three of the four sampled jurisdictions, the courts provided the complete addresses of all potential jurors contacted during calendar year 2001, and the outcomes of the requests for services. Philadelphia County, due to confidentiality concerns, scrubbed the last two digits of each address, sometimes making for some uncertainty about the micro-neighborhood to which an address belonged.

The sampled counties—Philadelphia, Allegheny, Montgomery, and Lehigh—were chosen based on the size of their 1999 populations of color. A county's "chance" of being sampled was proportional to its population of color. Since the researchers used representative sampling procedures, the results are generalizable to the populations of color in the Commonwealth.

Addresses provided were geocoded—located at a specific point on a map. Researchers successfully geocoded more than 85 percent of the addresses provided in three of the jurisdictions. Once the address was located, the attributes of the surrounding census block group or micro-neighborhood could be attached to the address, and to the outcome of the contact attempt. This allowed the researchers to try to "predict" the fraction of contacted potential jurors in a micro-neighborhood who would show up on service day, using the attributes of the micro-neighborhood as the "predictors." The researchers used racial/ethnic and age data from the 2000 census, but had to rely on socioeconomic status and stability data from the 1990 census. In their consideration of neighborhood attributes,

the researchers could isolate the role of each "predictor" and learn, for example, whether yield of potential jurors was affected by race or ethnicity when two micro-neighborhoods were otherwise similar in terms of age composition, socioeconomic status, and stability.

The study's multilevel models permitted a variety of calculations. The models describe the extent to which neighbors of the same micro-neighborhood "agree" with one another in terms of the outcome of jury service. A high degree of agreement between neighbors suggests that group processes are operating, and neighbors are influencing one another in terms of the outcome. "If yield is influenced by shared attitudes toward the criminal justice system among neighbors in a locale, or by shared hardships, or by other factors, we would expect to see some neighbors 'agreeing' with one another on the outcome," according to the Phase II report.[19] The multilevel models show how such agreement is arranged both within and between groups of neighbors, enabling the researchers to construct micro-neighborhood scores on average yield of jurors. The models not only show differences in yield between micro-neighborhoods, but differences in yield between neighbors in the same micro-neighborhood. "Stated differently, we can learn how much of the variation in yield is a function of differences between neighbors in the same micro-neighborhood, and how much of it is a function of differences between neighborhoods."[20] Thus, the model recognizes how potential jurors are "nested" into different neighborhoods.

In further explaining how the multilevel model approach can be used to link census block-group characteristics with average micro-neighborhood yield of potential jurors, the report notes that, in social science, it is understood that relationships between observed attributes are specific to the level of analysis at which they are observed. In other words, a finding that people from neighborhoods with a high ratio of home ownership are most likely to appear for jury service does not necessarily mean that homeowners are more likely than renters to appear. The former case describes an ecological relationship, while the latter case describes an individual-level relationship. "Although ecological relationships set the context for individual relationships, they do not completely determine them," the report notes in defining a term it uses extensively.[21] Multilevel models are widely used, the researchers report, in psychology, sociology, education, and criminal justice, among other areas.

Methods overview

The focus of the study was on populations of color, including African Americans, white Latinos, Native Americans, and Asian/Pacific Islanders. Counties with more households of color thus had a stronger chance of entering the sample, which resulted in the choice of Allegheny, Lehigh, Montgomery, and Philadelphia counties. The researchers were able to geocode addresses for 94 percent of the Philadelphia names, 90 percent of Montgomery, 87 percent of Lehigh, and only 83 percent of Allegheny.[22] The last figure falls below the 85 percent level that geographers regard as the threshold level for continuing the analysis to profile each block group's racial and ethnic composition, racial composition, socioeconomic status, and stability; for that reason, the researchers said the Allegheny County analysis "should be viewed with considerable caution."[23]

Geocoded addresses were placed within micro-neighborhoods corresponding to 2000 census block groups. A census block is four sides of one block, while a census block group is usually a cluster of four contiguous census blocks. It is the smallest spatial unit for which the U.S. Census releases "long form" census information that includes economic and occupational indicators.

According to the final report: "By considering all of these micro-neighborhood attributes, it can be determined whether race or ethnicity of context affect yield, after removal of the effects on the outcome that arise from age, stability or socioeconomic differences across micro-neighborhoods."[24]

Analysis overview

The Phase II study noted that it was impossible to perform a statewide examination of the specific steps in jury selection because different jurisdictions had different rules and procedures. Allegheny and Montgomery counties, for example, allowed members of the jury pool to call-in the night before the summons date to learn whether they were needed.[25] Some jurisdictions did precise tracking of non-responses to the initial summons, while others did not use a code allowing that to be tracked. And some counties had a liberal excuse policy so that virtually all qualified, non-excused potential jurors appeared on the day of service, and there were virtually no "no-shows."

The analysis of the four counties in the sample was focused on "potential juror yield": whether or not a contacted potential juror appeared on the day of service. Detailed results, including seven tables, are too extensive to include in this chapter, but are available in Appendix Vol. I.

When the yield figures were linked to characteristics of the micro-neighborhoods, the researchers were able to make the following observations about race and ethnicity:

- In each of the four jurisdictions, the proportion of contacted potential jurors showing up on the summoned date (yield) was generally lower if those contacted were from a micro-neighborhood with a higher proportion of African American residents.
- In three of the four jurisdictions, yield was lower if those contacted were from a neighborhood with a higher proportion of Latino residents.
- In one jurisdiction, Philadelphia, yield was lower if those contacted were from a neighborhood with a higher proportion of Asian American residents.
- These impacts of racial composition of the micro-neighborhood persisted after controlling for other features.

Some more specific findings, by county, were as follows:

Philadelphia County

- Latino population of a micro-neighborhood more dramatically affected yield than did African American population.
- The study linked integrated neighborhoods (30 to 70 percent African American) with higher yields.
- Lowest yields were seen in white neighborhoods beginning to integrate, and neighborhoods all or almost all African American.
- Yield was also lower in neighborhoods with a higher proportion of residents in the 18–30 age bracket.

Allegheny County

- The geographic analysis suggested that the rate at which residents were contacted was somewhat lower for low-income and more predominantly African American micro-neighborhoods.
- In general, differences in yield from micro-neighborhood to micro-neighborhood were very slight, making it extremely difficult to uncover predictors of yield.
- Age, stability, or economic status had no effect on yield.
- Yield was higher in locations with a lower proportion of African American residents.

Montgomery County

- Yield was higher in locations with a less predominantly African American population, although it should be noted that Montgomery County had fewer than 20 micro-neighborhoods that were more than 50 percent African American.
- Micro-neighborhood stability and socioeconomic standing had no significant effect on yield. But, lower yield was noted in micro-neighborhoods with higher portions of elderly or soon-to-be-elderly residents.

Lehigh County

- In general, yield was higher in Lehigh County in micro-neighborhoods with lower proportions of African Americans and/or lower proportions of Latinos. The researchers cautioned, however, that "The shape of each of these racial impacts is not simple."[26]

In general, the Phase II study demonstrated:

- That neighborhood racial composition affected the likelihood that a contacted potential juror would be qualified, not excused, and willing and able to show up for jury service.
- That there was underrepresentation by race in the middle stages of the processing of potential jurors in Pennsylvania. The study showed the effect to be large, particularly with regard to African Americans. Further, the effect could not be explained away by other factors such as income.

Specific contact rates varied by jurisdiction

The researchers in the Phase II study did not examine the adequacy of contact lists, although they did calculate "contact rates" from the number of contacted jurors per person aged 18 and older in each neighborhood. This allowed rates from each neighborhood to be compared with the average contact rate for the city.

The final report noted that there should be little systematic variation in the contact rate. This was indeed the case in Philadelphia, suggesting the lists used there were equally representative in different neighborhoods. In Allegheny County, however, there was a suggestion of systematic variation. There the contact rate in low-income, predominantly African American neighborhoods was between 40 and 70 percent of the average contact rate for the city. This suggested a variation by jurisdiction in the representativeness of initial contact lists.

Conclusions

- African Americans were underrepresented in juror yield in all sample counties.

  Juror yield was lower in neighborhoods with a higher proportion of African American residents, after controlling for other features of neighborhood fabric. This statistically significant effect appeared in all four sampled jurisdictions, although it varied considerably. In some jurisdictions, the yield dropped by 10 percent from all-white to all-African American neighborhoods.

- Latinos were underrepresented in juror yield in three of the sample counties

  In Philadelphia, Montgomery, and Lehigh counties, juror yield was significantly lower in neighborhoods with a higher proportion of Latino residents. The size of the impact varied, but was generally of comparable size to the impact of African American and Asian American composition.

- Asian Americans were underrepresented in juror yield in Philadelphia County

  In Philadelphia, yield was significantly lower in neighborhoods with a higher proportion of Asian American residents. In neighborhoods in which Asian Americans constitute 40 percent of the population, the yield was about 10 percent lower than in neighborhoods with no Asian American population.

ALLEGHENY COUNTY STUDY

A 2001 study by John F. Karns, J.D., Ph.D., University of Pittsburgh, *Statistical Representativeness of a Sample of Persons Selected for Jury Duty in Allegheny County Pennsylvania, May 12 through October 11, 2001*,[27] addressed whether there were substantial demographic differences between the county population and the criminal court jury panel; and whether any substantial differences were "just 'the luck of the draw' or…evidence of the operation of some systematic, biasing process." Karns used a questionnaire to ask jury panel members their gender, age, and race, and then, using standard Statistical Package for the Social Sciences (SPSS) software, compared the profile with precise 2000 census figures for Allegheny County residents over 18, the same age cohort that is called to jury service.

The survey identified significant differences in race and age between the general population and the jury panel.

- Persons 18 to 24 years old were 10.95 percent of the jury-eligible population, but only 0.75 percent of the jury panels. For full representation, in other words, 15 times more people ages 18 to 24 should have been selected for jury panels. In other age categories, persons 45 to 54 years old represented 18.15 percent of the county population but 31.9 percent of the jury sample; and persons 60 to 64 were 6.35 percent of the population but 11.47 percent of the jury panel.
- African Americans were 12.41 percent of the county population, but only 4.57 percent of the jury sample, meaning they were underrepresented by nearly 64 percent in the jury sample. (Only 15 persons in the jury sample designated themselves as Latino, a number too small to allow meaningful comparisons.)

When Karns cross-tabulated the jury panels by race, age, and gender, he noted that there were few white women in the under-25 age categories, but there were zero African American females under age 25 on the panels. In the jury sample overall, African American women tended to be somewhat older than white women. The same general patterns held true for men. There were no African American men under age 25 on the jury panels, and just 26.6 percent of African American men on panels were under age 45, making their mean age 52.3 years, or about three years older than their white male counterparts.

Karns went on to analyze racial distribution on the jury panels, demonstrating in a series of tables that:

- The age group pattern in jury panels was "moderately representative" of the county population, although the jury sample was unrepresentative of the larger community in four age categories: 25 to 34; 45 to 54; 55 to 59; and 60 to 64.
- The racial pattern showed a significant overrepresentation of whites on jury panels and a corresponding underrepresentation of African Americans. Among Allegheny County residents ages 18 and older, the ratio of whites to African Americans was about 6.75-to-1, while in the jury sample the ratio was 18.8-to-1. In raw numbers, the five-month survey found 4,657 whites on jury panels, along with 226 African Americans and 65 others. The overall population included 836,000 whites and 124,000 African Americans.

NEWSPAPER INVESTIGATION OF ALLEGHENY COUNTY JURIES

On July 21, 2002, the *Pittsburgh Tribune-Review* released the results of an investigation it conducted over the previous 18 months of the jury summoning system in Allegheny County.[28] Using a computer mapping program to locate the home addresses of the nearly 45,000 potential criminal court jurors, the investigation revealed that the residents of African American neighborhoods were half as likely to be called to jury duty as residents of white neighborhoods. In neighborhoods that were at least 98 percent white, according to the 2000 census, on average 53 of every 1,000 adults were summoned in the study's time period; whereas only 26 of every 1,000 adults in neighborhoods where African Americans are in the majority received a jury summons. Furthermore, the investigation found that of 1,031 prospective criminal jurors who reported for jury duty during a 12-day period in the spring of 2002, only 42 were African American, or 4 percent. The paper reported that Allegheny County's adult population is 11 percent African American.

The investigation noted several problems with the county jury selection process, including the following:

- The county jury commission does not buy change-of-address data from the U.S. Postal Service, a service commonly used by direct mail companies and some courts to improve accuracy and reduce postage costs;

- Census data show that African Americans in Allegheny County are much less likely than whites to own homes and, therefore, are more likely to move more often. Last year, nearly 15,000 juror questionnaires were returned by the post office for a wrong address. The jury commission does not follow up on those returned questionnaires;
- Juror compensation is low ($9 per day for the first three days of jury service) and lower-wage workers, including many African Americans, cannot afford to lose wages in order to perform jury duty.

As a result of this investigation and the efforts of others, the Legislature has approved a resolution calling for a state research panel to conduct a study to improve minority representation on juries and to examine juror compensation.

PUBLIC HEARING TESTIMONY

At six public hearings in Philadelphia, Pittsburgh, Harrisburg, State College, Wilkes-Barre, and Erie, the Committee heard testimony from a variety of judges, attorneys, and concerned citizens who addressed the absence of minorities on juries across the Commonwealth. The speakers brought several key concerns to the Committee's attention.

SMALL NUMBERS OF AFRICAN AMERICANS AND LATINOS ON JURIES

"Thus, in all of the cases which I have tried on behalf of African American plaintiffs in the past five years, a grand total of one African American was involved in the deliberations that determined the outcome of the case. Indeed, in most of the cases, the only African American in the courtroom was my client."

—Attorney Timothy P. O'Brien

Timothy P. O'Brien, a plaintiff's attorney with a civil practice in Pittsburgh, testified that he had represented more than 20 African American plaintiffs in civil jury trials during the past five years in both state and federal courts; the cases included personal injury claims, fair housing, employment discrimination, and police abuse litigation. In most of the cases, O'Brien said, the jury panel contained no African Americans; in all the cases combined, a total of two African Americans were selected as jurors, including a woman who was seated on a *Batson* challenge in a fair housing case but was later excused to care for her children. "Thus, in all of the cases which I have tried on behalf of African American plaintiffs in the past five years," O'Brien said, "a grand total of one African American was involved in the deliberations that determined the outcome of the case. Indeed, in most of the cases, the only African American in the courtroom was my client."[29]

O'Brien acknowledged in his testimony that the *de facto* exclusion of African Americans from juries has never been held unconstitutional. "Nevertheless, whether African Americans are excluded from juries intentionally, negligently, inadvertently, or for some other reason, the net effect is the same."[30]

Honorable Mark Ciavarella, Jr., testified at the Wilkes-Barre hearing that he had seen "maybe six or seven black individuals on juries" during his five years on the Luzerne County Court of Common Pleas.[31] Given the low number of African Americans in the jury pool and on juries, Judge Ciavarella said he must "always stress how important it is that we do not make decisions based on the color of somebody's skin. And I have to tell you something, my impression and experience has been that most of the jurors in Luzerne County, if not all, really go out of their way to make sure that doesn't become an issue…I had a whole host of criminal trials with a lot of not-guilty verdicts against black individuals from all-white juries."[32]

JURY SOURCE LISTS

Each county court system in Pennsylvania currently makes its own decisions about the source lists that it uses to construct the jury pool; the Commonwealth has no statutory mandate or restriction. In public hearings, the Committee heard testimony by court administrators and jury commissioners who described the operations of the lists.

Gladys Scott, court administrator of Erie County, said: "My job is not to select jurors. My job is to qualify the jurors, to bring them in for jury selection, and so I need a base."[33] The county's base is built on a voter registration list and a licensed driver's list. In response to questions by the Committee, Scott said she had no information about the racial breakdown of the pool because race was not listed on driver's licenses and was optional on voter registration forms. "Race is an optional question on our juror qualification forms as well. We're finding that many persons leave the question blank when they return their qualification forms, and many write on it 'none of your business.'"[34] The master list is updated annually with the names of registered voters, Scott said. Her office requested Social Security and welfare lists in an effort to expand the pool, but those requests were denied.[35]

James Minella, court administrator in Lackawanna County, testified at the Wilkes-Barre hearing that "Up until 1980, all counties were using the voters' list for their jury selection." After 1980, they decided, "This is probably the worst source for jury selection due to the fact that, particularly, young people do not register to vote. And it also shows that minority people are not registered to vote."[36] With that in mind, he said, Lackawanna County became one of the first counties in the Commonwealth to switch over to driver's license lists as its source of names for the jury pool.

J. Robert Chuk, court administrator in York County and former court administrator in Delaware County, said York County supplements its list with names from the county's per capita tax rolls, and has added the names of low-income people by using a list from the York Area Earned Income Tax Bureau. Chuk also said race is not tracked in jury questionnaires. "My own theory is that…we might get into worse or additional problems, were we to have some vehicle for indicating what particular group a juror belonged to. We think that might be more biased—that we could stack a jury one way or another. And we certainly do not want to leave that impression. We think that might be a violation of the Constitution and we don't want to do it."[37]

Allan Kirschman, jury commissioner for Allegheny County, also stressed that his office is concerned only with maintaining the jury pool, which is based on voter's registration lists, driver's license lists, and telephone directory listings. Asked at a public hearing to estimate how many minority jurors there were per 100 white jurors, Kirschman said, "I don't know because we don't have that contact with them."[38] He testified that the office was "not allowed" to ask questions about race or gender on the jury questionnaire.[39] He also said his office looked into using lists of public utility customers, but abandoned the idea because of confidentiality concerns. Asked about the possibility of maintaining a weighted list of minorities within the jury pool, Kirschman said, "I think that everybody thinks this will not be legal to do that, so we have not done that so far."[40]

INADEQUACY OF ATTEMPTED REMEDIES TO INCREASE JURY DIVERSITY

Recognizing that current policies were not yielding representative numbers of minority jurors, several counties launched special programs to supplement their jury source lists. In several cases the efforts proved futile, with only a handful of citizens volunteering.

In Allegheny County, Kirschman described the Jury Diversification Project that his office began in 1997 after hearing suggestions that they might be missing a large number of citizens. He said the office enlisted the aid of nine community organizations, 79 libraries and the local newspapers, but in three years the effort yielded only 70 inquiries, mostly from people already in the jury pool. In the end, five new citizens were added to the jury pool.[41]

In Lackawanna County, Minella described the complications that arose about a decade ago when the court attempted to recruit additional African Americans for the jury pool, using posters, TV spots, and other methods. "The act states that the president judge has the right—that if you do not own a driver's license in the Commonwealth—he could sign an order and you could recruit people for jury duty if they do not have a driver's license. If you have a driver's license, you can't sign up because you're already in the master list to be selected." Over a period of four or five months, Minella testified, only four additional names of African Americans were added to the list.[42]

Minella also described the county's efforts to reduce the number of potential jurors who had been excused after checking the "undue hardship" box on the jury questionnaire. "They excused lawyers, doctors, dentists, school teachers, registered nurses, pharmacists, undertakers, so therefore we have the guy in construction, basically, the guy working in the factory, coming in for jury duty."[43] The president judge sent letters to the medical society and bar association, urging members to serve on juries. "And, since 1980 until the present, probably our best jurors are the doctors, lawyers, et cetera."[44]

In Erie County, Scott reported her experience with an outreach program to Erie's minority churches that was in place between 1991 and 1997, when it quietly expired. "For any program to be successful, there must be interest and participation from those individuals who would directly benefit from it. The underrepresentation of minorities on the master list is an ongoing problem. That is why we implemented the community outreach. I do not know why the outreach ended. I do not know what else I, or the court, can do," she said.[45]

LIMITED VOIR DIRE AND THE ROLE OF JUDGES

Honorable Stephanie Domitrovich, of the Erie County Court of Common Pleas, wrote in a law review article that "Without a sufficient source list, random selection is a hurdle to obtaining a fully representative jury. Even if a list is perfectly inclusive, it remains statistically impossible to prove that those jurors represent all of the community's attitudes and experiences. Voter registration lists are neither inclusive nor representative."[46]

"Judges are the only ones that can make a difference in jury selection, making sure that we have more representative juries."

—Honorable Stephanie Domitrovich

Testifying in Erie, Judge Domitrovich called for expanding *voir dire* as a means of ensuring fuller minority participation in juries. She said: "The community perceives the jury selection process as fair when its members can participate fully in *voir dire*. Whether full participation is possible, however, is largely based on the foundation of *voir dire*, which is composed of basically our jury source lists and random selection."[47]

After pointing out that *Batson* challenges do not apply if there are no minorities to be challenged on *voir dire*,[48] she also addressed the " broad window" that *Batson* challenges can go through. "We accept a wide array of reasons to eliminate someone, because that's the case law."[49]

In her testimony, Judge Domitrovich also called for rethinking courtroom policies. "When a prosecutor or defense attorney will try to strike someone and say, 'Well, this is a non-gender or non-racial exclusionary statement,' I've been known to turn them down and say, 'I'm not going to accept that, because that is racial, that is culturally ethnic, and I won't accept that.'"[50]

White jurors, she said, frequently ask why minorities are not in the jury pool, recognizing that the situation is not fair to the defendant or to the jurors standing as judges of the facts. In that light, she said, "Judges are the only ones that can make a difference in jury selection, making sure that we have more representative juries."[51]

WIDESPREAD MISUSE OF PEREMPTORY CHALLENGES

David Baldus, a University of Iowa Law School professor, testified at the Philadelphia public hearing[52] about empirical research that he and George Woodward, a University of Iowa statistician, conducted on capital sentencing. Together, in the past five years they have studied capital sentencing systems in Georgia, New Jersey, and Colorado, as well as performing a study based on all 707 death-eligible cases processed in Philadelphia between 1983 and 1994. "We have focused on two decision points," Baldus explained in his testimony. "First are decisions of the prosecutors and jurors to charge, and sentence to life or death, offenders

accused of capital crimes. Our second focus is the use of peremptory challenges in the selection of juries in capital cases."[53]

In the Philadelphia study, Baldus and Woodward found, *inter alia*:

- In a study of jury selection for 317 capital cases between 1981 and 1997 in Philadelphia, prosecutors struck 51 percent of African American venire members and 26 percent of non-African American venire members, while defense counsel struck 54 percent of the non-African American venire members and 26 percent of the African American venire members. "What we learned in this study is that defense counsel [and prosecutors] have a mirrored picture of who constitutes good and bad jurors under the circumstances."[54]
- The 1986 *Batson* case, in which the U.S. Supreme Court prohibited the use of gender and race in the selection of jurors through the use of peremptory challenges, had no effect on strike rates. They were the same before and after the *Batson* decision.[55]
- The "principal targets" of peremptory challenges by prosecutors were young African American women; middle-aged and young African American men; and middle-aged women.[56] Baldus testified that this was borne out in a training tape on peremptory challenges that was prepared by then-prosecutor Jack McMahon in 1986 or 1987 and has been widely viewed in recent years since its release to the press. "The substance of Mr. McMahon's advice was to eliminate black members, especially young men and women, and to seek a jury that was predominantly white, middle-class, conservative and conviction-prone," Baldus said.[57]
- Race figured heavily in an explanation of who receives a death sentence. "Specifically, the defendant's race as black had, on average, the same level of aggravating effect on jury sentencing decisions as did the presence of two statutory aggravating circumstances."[58]

In the selection of capital juries, Philadelphia prosecutors and defense counsel systematically excluded venire members through the use of peremptory challenges on the basis of their race and gender despite federal law prohibiting such discrimination.

—Professor David Baldus

In sum, Baldus said, the research documented four findings relevant to jury selection in Philadelphia. Baldus found: 1) In Philadelphia capital trials, African American defendants were at a higher risk of receiving death sentences than were similarly situated non-African American defendants; 2) In the selection of capital juries, Philadelphia prosecutors and defense counsel systematically excluded venire members through the use of peremptory challenges on the basis of their race and gender despite federal law prohibiting such discrimination; 3) This discrimination skewed jury sentencing decisions in the direction of increasing the frequency of death sentencing and, in addition, it enhanced the level of race discrimination against African American defendants; and 4) This skewing effect was principally the product of prosecutorial strike rates against African American venire members that were not offset or counteracted by high defense counsel strike rates against non-African American venire members.[59]

Baldus proceeded in his testimony to recommend that peremptory challenges be abolished or at least restricted to a small number in Pennsylvania, "or certainly at least in this jurisdiction [Philadelphia]."[60] He and Woodward generated hypothetical estimates of the level of discrimination, given different strike rates; they concluded that 10 strikes for the defendant and five for the prosecution would "greatly minimize" the effects of the discrimination, which become most acute when prosecutors are striking at a rate "well above 50 percent."[61]

The Committee heard other testimony about the widespread abuse of peremptory challenges. Felipe Restrepo, of the Hispanic Bar Association, testifying in Harrisburg, spoke about Latinos being struck from juries under a *Hernandez v. New York* challenge, which ostensibly invokes translation difficulties as justification for a strike.[62] Robert Foreman, a veteran Pittsburgh criminal defense attorney, testified: "It has been my experience that potential black jurors are more frequently excused by peremptory challenge than potential white jurors. It has been my experience that potential black jurors are more frequently excluded by challenges of the prosecution than by the defense."[63]

Baldus' findings were challenged by Gary Tennis, chief of litigation for the Philadelphia District Attorney, who said Baldus' studies in Georgia and New Jersey had been "discredited."[64] Tennis also disputed the meaning of the McMahon tape within the district attorney's office. "That tape was

covered with cobwebs. Nobody ever looked at that tape. That was never the practice which reflected the formal policies of the Philadelphia District Attorney's office."[65] In addition, Tennis said that although the issue of attorneys excluding jurors because of race has been raised "hundreds and hundreds of times," the district attorney's office found only two instances in the past decade "where the matters were reversed because of *Batson*."[66] Finally, Tennis said his office did not think that keeping statistics on the race or ethnicity of defendants or victims was appropriate.[67]

Charles Cunningham, an attorney with the Philadelphia Defender's Association, said, "If anybody tells you the defense lawyers and prosecutors are not selecting jurors on the basis of race, then you'd better question them very seriously. To disprove that notion, walk into any Philadelphia courtroom. You will note a pattern and will see that the McMahon tape is alive and well in the district attorney's office."[68]

In that light, Cunningham called for an expansion of *voir dire* rather than an elimination of peremptory challenges:

"David Baldus has suggested that peremptory challenges might be gotten rid of altogether. I think that is a drastic solution. I think that one possible solution is the fact that we need…to expand *voir dire*, because what has taken place in Philadelphia is there is no *voir dire*. There are questionnaires, there are answers on papers. Lawyers and prosecutors do not have an opportunity to really question the jurors. And why? We are moving fast. We have to get this case done so that we can move on to the next case.

"Judges are under pressure to get cases disposed of so that they can have high statistics, and when you start putting such an emphasis on speed, something has to give. And what is that that's giving? It may be justice."

Cunningham continued, "And you can do justice if you have time, but we need to give lawyers the opportunity to expand their questions to find out if this person can be a fair juror. You can't tell by looking at a piece of paper. You can't tell when they answer all of the questions in the negative because you get no feel for that juror and, therefore, what is left? You sit in the courtroom looking at people, knowing nothing about them. And that forces people to revert to the stereotypes. You've got to give the lawyers and the prosecutors some leeway.

"Will it eliminate racism altogether? No, it won't. And if you don't think that racism exists in the criminal justice system, then you will have to believe that the criminal justice system exists beyond the rest of this world and certainly beyond this country."[69]

"The Batson challenge occurs at side bar, away from the public, the jury panel, the litigants, and the challenged juror. Often there is no stenographic record kept of the challenge…Thus, we in the justice system do not know how many times a particular attorney is subject to a Batson challenge…"

—Attorney Clifford Boardman

In his testimony before the Committee, Clifford Boardman, an attorney from Philadelphia who specializes in civil rights litigation, suggested another method of addressing the misuse of peremptory challenges. He recommended that the Court require that a database be created to record all information involved in a *Batson* challenge in order to take "racial manipulation of juries out of the dark."[70] He explained:

> "The Batson challenge occurs at side bar, away from the public, the jury panel, the litigants, and the challenged juror. Often there is no stenographic record kept of the challenge, and, if there is, it is not transcribed unless the Batson ruling is later appealed, which is exceedingly rare. In fact, almost always the only people who know the challenge ever existed are the litigants' attorneys and the judges. Thus, we in the justice system do not know how many times a particular attorney is subject to a Batson challenge, how many times a trial judge agrees with a challenge. We do not know the racial composition of the jury pool or of the impaneled jury as these records are either not created or not retained generally."[71]

OTHER TASK FORCE FINDINGS

STATE TASK FORCES

CALIFORNIA

Comments made in public hearings conducted by the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts suggested that juries in California were consistently unrepresentative and that this was detrimental to persons of color. In its final report, published in 1997, the committee quoted several speakers who offered stories of fundamentally unfair juries. One speaker reported that when the trial of a seriously injured plaintiff was transferred from downtown Los Angeles to Glendale, the judge urged the plaintiff to settle because "juries here are not going to be sympathetic to your [African American] client."[72] Another speaker who served as an alternate juror reported that at least one member of a hung jury "just could not see a white [defendant] going to jail because he had done anything to an African American [victim]."[73] An Oakland resident put it bluntly, stating:

> "There should be some way to guarantee that a black is in a jury when another—when black people are involved…I'd rather have that one black person on a jury trying to make a decision about my life, than I would trusting my life to the decision of people that don't have no—that are not black, plain and simple as that."[74]

The committee's report noted that juries can be non-representative for a number of reasons. One reason is systemic: minorities are often excused for hardship because of economic circumstances and are more frequently excused for childcare or other needs than are middle-class whites, making them less likely to serve. [75] According to the committee's report, there are numerous other reasons that California juries are non-representative. Voter lists and Department of Motor Vehicles lists are often used for juror selection, yet some members of ethnic minority groups may not appear on either list. Furthermore, because different ethnic groups tend to be concentrated in certain areas, performing a simple, random selection may miss such individuals and is not as effective as a "more sophisticated cluster sampling." The committee also noted that it is much easier to lose track of individuals who tend to rent rather than own their homes, because they may move more often than middle-class residents, rendering their addresses

obsolete. Insufficient knowledge of English and lack of U.S. citizenship are grounds for ineligibility for juror service in California, and exclude an estimated 37.5 percent of the Latino population there.[76]

OREGON

The Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System was completed in 1994. It addressed three primary issues with respect to minority participation on juries: 1) underrepresentation of minorities on jury pools, 2) selection of the jury panel and perceived bias in that process, and 3) concerns about racial bias during jury deliberations. In incorporating information obtained from a 1993 study conducted by the Multnomah Bar Association into its report, the task force noted its belief that similar results would have been obtained if the same study had been conducted in other parts of the state. The Multnomah Bar Association Report concluded that the master list from which jurors were subpoenaed "did not include certain groups in proportion to their representation in the county: those under 35 and over 75, never married people, renters, and black and Asian citizens."[77]

In Oregon, master lists are prepared by the state court administrator by merging lists of registered voters and persons with driver's licenses or Department of Motor Vehicle identification cards. A county notifies the state court administrator that it needs a certain number of jurors, and the administrator then creates a randomly selected list of jurors from its combined list. Courts draw their own lists of potential jurors from the master lists and send those potential jurors subpoenas through the mail. The task force report indicates that the most significant problem with this system is that "a large percentage of those who are sent the subpoenas…receive a deferral or an excuse from serving."[78] As noted frequently in other state task force reports, these excuses are based, among other things, "on medical reasons, financial hardship, the need to care for small children…or business hardship,"[79] all reasons that affect minorities in significantly greater numbers than non-minorities.

The Oregon task force also gathered information about perceptions of possible racial bias during jury deliberations. Two-thirds of survey respondents voiced the opinion that "peremptory challenges are used to eliminate minorities from the jury based solely on the juror's race or ethnicity."[80] Further, more than 40 percent of all respondents (including 55 percent of minority respondents) stated a belief that a minority litigant

was less likely to win a personal injury lawsuit than a non-minority litigant, and almost 45 percent of all respondents (including almost 60 percent of minority respondents) agreed that a minority litigant who did win would likely receive less compensation from a jury than a non-minority litigant.[81]

OHIO

In preparing the jury chapter of its 1999 final report, the Ohio Commission on Racial Fairness focused on "citizens' attitudes toward jury duty and their level of satisfaction with various facets of the administration of justice as jurors." These issues were addressed through juror surveys and public hearing testimony about racial bias on Ohio juries. The commission noted that: "The most cogent data on racial bias concerns came from commission public hearings."[82] Four major concerns arose during the public hearing testimony: First, there was concern that all-white juries were trying minority defendants, especially African Americans; second, it was frequently reported that jury pools that depended solely on voter registration lists underrepresented poor people; third, it was suggested that non-whites were less trustful of the judicial system and therefore less likely to serve on a jury if summoned; and finally, public hearing testimony indicated that minorities were routinely eliminated during *voir dire* solely on account of their race, and were therefore less likely to be selected for jury duty even if summoned.[83]

The commission also obtained data through its juror surveys about jurors' perceptions of how they are treated in courtrooms. Overall, the survey data showed that 70.1 percent of the surveyed jurors were white; almost 24.7 were African American; about 2.8 percent were Latino; and 2.4 percent were "others," including American Indian and Asian.[84] The commission found that whites were "the most satisfied" with their treatment and with other jury duty issues, while Latinos were the "least satisfied" and African Americans fell "somewhere in the middle."[85] Although the number of Latinos in the survey sample was not statistically significant, the commission was careful to note that it was socially significant, especially in light of the growth of the Latino population in Ohio over the past two decades and the anticipation that it would continue to grow in both size and influence.[86]

NEW YORK

The report of the New York State Judicial Commission on Minorities, published in 1991, stated that, "according to most sources, minorities are underrepresented on juries in certain New York State courts."[87] The commission found that underrepresentation of minorities on juries led to perceptions that people of color are not treated equally by the courts, and it further noted that such limited minority underrepresentation can, in fact, disadvantage minority litigants. Although the Office of Court Administration does not maintain data on the number of minorities serving in the New York State Court system, the commission collected data on this topic by surveying judges and litigators.

The judges in the survey expressed a variety of personal views regarding the reasons for the "substantial underrepresentation of minorities on juries in New York State." One African American judge suggested that, "sequestration of jurors may influence minorities because of greater family responsibilities" and a white judge stated that, "frequently, minority jurors asked to be excused for hardship reasons either financial or personal, i.e., young children. This frequently results in a minority defendant being tried by a jury with no minority members."[88] Litigators in the survey commented on the small proportion of minorities in the jury pool, and some explained that, "The likelihood of getting an all-white jury must always be taken into consideration by minority litigants in deciding whether to take a case to trial, on the assumption that they will not get a fair trial if the jury is all white."[89]

The commission also examined the jury selection process in order to determine "at what points potential minority jurors are lost" by examining how juror source lists are compiled, how these lists are used by local commissioners and how peremptory challenges are used. The commission found the New York Office of Court Administration (OCA) compiling master juror lists from three lists—operators of motor vehicles, registered voters, and individuals to whom state income tax forms are mailed.[90] While the use of these lists has been upheld by the courts, the commission noted that they may be "insufficient for the purposes of ensuring desirable levels of minority representation."[91] This may be the case, in part, because the master list is "based on sources which may not include the economically disadvantaged, and thus the OCA list may exclude a disproportionate number of minorities."[92]

According to the commission, the overall response rate of the general public to jury notices is another point at which potential minority jurors drop out of the system. The report noted that there was a very low

overall response rate to the notice to appear, and that differences in the response rate of minorities and non-minorities to jury notices may result in an underrepresentation of minorities in juror pools."[93]

The third point at which the commission observed minorities disappearing from the jury pool was during the *voir dire* process and through the use of race-based peremptory challenges. Litigators who were questioned by the commission perceived that peremptory challenges in criminal cases were still used to exclude individuals from juries on the basis of their race.[94] Most litigators, according to the report, also expressed "marked dissatisfaction with the *voir dire* process as a way of ensuring a bias-free jury."[95] For example, an African American litigator in New York City told the commission, "I have had white judges ask very insensitive questions of potential minority jurors to discourage them from serving," and a white litigator voiced the following concerns:

> "Further, for the few defendants with the courage to go to trial, the system's mania for speed and 'efficiency' often results in woefully inadequate jury selection, based on a false belief that the process is inordinately time consuming. As a result, attorneys have little to rely on in selecting jurors and thus often fall back on their own racial biases and prejudices in exercising peremptory challenges."[96]

In sum, the commission noted: "Many litigators believe that questions about racial fairness are answered dishonestly."[97] One explanation was that judges, "who are clear authority figures in the court," commonly and actively participate in *voir dire* and that "because of social pressure, people may be less likely to respond honestly to questions posed by someone in authority in a group setting."[98]

NEW JERSEY

A key finding of the New Jersey Supreme Court Task Force on Minority Concerns, which published its final report in 1992, was that minorities are underrepresented on New Jersey juries, resulting in jury decisions that discriminate against minorities. At the time of its study, the task force was unable to find or generate statistics to document "actual underrepresentation of minorities on juries in New Jersey, or the degree and rates of such underrepresentation because racial and ethnic information about jurors was not collected."[99] Thus, in reaching its conclusion, the task force relied heavily on scholarly literature, reports of other jurisdictions, and public hearing testimony. The task force also noted that initial allegations of underrepresentation were raised in at least 10 New Jersey counties, although

at the time the report was published no court had yet "held that constitutionally significant under-representation" was found.[100] Still, in *State v. Ramseur*,[101] a case that examined minority representation on juries in Essex County, the New Jersey Supreme Court found that certain improvements to increase the representativeness of juries were still "far from optimal," concluding that "greater representativeness on the jury panels is obviously desirable."[102]

The task force found that several statutory requirements presented significant impediments to minorities serving on juries. The first was the New Jersey statutory requirement that a juror had to be a citizen of the state. Census and other data showed that this citizenship requirement affected persons of color disproportionately, as 3 percent of the African American population, 23 percent of Latinos and approximately 50 percent of Asian/Pacific Islanders in 1980 were non-citizens. New Jersey statutes also stipulated that jurors may not have a criminal conviction. Accordingly, indirect evidence gathered by the task force suggested African Americans in particular, and Latinos to a lesser degree, were more likely than whites to be ineligible to serve on juries.[103] Many persons of color were also disqualified from jury service in New Jersey because of the requirement that jurors "shall be able to read, write, and understand the English language."[104] The task force found that this requirement had the most dramatic effect on Latinos, and a less dramatic, though "still significant, impact on Asian-Pacific Islanders."[105] A final legal obstacle presented by New Jersey statutes appeared in the form of an exemption for "any person who has the actual physical care and custody of a minor child." According to the task force, single mothers were the class of mothers with minor children most likely to be affected by the exemption, and at the time almost one in three African American mothers was a single parent and more than one in five Latino mothers was a single mother."[106]

The task force also noted several non-statutory reasons that minorities were underrepresented on New Jersey juries. A significant and surprising finding was that "some African Americans and Latinos do not register to vote because they do not want to be called as jurors."[107] In addition to reflecting a desire to avoid jury duty, the task force found that this reluctance also reflected upon the hardship that jury service could present for many minorities. An individual who offered written testimony to the task force noted:

> "For a minority or any other person whose wages are not reimbursed by their employer, and for a minority businessperson, the current fees paid for juror service amount to a severe economic hardship. Since many jurors are reimbursed by their employers, it also places an unfair burden on minority and other small business persons who have to subsidize the jury system while they also lose the services of their employees."[108]

Fear of, or lack of confidence in, the judiciary can also restrict minority access to juries. According to the Report on Minority Concerns prepared in New Jersey in 1984, there was "an inherent fear of the judicial system, which keeps many minorities from willingly responding to a call to jury service." Further, cultural factors can also affect minority participation in juries, especially with respect to Latinos, who may come from totalitarian countries and may bring with them a profound fear of "all things governmental."[109]

Taken collectively, the task force concluded that the factors discussed above can mean that as much as 50 percent of the population of African Americans, Latinos, and Asian/Pacific Islanders are unavailable for jury service on any given day "because of a combination of legal, socioeconomic, political, and cultural factors."[110]

As a result, the task force found that some of New Jersey's minorities believed that jury decisions in both criminal and civil cases were less favorable for persons of color. In civil matters, this meant that juries tended "to make smaller awards in personal injury cases where the plaintiff is a minority" and also reflected on the "imputation by jurors on pain undergone by minorities who have suffered injuries compared to similarly situated whites."[111] With respect to criminal cases, the Committee on Minority Concerns concluded that the lack of minorities on juries leaves minority defendants "prey to the prejudices and fears of that unrepresentative jury."[112] This position was powerfully summarized during the task force's public hearings by Augustinho Monterio, president of the Greater Red Bank Chapter of the NAACP, who stated:

> "If there's nothing that the courts can do to get the number of African Americans on juries, then all the rest of it doesn't amount to a hill of beans…There are very few people, other than African Americans, who understand the African American psyche. Nobody else has ever had or ever lived or perhaps could ever have endured what African Americans have endured in this country."[113]

FEDERAL TASK FORCES

D.C. CIRCUIT

Unlike the jury pool for most federal courts, the jury pool for the District of Columbia Circuit is predominantly African American.[114] Yet the Report of the Gender, Race, and Ethnic Bias Project in the D.C. Circuit still noted evidence of racial and ethnic bias in the selection of jurors.

The committee conducted a survey exploring possible discrimination in the selection of non-African American minority jurors, and the impact of race and ethnicity in the selection of all jurors. When asked if there was discrimination in the selection of jurors in the D.C. federal courts, 67 percent of whites said that there was no discrimination against African Americans in the selection of jurors, while only 31 percent of African American respondents felt that was the case.[115] The report further noted that Latino attorneys were more likely to identify discrimination against non-African American minorities, and that "essentially similar percentages of African Americans and whites perceived discrimination against whites in the selection of jurors."[116]

With respect to the impact of race and ethnicity in the selection of jurors, nine of the 10 judges interviewed for the report stated that race played a role in the selection process.[117] They acknowledged that this could create a situation in which minorities felt unwelcome in the justice system. In interviews conducted by the committee, one judge commented, "In reading the records and cases, I sense a perception of how jurors perceive prosecutors and the system…I think that a substantial number of jurors perceive the system as 'white.'"[118]

The committee found that Latinos were not well-represented in the D.C. Circuit juries. During interviews, several judges "remarked on the low numbers of Hispanics represented in the jury venire," and during the public hearing and in attorney focus groups the committee "heard concerns that Hispanics were serving on federal juries in very small numbers."[119] The committee could not accurately determine, however, whether the sources used for the jury pool—the D.C. Board of Elections registered voters file and the D.C. Department of Motor Vehicles file of individuals 18 years and older who have a driver's license, learner's permit, or valid identification card issued by the DMV—represented "a fair 'cross-section' of the District of Columbia community, including Hispanics."[120]

In order to identify the number of Latinos called for jury duty and the possible basis, if any, for their disqualification, the committee reviewed all of the jury questionnaires for individuals summoned from September 1992 through March 1993.[121] The committee listed the following three reasons for its inability to determine accurately the Latino presence in the jury pool: First, it was unclear whether all respondents to the questionnaire consistently recorded their Latino origin; second, fewer than 50 percent of all people who received jury summonses responded, and there was no way to determine how many Latinos were included in that number; and finally, additional persons who returned questionnaires were either "exempted, excused or disqualified from jury service."[122] The committee further noted that "substantially more Latinos—58 of 92—were disqualified for lack of U.S. citizenship than for any other reason," and "lack of D.C. residency disqualified an additional eight people and limited English ability excluded another five people."[123] In all, nearly half of the 122 Latinos responding to juror summonses were disqualified on the basis of citizenship, and almost 75 percent of Latinos responding to jury questionnaires were not qualified or were excused.[124]

THIRD CIRCUIT

The Third Circuit Task Force on Equal Treatment in the Courts created a Committee on Jury Issues to study two general areas: 1) treatment of jurors on the basis of race and ethnicity, and 2) the racial and ethnic composition of the jury pool and juries in each district or jury division compared to the composition of the population in these areas.[125] As the basis for its 1997 report, the task force collected responses to surveys and questionnaires, obtained public hearing testimony, and analyzed relevant literature in order to obtain a better understanding of jury issues related to racial and ethnic bias. Generally speaking, jurors, judges, court employees, and attorneys all indicated that jurors appeared to be treated fairly in the Third Circuit with respect to their race and ethnicity. When jurors did identify what they perceived to be incidents of racial or ethnic bias, they most often indicated this bias had been exhibited by another juror.[126] For example, some of the responding jurors indicated that a fellow juror had exhibited offensive conduct, and had subsequently been excused by the trial judge prior to deliberations.[127]

Public hearings were one of the methods used by the task force to investigate the perception that minorities are underrepresented on jury pools in the Third Circuit. According to the final report: "Many speakers

at the public hearings throughout the Third Circuit expressed their impressions that racial and ethnic minorities were under-represented in the jury pool."[128] This was widely perceived to be a result of the fact that minorities were underrepresented on voter registration lists. For example:

> "In the District of Delaware, the Middle District of Pennsylvania, and the Western District of Pennsylvania, the jury pool is drawn from lists of registered voters. In these districts and generally in the jury divisions within the districts, racial and ethnic minorities, particularly African Americans and Hispanics, are not represented in numbers as great as their percentage of the general population."[129]

The discriminatory use of peremptory challenges was cited as another possible reason for minority underrepresentation on juries. While "only a small percentage of judges in the Third Circuit believe that racial and ethnic minorities are more likely than other jurors to be excused on peremptory challenges,"[130] a speaker from the Eastern District of Pennsylvania suggested that "the prohibition on race-based peremptory challenges is very difficult to enforce because it is extremely difficult to assess an attorney's reasons for challenging a prospective juror."[131] Two speakers from the Middle District of Pennsylvania also shared this concern, with one speaker noting that this difficulty was multiplied when there are few minorities on the panel, because there was no discernible pattern of race-based challenges.[132]

The task force also heard from more than a dozen attorneys who, in their responses to questionnaires, noted the lack of minority jurors as well as the effect their absence could have on the outcome of cases. One attorney wrote:

> "There are so few people of color selected through the present jury system that most attorneys who themselves are minority or who represent minorities are deeply concerned about fairness in decision making in the federal court and often [if possible] seek to use the state courts."[133]

Attorneys and judges alike noted that the racial and ethnic composition of juries influenced the valuation of cases for settlement purposes.

SECOND CIRCUIT

According to the Report of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, which was published in 1997, the federal courts in recent years have grown "considerably more concerned with—and less tolerant of—jury selection that is influenced by racial or gender stereotypes."[134] The task force was particularly concerned with two primary aspects of the jury process: Fairness in the methods used in forming the jury pool, and the selection of actual jurors. Racially skewed juries in the Eastern District of New York were the subject of considerable litigation, and the District of Connecticut also had difficulties creating a racially representative jury pool, as described in *United States v. Jackman*.[135] In *Jackman*, the Second Circuit reversed a conviction in a criminal case that was decided by a jury selected from an unrepresentative pool.[136]

Although several sources of data were examined in order to prepare the task force report, some of the data were inadequate, either because the data itself were incomplete or because no information was available about the racial and ethnic composition of jury panels in certain areas of the Second Circuit. One of the key sources of information for the task force was a juror survey completed by 488 of the 940 persons who served as jurors during a six-week period in the spring of 1996. Up to 9 percent of the respondents felt that they had been selected because of their race. Overall, 7.6 percent of the respondents felt that race had played some role in their selection. Women and minorities were more likely than white men to attribute their selection to race or gender.[137] Most jurors responded positively to inquiries about how they were treated and how they perceived others were treated. Among the respondents, 97.6 percent reported that no one had treated them inappropriately because of their race, ethnicity, or gender and 97.9 percent of respondents "reported no untoward incidents involving race or ethnicity."[138]

BEST PRACTICES

SAN JOAQUIN COUNTY, CALIFORNIA

The San Joaquin County Superior Court in Stockton, CA, has instituted a range of measures geared toward improving both the rate of response to jury summonses and the experiences of citizens once they enter the jury pool.

"It would be great if everyone could have the experience of sitting on a trial," wrote Superior Court Judge William J. Murray Jr. and Deputy Jury Commissioner Annette Kirby in the first of a three-part series published in the *Stockton Record* in 2000. "Unfortunately, many are called, but few are actually chosen for jury service. This is part of the process. Those who actually sit through trials gain a better appreciation of the selection process. Many who are not selected equate the concept of jury service with actually sitting on a jury and believe that it is a waste of time if they are not selected. It is important for those who feel that way to understand the concept of jury service is not limited to actually serving. It includes appearing for purposes of going through the selection process."[139]

Murray and Kirby explain that the San Joaquin court mails summonses five weeks in advance of the appearance date, even though California law requires only a 10-day notice. This gives people time to make arrangements with employers and childcare providers. An exit survey of jurors conducted in 1999 showed 89 percent found the overall jury service to have been positive; and 39 percent gained more positive impressions of the justice system during their jury service.[140]

Other hallmarks of the San Joaquin program, as described by Murray and Kirby, include:

- In 2000, the court began requesting updated voter registration and licensed drivers lists every six months instead of every year;
- Following up on efforts to reach those who do not respond to the initial summons, using techniques developed in the county's Juror Education and Compliance Program to reach about 70 percent of the non-responders. The eventual response rate eliminates much of the statistical disparity between the jury pool and actual juries;
- Providing live orientations for people summoned to jury service, with judges available at the end of the sessions to answer questions;

- Establishing a jury service committee to monitor and evaluate jury service issues in the county. Judges, court administrative staff, and members of the general public all serve on the committee;
- Instituting a school program called Courtroom to Schoolroom that emphasizes the importance of jury service;
- Distributing an informational brochure for employers, and awarding certificates of appreciation to employers who pay employees while they are on jury duty; and
- Engaging in outreach activities toward the local Latino community. An informational flyer on jury service was translated into Spanish, and court administrators made presentations before community groups to encourage participation.

Stockton County improved facilities in the jury assembly room by installing computer modems and subscribing to select satellite television channels that members of the jury pool could watch while waiting to be assigned to a courtroom. Jury rooms were also redecorated and stocked with reading materials.

The *Stockton Record* published two three-part series about juries during Jury Appreciation Week in 2000 and 2001. In the first series, Murray explained in a section entitled "Jury of Your Peers—No Such Constitutional Right" that appellate courts have found that the right to a jury trial includes a right to a "fair and reasonable cross-section of the community," which demands that courts ensure the fairness of the master source list and the venire.[141]

In the second series, entitled "Jury Duty—It's Not Fair If You're Not There," Murray and Kirby provided straightforward responses to questions such as "How did my name get selected for jury duty?" and "How often can I be summoned?"[142]

THE AMERICAN BAR ASSOCIATION RECOMMENDATIONS

The American Bar Association has produced the following recommendations for preventing discriminatory practices in the jury selection process:

- Compare the source list being used with the population data of the jurisdiction;
- Take corrective action(s) such as supplementing the source list with additional lists;
- Examine court policies on granting excuses;
- Take corrective action(s) such as establishing written and uniform procedures for granting excuses;
- Examine court practices with respect to peremptory challenges during the *voir dire* process; and
- Take corrective action if the *voir dire* process discriminates against any group in the jurisdiction.

RECOMMENDATIONS

TO THE SUPREME COURT OF PENNSYLVANIA

The Committee recommends that the Court:

1. Direct the AOPC to design a standardized system for court administrators throughout the Commonwealth to record the race and ethnicity of all individuals who are summoned for jury service, who appear in court in response to a summons, and who are selected for jury duty. This information should be retained and reported by each court administrator to the AOPC on an annual basis.
2. Direct county court administrators to use multiple sources in compiling jury lists, rather than relying strictly on voter registration lists in which young people and minorities are generally underrepresented and driver's license lists which tend to exclude minorities, the poor, the young, and the elderly. Other possible source lists that have been used in other states include utility subscriber lists, welfare lists, tax collection lists, high school graduate lists, library address lists, and unemployment compensation lists.
3. Direct trial judges to exercise increased scrutiny to ensure that peremptory challenges are not used improperly based on race in the *voir dire* process.
4. Expand *voir dire* to allow counsel the opportunity to question jurors more extensively than is now permitted in many counties, to better ensure fairness and impartiality in the jury selection process.
5. Direct trial judges to engage in individual, not group, questioning of potential jurors regarding racial bias.[143]
6. Direct county court administrators to tighten standards for exemption from jury service and to enforce strictly the jury summons.
7. Require that all *Batson* and other similar challenges be made part of the official court record.
8. Require that a database be established regarding every *Batson* challenge and other similar challenges. The database should contain the name and race of each juror, the basis for the challenge, the names of the striking and challenging attorneys and trial judge, and all other information pertinent to the challenge. All courts should use comparable codes to create and maintain such a database

9. Consistent with the recommendations set forth in Chapter 3, encourage court administrators to establish licensed childcare facilities in courthouses with funding through Title 42 Pa. Cons. Stat. Ann. § 3721 for individuals who have been summoned for jury duty.
10. Consistent with the recommendations set forth in Chapter 3, require training of court administrators to understand better how procedures by which prospective jurors are disqualified, exempted, and excused may adversely affect the composition of the jury pool, and to identify ways to address these inequities.

TO THE LEGISLATURE

The Committee recommends that the Legislature enact legislation to:

1. Require employers with a certain minimum number of employees to develop a paid leave policy for employees so that employees will receive their regular pay while serving on a jury. Employers should receive a state tax credit reflecting their payments to active jurors.
2. Establish a statewide Office of Jury Commissioner, similar to those in Massachusetts, Connecticut, and New York, whose function is to produce a master list of jurors for each county in a more cost-effective and efficient manner, and to increase minority representation on juries throughout the Commonwealth. It is intended that a centralized process of gathering the most representative jury source lists, eliminating duplication of names, and utilizing a professional service to regularly update juror addresses will increase the likelihood of producing a more representative pool of jurors for each county.
3. Conduct a study of juror compensation provided by employers and the courts for jury service. Following completion of the study, enact legislation to increase juror pay if supported by the results of the study.[144]
4. Conduct a study of transportation problems that impede citizens' abilities to serve as jurors, and develop solutions supported by the study.

TO BAR ASSOCIATIONS

The Committee recommends that county bar associations, in conjunction with jury commissioners and court administrators:

1. Develop community outreach programs to emphasize the importance of jury service and encourage citizens to perform their jury duty, particularly in minority communities.

ENDNOTES

[1] Evan R. Seamone, *State Inaction to Increase Jury Compensation and the Need to Identify Forward-Looking Standards*, N.Y.U. J. Legis. & Pub. Pol'y, Vol. 5, Number 2, 291 (2002) [hereinafter Seamone].

[2] Seamone, *supra,* at 291.

[3] An annotated bibliography of relevant articles on race and jury service is attached in Appendix Vol. I.

[4] Allegheny County.

[5] Testimony of Gladys Scott, Erie Public Hearing Transcript, pp. 26–27 [hereinafter Scott Testimony].

[6] Among the articles are the following: Mark Houser, "A Jury of Peers?" *Pittsburgh Tribune-Review*, July 21, 2002 [hereinafter Houser, "A Jury of Peers?"]; "State Senate: Jury Study Ordered," *Pittsburgh Post-Gazette*, October 11, 2002.

[7] Ralph B. Taylor and Lillian Dote, *Understanding Juror Selection Processes Through Jury Documents and Administrator Surveys: Exploring Implications for Under-Representation of Populations of Color*, Phase I report to the Work Group on Racial and Gender Bias in Jury Selection (Philadelphia: August 2001). *See* Appendix Vol. I [hereinafter Taylor and Dote].

[8] Taylor and Dote, *supra* at 22.

[9] *Id.* at 40.

[10] *Id.* at 41.

[11] *Id.*

[12] In many jurisdictions, the lack of African American and Latino jurors is a question of numbers. As of 1999, the Commonwealth's residents included 1.6 million people of color, including more than 1.1 million in four counties—Philadelphia, Allegheny, Delaware, and Montgomery. The ratio of minority residents was 45.7 percent in Philadelphia County, 11.7 percent in Allegheny County, 5.6 percent in Delaware County and 5.1 percent in Montgomery County. Of the remaining 63 counties, only Delaware and Montgomery had minority populations of more than 5 percent, while nine others had minority populations between 1 and 5 percent. The minority population was therefore less than 1 percent in 55 of the state's 67 counties. Ralph B. Taylor, Jerry H. Ratcliffe, Ron Costeck and Lillian Dote, *Potential Under-Representation by Race and Class in the Middle Stages of Juror Selection in the Commonwealth of Pennsylvania: A Located Analysis,* Phase II report to the Work Group on Racial Bias in Jury Selection (Philadelphia: June 2002), Table 1, p. 14, Appendix Vol. I [hereinafter Taylor, Ratcliffe, Costeck and Dote].

[13] Taylor and Dote, *supra* at 41.

[14] *Id.* at 42.

[15] Taylor, Ratcliffe, Costeck and Dote, *supra*.

[16] *Id.* at 4.

[17] *Id.* at 2.

[18] *Id.* at 3.

[19] *Id.* at 4.

[20] *Id.*

[21] *Id.* at 5.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 6.

[25] *Id.*

[26] *Id.* at 12.

[27] *See* John F. Karns, J.D., Ph.D., *Statistical Representativeness of a Sample of Persons Selected for Jury Duty in Allegheny County, Pennsylvania May 12, through October 11, 2001* at Appendix Vol. I.

[28] Houser, "A Jury of Peers"?, *supra*.

[29] Testimony of Timothy P. O'Brien, Pittsburgh Public Hearing Transcript, pp. 163–164 [hereinafter O'Brien Testimony].

[30] *Id.* at 166–167

[31] Testimony of Honorable Mark Ciavarella, Jr., Wilkes-Barre Public Hearing Transcript, p. 210 [hereinafter Ciavarella Testimony].

[32] *Id.* at 211.

[33] Scott Testimony, *supra* at 33.

[34] *Id.* at 27.

[35] *Id.* at 31.

[36] Testimony of James Minella, Wilkes-Barre Public Hearing Transcript, p. 120 [hereinafter Minella Testimony].

[37] Testimony of J. Robert Chuk, Harrisburg Public Hearing Transcript, p. 89 [hereinafter Chuk Testimony].

[38] Testimony of Allan Kirschman, Pittsburgh Public Hearing Transcript, p. 80 [hereinafter Kirschman Testimony].

[39] *Id.* at 81.

[40] *Id.* at 77.

[41] *Id.* at 74–75.

[42] Minella Testimony, *supra* at 121.

[43] *Id.* at 123.

[44] *Id.*

[45] Scott Testimony, *supra* at 26.

[46] Honorable Stephanie Domitrovich, *Jury Source Lists and the Community's Need to Achieve Racial Balance on the Jury,* 33 Duq. L. Rev. 39 (1994).

[47] Testimony of Honorable Stephanie Domitrovich, Erie Public Hearing Transcript, p. 65 [hereinafter Domitrovich Testimony].

[48] *Id.* at 67.

[49] *Id.* at 82.

[50] *Id.*

[51] *Id.* at 67.

[52] Professor Baldus' testimony and study is described at length in Chapter 6 of this report, Racial and Ethnic Disparities in the Imposition of the Death Penalty.

[53] Testimony of David Baldus, Philadelphia Public Hearing Transcript, p. 62 [hereinafter Baldus Testimony].

[54] *Id.* at 67.

[55] *Id.* at 69.

[56] *Id.* at 85.

[57] *Id.* at 65–66 and 85.

[58] *Id.* at 64.

[59] *Id.* at 77–78.

[60] *Id.* at 81.

[61] *Id.* at 82.

[62] Testimony of Felipe Restrepo, Harrisburg Public Hearing Transcript, p. 84 [hereinafter Restrepo Testimony].

[63] Testimony of Robert Foreman, Pittsburgh Public Hearing Transcript, p. 171 [hereinafter Foreman Testimony].

[64] Testimony of Gary Tennis, Philadelphia Public Hearing Transcript, p. 265 [hereinafter Tennis Testimony].

[65] *Id.* at 266.

[66] *Id.* at 263–264.

[67] *Id.* at 267–268.

[68] Testimony of Charles Cunningham, Philadelphia Public Hearing Transcript, p. 304 [hereinafter Cunningham Testimony].

[69] *Id.* at 305.

[70] Testimony of Clifford Boardman, Philadelphia Public Hearing Transcript, p. 356.

[71] *Id.* at 355–356.

[72] Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts, p.192 (1997).

[73] *Id.*

[74] *Id.*

[75] *Id.* at 196.

[76] Id.

[77] The Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System, p. 73 (1994).

[78] *Id.* at 74.

[79] *Id.*

[80] *Id.* at 78.

[81] *Id.* at 79.

[82] The Report of the Ohio Commission on Racial Fairness, p. 31 (1999).

[83] *Id.*

[84] *Id.* at 32.

[85] *Id.*

[86] *Id.* at 33.

[87] Report of the New York State Judicial Commission on Minorities, Volume Two, *The Public and the Courts*, p. 222 (1991).

[88] *Id.* at 225.

[89] *Id.* at 229.

[90] *Id.* at 250.

[91] *Id.* at 233.

[92] *Id.* at 233–234.

[93] *Id.* at 235, 251.

[94] *Id.* at 251.

[95] *Id.* at 239.

[96] *Id.* at 241–242.

[97] *Id.* at 251.

[98] *Id.* at 251–252.

[99] New Jersey Supreme Court Task Force on Minority Concerns, Final Report, pp. 221–222 (1992) [hereinafter New Jersey Final Report].

[100] *Id.* at 223.

[101] *State v. Ramseur*, 106 N.J. 123, 524 A.2d 188 (1987).

[102] *Id.*

[103] New Jersey Final Report, *supra* at 226.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.* at 229.

[109] *Id.* at 229–230.

[110] *Id*. at 230.

[111] *Id*.

[112] *Id*. at 231.

[113] *Id*. at 234.

[114] The Gender, Race, and Ethnic Bias Task Force Project in the D.C. Circuit, IVB-112 (1995). "In 1993 juror questionnaires showed that 70% of jurors in federal district court were African American, 27.4% were white and 1.3% were 'other' (1.3% did not respond)."

[115] *Id*.

[116] *Id*. at IVB-113.

[117] *Id*.

[118] *Id*. at IVB-115.

[119] *Id*. at IVB-123–124.

[120] *Id*. at IVB-125.

[121] *Id*. at IVB-126.

[122] *Id*.

[123] *Id*. at IVB 126–127.

[124] *Id*. at 127.

[125] The Report of the Third Circuit Task Force on Equal Treatment in the Courts, 42 Vill. L. Rev. 1355, 1757 (1997).

[126] *Id*. at 1801.

[127] *Id*. at 1759.

[128] *Id*. at 1760.

[129] *Id*. at 1802–1803.

[130] *Id*. at 1804.

[131] *Id*. at 1785.

[132] *Id*.

[133] *Id*. at 1765.

[134] Report of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, p. 101 (1997) [hereinafter Second Circuit Report].

[135] *United States v. Jackman*, 46 F.3d 1240, 1242–44 (1995).

[136] *Id*. at 1242.

[137] Second Circuit Report, *supra* at 102.

[138] *Id*. at 104.

[139] William J. Murray, Jr., and Annette Kirby, "Jury Duty—It's Not Fair If You're Not There" (*Stockton Record*, May 2000) [hereinafter Murray and Kirby, "It's Not Fair If You're Not There"].

[140] William J. Murray, Jr., and Annette Kirby, "Jury Duty—Many Are Called, Few Are Chosen, All Are Appreciated" (*Stockton Record*, May 2001).

[141] William J. Murray, Jr., and Annette Kirby, "Jury of Your Peers—No Such Constitutional Right" (*Stockton Record*, May 2001).

[142] Murray and Kirby, "It's Not Fair If You're Not There," *supra*.

[143] The Committee recommends the use of written questionnaires but not as a substitute for counsel-directed *voir dire*.

[144] The study should include consideration of a pay rate that will increase public participation in jury service in general, and will facilitate efforts to create more representative juries; an increase in the rate of travel reimbursement for jurors; special provisions for jurors who are compensated on an hourly basis and provisions requiring employers with a prescribed minimum number of employees to pay for the first three days of an employee's juror service.

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INTRODUCTION

A hallmark of American constitutional democracy is the right to an impartial jury. The courts have generally interpreted this to mean that defendants are entitled to a jury of their peers, or to a jury that accurately represents a cross-section of the community. U.S. Supreme Court rulings over the past century have gradually expanded interpretation of this provision to mean that discrimination in jury selection against African Americans, Latinos, and women is impermissible. The Court's 1946 ruling in *Ballard v. United States*, 329 U.S. 187 (1946), prevented women from being excluded from jury service. Later, the Court, in its 1978 ruling in *Duren v. Missouri*, 439 U.S. 357 (1978), found that defendants could prove a violation of Sixth Amendment rights if they could show particular groups had been underrepresented on juries, whether or not the court had intentionally sought to exclude these groups. In short, the Court held that an unrepresentative jury is an unfair jury.

Some believe that the deliberate exclusion of distinct segments of the population from juries is, for the most part, a thing of the past. Others argue that American courts have not entirely dismantled barriers to jury participation that have the effect of excluding certain individuals or that impose an undue burden upon them. Moreover, sometimes actions that are perceived as supportive of women, such as excusing them from jury participation, can adversely impact the goal of representative participation. In its study of Gender Bias in Jury Selection, the Committee investigated the barriers faced by Pennsylvanians, particularly women, who are summoned to serve on juries.

There is an extensive body of research on jury selection and juror treatment that identifies a wide variation in the willingness and ability of women to serve on juries. Factors analyzed in the literature include race, age, education, and socioeconomic status of jurors.[1] While some of the questions asked by the Committee are similar to questions asked in the earlier research, the Committee did not seek to develop a comprehensive picture of the myriad groups affected by practices of jury selection and juror treatment. Most of the studies do not consider gender as a determinant of summons response or as a variable likely to affect either citizens' willingness to serve or their experiences as jurors; a notable exception is the Losh, Wasserman, and Wasserman article cited above in endnote 1, which finds no significant difference in the propensities of men and women to request excuses or deferrals or to disregard a call to jury service. Many of the studies, however, do connect an ability to serve with issues that appear to be gender-related. Most notable among these issues is a need for childcare.

Focus of Inquiry

The Committee identified three juror outcome factors that may be influenced by the respondent's gender. The three are summons response, jury selection, and experiences during trials and deliberations.

First, the Committee investigated summons response, asking whether women and men may have distinct scheduling needs or problems that influence their ability to serve. In this context, the Committee discussed issues that are often gender-related, such as childcare. In addition, the Committee considered variables such as economic hardship, employer compensation, and transportation needs that, while not specific to gender, may affect men and women differently, according to differences in socioeconomic status, occupation, and family roles.

Second, the Committee investigated jury selection, asking whether women and men tend to be struck from juries at different rates in particular types of cases: Do women and men tend to be asked different types of questions during *voir dire*? Are men and women treated differently in the selection process by attorneys or the court?

Third, the Committee examined whether women have different experiences during the trial itself and during deliberations: Are women, for instance, expected to consider evidence differently from men in certain types of cases, and during deliberations do women and men tend to play different roles? Under this final topic, the Committee's specific objectives were to consider the rate at which women and men are selected as presiding jurors (forepersons), to measure differences by gender in how active individuals are in deliberations, and to gather evidence about the treatment of jurors by other jurors.

Research Methodology

The Committee utilized a variety of research methods in gathering its data. In April 2001, two surveys were mailed to jury commissioners in each of the 67 counties in Pennsylvania, seeking information on gender-related issues in jury selection and jury service. Follow-up interviews were then conducted with selected jury commissioners in an effort to discuss court-sponsored childcare programs in more detail. The Committee also obtained anecdotal information from witnesses who testified during the public hearings. Finally, the Committee consulted with other states and selected counties in Pennsylvania to seek information about other court-sponsored programs that have been effective in promoting participation.

SYNOPSIS OF FINDINGS

The Committee's findings, elaborated in greater detail below, indicate that men and women do face different obstacles to jury service.

- First, the Committee found that responsibility for childcare falls predominantly upon women, as does the responsibility for elder care. Several Pennsylvania courts have developed childcare programs or childcare reimbursement programs, and the Commonwealth has taken steps to enable courts to provide such programs.
- Second, the Committee found that travel to and from the courthouse is generally more difficult for women than for men. While recommending further research into this discrepancy, the Committee suggests that courts look at ways to facilitate jurors' access to the courthouse via public transportation wherever it is available.
- Third, the Committee found that jury service presents an economic hardship for both men and women. Given the predominance of either men or women in certain occupations, it behooves the courts to investigate juror compensation by employers in those workforce sectors that tend to employ one gender or the other. Based on the findings, the courts might consider increasing compensation for jurors.
- And fourth, the Committee found some evidence that the interpersonal dynamics within the jury room can operate to the detriment of the female jurors. While the research clearly shows that women in Pennsylvania are less likely than men to be chosen as presiding jurors, the scope of the study did not permit a consideration of differences in the ways that women and men regard deliberations. There is abundant psychological research on gender differences in handling conflict and in processing information, yet little of this research has been brought to bear on jury decision-making. It may be helpful for the courts to issue instructions emphasizing the importance of gender equality in the selection of the jury foreperson and encouraging sensitivity in juror deliberations. Courts may also benefit from training their employees to recognize patterns of male and female behavior and to be vigilant in identifying potential coercion or conflict among jurors based upon gender.

RESEARCH METHODOLOGY

JURY COMMISSIONER SURVEY

Summary

The Committee sent a survey to jury commissioners in each of the 67 counties in the Commonwealth in order to determine, anecdotally, if gender influences willingness to serve on juries, participation in jury deliberations, and juror treatment. A copy of the survey is included in Appendix Vol. I. Responses to the survey were submitted by 49 jury commissioners (73 percent), including two court systems each comprising two counties.

The results of the jury commissioner survey identified three primary factors that impede jury service for women: the need for childcare, the need for elder care, and transportation problems. While ameliorating the problems will likely increase the participation of women on juries, according to the survey, the changes are also likely to benefit many men. And while the survey generally did not find a gender-related component in juror treatment policies, the fact that women are less likely than men to serve as jury forepersons may indicate that women play a less significant role in leading jury deliberations.

The Survey Instrument and Method

The Jury Commissioner Survey contained eight questions concerning jury commissioners' perceptions of how male and female jurors felt about various aspects of jury service. Questions were grouped into two categories: Whether gender is related to willingness to serve and jury selection; and whether jurors' gender has an effect on juror treatment and jury deliberations.

First, respondents were asked about how frequently jury summons respondents cited various issues as impediments to jury service. The issues included childcare, elder care, economic hardship, transportation, lack of appropriate wardrobe, length of trial, length of trial day, inability to render a fair decision, and lack of confidence that one's opinions will count. Respondents were also asked about whether, in their opinion, peremptory challenges are used more often to strike men or women. Finally, respondents were asked whether men or women invoke jury service excuses or deferrals more frequently, and whether those failing to appear for jury service appear to be disproportionately male or disproportionately female.

Second, respondents were asked a series of questions about concerns raised by empaneled jurors regarding the adequacy of physical facilities and the civility of the judge, attorneys, court personnel, and other jurors.

In this latter series of questions, respondents were asked whether such concerns tend to be raised more by men or by women, and whether, in their opinion, men and women might have the concerns even if they do not raise them with the jury commissioner. Respondents were also asked to estimate the ratio of male and female jury forepersons chosen by the jury panels. An additional survey question sought to identify courts in which the first juror selected is automatically made the presiding juror.

Survey questions about peremptory strikes, deferral requests, excuse requests, and summons non-respondents had three answer categories—"more frequently women," "more frequently men," or "no difference." All other questions, which addressed the frequency with which the various concerns were raised, had four scalable categories for responses—"never or rarely," "sometimes, but not frequently," "frequently," and "very frequently or always." The scaling of responses, from one to four in order of frequency, enabled the calculation of averages.

Jury Selection Findings

Respondents were asked about nine factors that might serve as impediments to jury service. In each case, the survey asked how frequently each of the nine factors was cited by all jurors, by male jurors and by female jurors. Only three of the nine—childcare, elder care, and economic hardship—were cited with any frequency, which, in this case, meant a mean response greater than two, between "sometimes, but not frequently" and "frequently." Four other factors—transportation, the length of trials, the length of the trial day, and the inability or reluctance to render a fair decision—were noted by at least 10 respondents as a concern of jurors at least some of the time. The two remaining factors—lack of appropriate wardrobe and lack of confidence that one's opinions would count—were judged by virtually all respondents as negligible factors in terms of willingness to serve on a jury.

TABLE 1
Impediments to Jury Service for all Jurors and by Gender

Factor	All Jurors	Men	Women
Economic hardship *	2.84	2.88	2.61
Childcare *	2.27	1.31	2.65
Elder care *	2.14	1.55	2.31
Length of trial	1.80	1.80	1.76
Transportation *	1.61	1.33	1.63
Inability to reach a fair decision	1.61	1.53	1.65
Length of trial day	1.35	1.27	1.39
Confidence that one s opinions will count	1.20	1.14	1.14
Appropriate wardrobe	1.04	1.02	1.02
N	49	49	49

**p<.05 for H_0: mean response for men = mean response for women.*

** Figures shown are the mean estimate of respondents on a scale of one to four where one indicates the factor is never mentioned by jurors and four indicates that the factor is very frequently or always mentioned by jurors.*

** Male and female means are responses to separate questions. The male and female means should not necessarily average out to the mean for all jurors.*

Table 1 presents the mean response for each of these questions for all jurors, and separately for male and female jurors. Questions on which differences in responses for men and women reached conventional standards of statistical significance (p<.05) are marked with an asterisk. As the table shows, four factors—childcare, elder care, economic hardship and transportation—produce different results based on the juror's gender. Men are more likely than women to cite economic hardship as a factor, while women are more likely than men to cite childcare, elder care, and transportation problems as factors. The reasons for each of these differences seem likely to be related to workforce participation—more women than men are responsible for the care of children or parents, and men seem more likely to be the primary breadwinners. In the case of transportation, it may be that in families with a single car, men are more likely than women to rely upon that car to get to work.

Respondents were also asked whether men or women were more likely to request a deferral, request an excuse, or fail to show up. In all three cases, most respondents responded that there was no difference between men and women.

Jury Service Findings

Fewer variances according to gender were found in responses to the battery of questions on jury service circulated by the Committee. The questions related to jury service used the same four-point scale used in the survey questions regarding jury selection, asking respondents to rate the frequency of complaints from jurors regarding court facilities and the civility of judges, court personnel, attorneys, and other jurors. Respondents were also asked their opinions about whether any such complaints were justified. In all categories but one—the adequacy of court facilities—at least 90 percent answered "four," the most favorable response. Seventeen jury commissioners, or 35 percent of the respondents, commented on the quality of court facilities, including the jury waiting room, the food available for jurors, and the rest rooms. There was no variation according to gender in the frequency of complaints about the facilities.

The survey question about jury forepersons was the only one to show a pronounced variation of responses according to gender. The mean percentage of male forepersons reported in the survey, when averaged across participating jurisdictions, was 58.9 percent, while the mean percentage of female forepersons was 38.9 percent. (The figures did not add up to 100 percent because respondents reported these figures in separate questions.) Approximately 20 percent of respondents claimed no knowledge of the gender of forepersons, and two respondents noted that the first juror selected is always the presiding juror.

Courts, of course, have little control over the selection of presiding jurors. It is unclear what the courts might do to exert more influence in this regard, aside from requiring that the first juror selected is to be the presiding juror—a technique that may have other drawbacks unrelated to gender. The finding about the disproportionate number of male forepersons does merit further study, however.

In conclusion, it is evident from these data that childcare, elder care, and transportation are the primary issues that affect women's participation on juries. Subsequent sections of this chapter present information on the attempts Pennsylvania courts have made to confront these issues and to develop solutions to these problems.

FOLLOW-UP SURVEY AND INTERVIEWS

To reach a clearer understanding of Pennsylvania courts' accommodations for jurors who are the primary caretakers of their children, the Committee sent a second survey to each jury commissioner to request information about the courts' childcare practices. Nearly 88 percent of the commissioners responded (57 of 65). A copy of the second survey is included in Appendix Vol. I.

The survey asked whether the court has its own childcare facilities, whether it provides compensation to jurors for childcare, and what policy it follows for granting excuses or deferrals on the basis of childcare needs. In an attempt to discover information the courts may already have collected from jurors, the second jury commissioner survey asked the courts to pass along copies of any exit surveys of jurors they may have conducted. In several cases, the Committee went on to discuss childcare with courts that sponsor programs.

Findings

The Committee identified two Pennsylvania counties that provide childcare for jurors and a third—Monroe County in Northeastern Pennsylvania—that provides a childcare reimbursement. The two counties with childcare are Pike County, a small county of 28,000 people in Northeastern Pennsylvania along the New York and New Jersey borders, and Montgomery County, an area of 680,000 people that comprises many of the Northern Philadelphia suburbs. Pike County did not provide details of its program. Montgomery County, however, explained that the Montgomery County Court Care Program was initiated in 1996 and is funded through the county by means of a fee collected by the prothonotary or clerk of courts. The program serves approximately 10 children per day and is licensed by the Pennsylvania Department of Public Welfare. There is no charge for the service and it is available to all families who have court business. Prospective jurors receive information about the childcare when they receive the jury summons, in a telephone message one day prior to jury service, and in postings on the jury board in the marshaling room area.

In the follow-up survey, 55 of 57 respondents noted that they grant prospective jurors a deferral for childcare reasons; the deferral is either automatic or on a case-by-case basis, as determined by court personnel or the judge. The survey also discovered that 43 of the 57 courts grant excuses for childcare—again, either automatically or on a case-by-case

basis. Each court, however, is different, and in some cases it was difficult to distinguish between an excuse and a deferral. Flexibility in childcare arrangements would seem to facilitate jury service for parents of young children—a disproportionately female group according to the survey.

Still, some courts have had difficulty with this concept. Court reformers in New York discovered during the 1990s that mothers of young children were not only excused, but removed from the jury rolls; the women did not receive summonses even when their children were older.[2] Several Pennsylvania counties seem to be aware of such potential problems. Philadelphia County, for instance, excuses such parents for three years. Allegheny County excuses parents for two years if they have pre-school age children and for two to four months, upon request, if they have elementary school children. Lebanon County excuses parents of young children for one year, and along with Lehigh and Dauphin counties, allows a parent caring for a disabled or special needs child to be excused for a longer period of time. Several respondents also noted other circumstances in which the courts seek to accommodate parents of young children by excusing or deferring jury service. In Bucks County, for instance, parents who are called to serve on a jury during the summer may defer their service until their children have returned to school.

Exit Surveys

Finally, in an attempt to solicit further data on the relationship between gender and jury service, the Committee asked the jury commissioners about juror exit surveys. In response, 14 of the 57 respondents forwarded copies of their exit surveys and two other respondents noted that their courts were in the process of developing exit surveys. Nine of the 14 counties collect information on the exit survey respondent's gender. Montgomery, Chester, Bucks, Dauphin, Blair, and Warren/Forest counties use the same standardized survey. This survey collects demographic information on the gender, age, and occupation of the jurors, and it asks them how they felt about jury service in general; about the amenities of the court and the surrounding area; and about the one-day/one-trial system. Respondents are also asked if they lost income due to jury service, whether they had served before, and, if so, how the latest service compared with the previous service. And, if they had not served before, whether the experience met their expectations. Elsewhere, the group found that Carbon and Franklin/Fulton Counties use their own exit surveys, with similar questions. Lancaster County has an exit survey that asks jurors three questions related to childcare: First, whether they had to find and pay for childcare in order

to serve; second, if so, whether they would use court-provided childcare if they were to serve again; and third, whether they would be willing to donate their jury pay and mileage reimbursement to the court if it were to use the funds to establish a childcare program.

By systematically collecting and tabulating the data from these surveys, the courts could explore many issues through jurors' eyes—issues that include the economics of jury service, concerns about juror treatment, and concerns about gender. But in follow-up interviews with the counties that conduct juror exit surveys, the Committee found that most court systems retain the data for only a short time, and none for longer than one year. Further, the courts do not systematically record the information in a database, which could then be analyzed. The juror exit survey is nonetheless a valuable tool for obtaining information with gender implications. With this in mind, the Committee recommends that all counties distribute a standardized juror exit survey and collect and retain the data for regular analysis.

CAPITAL JURY PROJECT DATA

In addition to conducting surveys and personal interviews, the Committee also obtained data from the Capital Jury Project, a 14-state study of the jury deliberation process in death penalty cases sponsored by the National Science Foundation and coordinated by William Bowers, principal research scientist, College of Criminal Justice at Northeastern University. The data for the study was obtained from in-depth interviews with 1,155 jurors in death penalty cases around the country. The Pennsylvania research in this study was conducted by Wanda Foglia, J.D., Ph.D., associate professor of law and justice studies at Rowan University, along with John Lamberth, Ph.D., associate professor of psychology at Temple University. Most of Foglia's work related to the role played by race in the jury deliberation process and in the outcomes of capital murder cases. At the request of the Committee, Foglia reviewed her data from Pennsylvania, focusing on the experience of female jurors in capital murder cases. While the study was not aimed at detecting gender bias, she found a small amount of evidence suggesting that female jurors were more dissatisfied than males with their jury experience. In particular, female jurors were more likely to say that the jury decided guilt and punishment at the same time and that the jurors had become too emotionally involved in the case. In reviewing the narrative accounts from female jurors, she found complaints that men had pressured them during the decision-making process. While these findings are not statistically significant, Foglia concluded that the suggestion of gender bias in the jury room may warrant further study.

PUBLIC HEARING TESTIMONY

Public hearings held by the Committee yielded several statements from witnesses on the issue of gender bias within the jury selection process, as well as statements about impediments faced by women in serving as jurors.

The Committee heard evidence of systemic discrimination against women in the jury selection process in capital cases from Robert Dunham, director of training for the Capital Habeas Corpus Unit in the Federal Defender's Office in Philadelphia. Dunham described a case involving a prosecutor who, during jury selection for a capital murder case, exercised a much greater percentage of peremptory strikes against female prospective jurors on the basis of a "stereotypical view that, because someone was a woman, she would not be able to make the choice as to whether someone should live or die."[3] In that case, the prosecutor had struck nine women and one man from the jury panel. During *voir dire*, he directed only to female prospective jurors a question about difficulty they might have in making a decision between life and death for a defendant. After the court precluded the prosecutor's improper questioning, he accelerated his rate of directly striking women from the panel.

During the same public hearing, the Committee also heard testimony from David Baldus, professor of law at the University of Iowa and the author of a large-scale study on the impact of race on the use of peremptory challenges and sentencing decisions in capital murder cases in Philadelphia County. Baldus testified that his data indicated that the United States Supreme Court decision in *J.E.B. v Alabama,* 511 U.S. 127 (1994), prohibiting gender discrimination in the jury selection process, has had little, if any, impact on the use of peremptory challenges by prosecutors and defense counsel in Philadelphia.[4] He stated that in Philadelphia between 1981 and 1997, "over 2,100 venire members were excluded from jury service because of their race and over 800 were excluded because of their gender."[5]

Baldus found the principal targets of peremptory challenges by prosecutors in capital murder cases were young, middle-aged and older African American women and young African American men. As evidence, he cited advice provided by former prosecutor Jack McMahon of the Philadelphia District Attorney's office on a training tape for newly hired prosecutors between 1986 and 1988. On the tape, McMahon criticizes prosecutors who "treat blacks all the same."[6] He ranks "the young ones" as the most dangerous potential jurors in capital murder cases, followed by middle-

aged and older African American women, the so-called "black moms" who might be expected to exhibit a "maternal instinct" for a defendant.[7] He advises young prosecutors to use their peremptory challenges to strike African American potential jurors in that order.

> *The principal targets of peremptory challenges by prosecutors in capital murder cases were young, middle-aged and older African American women and young African American men.*
>
> —Professor David Baldus

Other witnesses before the Committee identified specific impediments that tend to reduce the numbers of women serving as jurors. The jury commissioners from York County and Lackawanna County both testified they heard a significant number of people requesting to be excused from jury duty, based upon their lack of child or elder care. Robert Chuk, the York County jury commissioner, stated that prospective jurors' lack of childcare was a problem for a "large number of people."[8] He added that he places requests for an excuse based on lack of childcare "fairly high on the list" and indicated that the court routinely grants excuses from jury service for that reason.[9] Chuk also observed that of prospective jurors requesting an excuse because of a lack of childcare, the "vast majority are women."[10]

The Committee identified economic hardship as a second impediment to juror service, affecting both males and females. Chuk testified that a high percentage of excuses from jury service are granted on the basis that the prospective juror's employer will not pay him or her for the dates of jury duty.[11] James Minella, jury commissioner of Lackawanna County, testified that "economic reasons" for an excuse from jury duty were common.[12] He cited the hypothetical example of a construction worker who has not worked in six months, has a large family, and cannot afford to lose a day's pay to perform jury service. Minella indicated that such an individual would be excused from service.[13]

> *Prospective jurors' lack of childcare was a problem for a "large number of people…Of prospective jurors requesting an excuse because of a lack of childcare, the "vast majority are women."*
>
> —Jury Commissioner Robert Chuk

BEST PRACTICES

CHILDCARE

Pennsylvania

The Pennsylvania Legislature enacted legislation in 2000 that provides for the start-up and daily operating costs of childcare facilities in jurisdictions across the Commonwealth.

After childcare was identified in the first jury commissioner survey as one of the three main impediments to women serving as jurors, the Committee sought to identify courts in Pennsylvania with functioning childcare programs.

The Pennsylvania Legislature enacted legislation in 2000 that provides for the start-up and daily operating costs of childcare facilities in jurisdictions across the Commonwealth. The statute, set forth in Title 42 Pa. Cons. Stat. Ann. § 3721, enables a county judicial center or courthouse to provide "a childcare facility for use by children whose parents or guardians are present at the county judicial center or courthouse, for a court appearance or other matter related to any civil or criminal action where the person's presence has been requested or is necessary." The facility must either be located within the county judicial center or courthouse or must be readily accessible to it, and the facility must be licensed and operated pursuant to the regulations of the Pennsylvania Department of Public Welfare. The statute also authorizes funding for start-up and operational costs of court-sponsored childcare facilities through the collection of a $5 filing fee for civil or criminal proceedings.

Montgomery County

The Committee's research showed that Montgomery County has the only court system in the Commonwealth that provides childcare in any meaningful way, although other counties have indicated an interest in establishing a similar program. Montgomery County created its Court Care Center in 1995 as the Commonwealth's first drop-in courthouse childcare center to operate with a full-time professional childcare staff fully licensed by the Pennsylvania Department of Public Welfare. According to the staff, one factor behind creation of the center was a recognition of the

disproportionate number of women who are unable to participate in the jury system due to lack of childcare.

Other States

According to the Center for the Study of Social Policy in Washington, D.C., there are more than 30 courthouse childcare centers across the country. The trend is detailed in the center's report, *Children in the Halls of Justice,* which was funded by the Department of Justice to help make the courts more accessible to the public.

Orange County, Florida, has been providing childcare services for five years at A Place for Children, serving people who have been summoned for jury duty. The center is located in the courthouse and operated by the Children's Home Society of Florida, a non-profit social services agency, with support from the Citizen's Commission for Children, a department of the Orange County Health and Community Services Division. The Orange County Bar Association and the Ninth Judicial Circuit also provide assistance to the center.

Massachusetts, New York, and California have all passed legislation to encourage the establishment of courthouse childcare centers, either by appropriating construction funds or by requiring all new courthouses to include space for such services. Other states, including Minnesota and Colorado, provide a $50 stipend for childcare for jurors.

In New York, at least 10 childcare facilities now link parents with court business to services such as Head Start. The centers were created with the help of New York's Permanent Judicial Commission on Justice for Children, which is co-chaired by Chief Judge Judith S. Kaye, State of New York Court of Appeals. Other states, such as Florida, Arizona, and Illinois, also boast childcare programs in some jurisdictions. Although the programs differ in function and funding, they share a goal of providing a safe place for children while their parents or caregivers have official business with the court.

JUROR COMPENSATION

Pennsylvania

Economic hardship was identified both by Committee surveys and hearings as a serious impediment to jury service for both men and women in the Commonwealth. Pennsylvania law authorizes courts to compensate jurors with a nominal fee of $9 per day for the first three days of service, increasing to $25 for each additional day.[14] The statute also provides for jurors to receive a travel allowance of 17 cents per mile, except within Philadelphia County. Additionally, state law prohibits Pennsylvania employers from penalizing an employee for responding to a jury summons or serving as a juror, although the law does not require an employer to compensate an employee for time lost due to jury service. The law exempts from these provisions any retail or service industry employers with fewer than 15 employees and manufacturing employers with fewer than 40 employees.

Other States

Lacking the resources to conduct large-scale research into juror compensation in Pennsylvania, the Committee reviewed the practices of other states as a means of seeking a basis for revisions in current compensation provisions.[15] In addition, the Committee identified several states where legislation was enacted in an effort to increase juror participation by increasing compensation. Highlights of that research include the following:

New York

The state recently increased compensation from $15 per day to $40 per day.

Massachusetts

In 1979, Massachusetts adopted a new compensation plan which required employers to pay employees their salaries for their first three days of service, after which the state would pay $50 per day.

Arizona

Currently, Arizona pays jurors $12 a day, a payment set in 1970. A committee recommended an increase to $50 a day with employers paying the first three days. The additional cost would be partly offset by eliminating mileage compensation for jurors who travel less than 50 miles roundtrip.

California

Currently, California does not compensate its jurors for the first day and pays $15 a day thereafter. California's Blue Ribbon Commission on the issue recommended an increase in juror pay to $40 per day for the first 30 days of service and $50 per day afterwards. Under the recommended program, unemployed jurors would be eligible to collect an employment disability payment in the same amount.

New Hampshire

New Hampshire pays jurors $20 per day and $10 for a half day. A commission also recommended increasing juror pay to $50 per day.

Washington

The state's range of juror pay varies from $10 to $25 a day. A committee recommended that the juror fee be increased to $10 per day for the first day of service and $45 for each day thereafter.

The Committee also identified a large-scale study on the juror fee issue, which the National Center for State Courts conducted for the state of Arizona. The study could serve as a model for a similar effort in Pennsylvania. Topics covered by the study include the extent to which jury service presents a financial hardship for prospective jurors in Arizona, jurors' opinions on several alternative fee structures, and the estimated costs of those alternative fee structures.

It would appear prudent for Pennsylvania to conduct a similar type of analysis, given the responses to Committee surveys indicating that jury service does indeed pose an economic hardship for men and women in the Commonwealth, thereby reducing their participation rate. The analysis could be performed with the assistance of the National Center for State Courts and could serve the purpose of increasing jury participation by all citizens of Pennsylvania. In particular, such an analysis could lead to greater jury participation by women and minorities—the people most disproportionately represented in the lower-income population. It is upon women and minorities that jury service imposes the greatest financial hardship.

RECOMMENDATIONS

TO THE SUPREME COURT OF PENNSYLVANIA

The Committee recommends that the Court:

1. Direct the AOPC to develop a standard jury service survey, or identify one from among surveys that are already utilized in Pennsylvania or other jurisdictions. The survey should be used across the Commonwealth on a regular basis to afford the collection of pertinent data about the composition of the jury, the process of jury selection, the jurors' experiences, and other relevant information about them and their service.
2. Require training of court administrators to understand better how procedures by which prospective jurors are disqualified, exempted, and excused may adversely affect the composition of the jury pool, and to identify ways to address these inequities.
3. Encourage court administrators to take advantage of recently enacted state legislation, Title 42 Pa.Cons.Stat.Ann. § 3721, which provides for funding for the start-up and daily operating costs of licensed childcare facilities in courthouses across the Commonwealth.
4. Direct the drafting and implementation of a standard jury instruction to state that the jury deliberation process be conducted in a manner that provides all jurors, regardless of gender, the opportunity to speak and be heard.
5. Require training of court personnel regarding interactions with jurors to ensure gender neutrality.
6. Study gender dynamics within the jury room to determine whether special instructions from the court or other measures are needed to ensure full participation by females in the jury deliberation process.

TO THE LEGISLATURE

The Committee recommends that the Legislature:

1. Require employers with a certain minimum number of employees to develop a paid leave policy for employees so that employees will receive their regular pay while serving on a jury. Employers should receive a state tax credit reflecting their payments to active jurors.
2. Conduct a study of juror compensation provided by employers and the courts for jury service. Following completion of the study, enact legislation to increase juror pay if supported by the results of the study.[16]
3. Conduct a study of transportation problems that impede citizens' abilities to serve as jurors, and develop solutions supported by the study.

ENDNOTES

[1] *See generally* Alker, Hosticka, and Mitchell, *Jury Selection as a Biased Social Process*, 11 Law and Society Review 9 (1976); Alker and Barnard, *Procedural and Social Biases in the Jury Selection Process*, 2 Justice Systems Journal 246 (1978); Boatright, *Improving Citizen Response to Jury Summonses*, American Judicature Society (Chicago: 1998); Boatright, *Generational Differences in Attitudes Towards Jury Service*, 19 Behavioral Sciences and the Law 235 (2001); Fukurai and Butler, *Organization, Labor Force, and Jury Representation*, 32 Jurimetrics Journal 49 (1991); Fukurai, Butler, and Krooth, *Where did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection*, 22 Journal of Black Studies 196 (1991); Losh, Wasserman, and Wasserman, *Reluctant Jurors: What Summons Response Reveals about Jury Duty Attitudes*, 83 Judicature 304 (2000); Munsterman, Lynch, and Penrod, National Center for State Courts, *The Relationship of Juror Fees and Terms of Service to Jury System Performance* (1991); Richert, *Jurors' Attitudes Towards Jury Service*, 2 Justice Systems Journal 233 (1977); Seltzer, *The Vanishing Juror: Why are there not Enough Jurors?*, 20 Justice Systems Journal 214 (1999).

[2] *See* Unified Court System of New York State, The Jury Project: Report to the Chief Judge of New York, pp. 6–8,and pp. 3034 (New York: 1994).

[3] Testimony of Robert Dunham, Philadelphia Public Hearing Transcript, pp. 177178.

[4] Testimony of David Baldus, Philadelphia Public Hearing Transcript, p. 69.

[5] *Id.* at 7071.

[6] *Id.* at 85.

[7] *Id.*

[8] Testimony of Robert Chuk, Harrisburg Public Hearing Transcript, pp. 9495

[9] *Id.* at 95

[10] *Id.* at 96

[11] *Id.*

[12] Testimony of James Minella, Wilkes-Barre Public Hearing Transcript, p. 131.

[13] *Id.*

[14] 42 Pa. Cons. Stat. Ann. § 4561.

[15] *See* Table below.

[16] The study should include consideration of a pay rate that will increase public participation in jury service in general, and will facilitate efforts to create more representative juries; an increase in the rate of travel reimbursement for jurors; special provisions for jurors who are compensated on an hourly basis and provisions requiring employers with a prescribed minimum number of employees to pay for the first three days of an employee's juror service.

JUROR COMPENSATION TABLE

	Employer Pays	Jury Fees (per day)
Alabama	Yes	$10
Alaska	No	$25
Arizona	No	$12
Arkansas	No	$20
California	No	$5 (a)
Colorado	Yes	$0 for 3 days, then $50 (b)
Connecticut	Yes, first 5 days only	$0 for 5 days, then $50 (c)
Delaware	No	$20
District of Columbia	Yes, up to 5 days	$30 (d)
Florida	No	$15 for first 3 days, $30 after
Georgia	Yes	$5–$35 (e)
Hawaii	No	$30
Idaho	No	$10 for half day
Illinios	No	$4–$15.50, varies among counties
Indiana	No	$7.50 if not selected—$17.50 if selected
Iowa	No	$10
Kansas	No	$10
Kentucky	No	$12.50
Louisiana	No	N/A
Maine	No	$10
Maryland	No	$10–$20 varies among counties
Massachusetts	Yes, first 3 days	Employer pays first 3 days, then state pays $50 a day (f)
Michigan	No	$15 minimum
Minnesota	No	Rate set by Supreme Court
Mississippi	No	$25
Missouri	No	$6
Montana	No	$25
Nebraska	No	$35
Nevada	No	$15 for first 5 days, then $30
New Hampshire	No	$10 for half day
New Jersey	Employer pays salary minus jury fees	$5
New Mexico	No	State Minimum Wage
New York	Partial	$40 (g)
North Carolina	No	$12 for first 5 days, then $30
North Dakota	No	$25
Ohio	No	Varies among Counties

Oklahoma	No	$20
Oregon	No	$10
Pennsylvania	No	$9 first 3 days, then $25
Puerto Rico	No	$20 minimum per day
Rhode Island	No	$15
South Carolina	No	$2–$12
South Dakota	No	$40
Tennessee	No	$10 minimum; may be supplemented by local body
Texas	No	$6–$50
Utah	No	Day 1—$18.50; subsequent days—$49
Vermont	No	$30
Virginia	No	$30
Washington	No	$10–$25 varies among counties
West Virginia	No	$15
Wisconsin	No	$16 minimum per day
Wyoming	No	$30 for first 5 days, then $50 at discretion of the court
Federal courts	No	$40 (h)

a) California: Minimum unless county stipulates higher fee;

b) Colorado: Fees include expenses to unemployed jurors;

c) Connecticut: Employer pays full-time employed jurors regular wages for first five days. Part-time employed jurors and unemployed jurors are reimbursed for out-of-pocket expenses;

d) District of Columbia: For second day and thereafter;

e) Georgia: By opinion of the Attorney General;

f) Massachusetts: Fees include expenses to unemployed jurors. Such expenses may be paid from first day of service;

g) New York: Employers with more than 10 employees pay $40 for the first three days; thereafter, the state pays. If the employer pays the entire salary, then state pays nothing. Jurors who work for employers with 10 or fewer employees (who do not pay regular wages while on jury duty) or jurors who are not employed received $40 per day from the state;

h) Federal courts: A juror required to attend for more than 30 days may be paid, at the discretion of the trial judge, an additional fee not to exceed $10 per day.

4 SENTENCING DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM

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INTRODUCTION

Changes in federal and state criminal justice policies have significantly increased the population in our nation's prisons. According to the Bureau of Justice Statistics at the U.S. Department of Justice, local, state, and federal prisons held a record 2.07 million prisoners as of June 30, 2000.[1] In 1980, there were only 501,886 prisoners.[2] As a consequence, one in every 142 Americans was incarcerated in 2000, compared to one in every 451 in 1980.[3]

Pennsylvania's state prison population has undergone a similar transformation in the past 20 years, increasing from 8,243 in 1980 to a record 38,481 as of August 31, 2000, a 367 percent increase.[4]

In Pennsylvania, racial and ethnic minorities account for 66 percent of the state prison population but only 12 percent of the Commonwealth's population. Pennsylvania ranks sixth highest in the nation in the racial disproportionality of its rate of incarceration…

—Pennsylvania Department of Corrections and U.S. Bureau of Justice Statistics

The explosion in the federal and state prison populations has affected racial and ethnic minorities to a greater extent than others. In 1930, 77 percent of the people admitted to U.S. prisons were white, 22 percent were African American and one percent were other racial and ethnic minorities.[5] That ratio was virtually reversed by 2000, with African Americans and Latinos accounting for 62.6 percent of all federal and state prisoners.[6] In Pennsylvania, racial and ethnic minorities account for 66 percent of the state prison population but only 12 percent of the Commonwealth's population.[7] Pennsylvania ranks sixth highest in the nation in the racial disproportionality of its rate of incarceration, with an incarceration ratio of 18.4 African American citizens for every one white citizen per 100,000 population.[8]

Social scientists disagree about the sources of such a disparity or overrepresentation—whether it is due to disproportionate involvement in criminal offenses or to criminal justice system biases.[9] The results of numerous studies of race differences in sentencing outcomes have been mixed, with many studies drawing criticism for their failure to control

adequately for legally relevant variables such as seriousness of the offense and prior criminal record.[10]

More study on the basis for such disparities is needed. The studies aside, however, there is clearly a perception, particularly in minority communities, that sentencing in Pennsylvania is not unbiased and evenhanded. The statistics cited above, as well as people's personal experiences with the system, support this perception. As described in more detail later in this chapter, several witnesses testifying before the Committee during its public hearings expressed strong concerns about disparate levels of incarceration, particularly between African American and white defendants. Several witnesses testified, as well, to the devastating effect that the high rate of incarceration of African American defendants has on African American families and communities.

Focus of Inquiry

The Committee sought to undertake a comprehensive examination of whether racial, ethnic or gender disparities in sentencing exist in the Commonwealth. The Committee also sought to determine whether any such disparity was the product of bias based on race, ethnicity, or gender, or whether it instead reflected the reliance of courts and other decision-makers (particularly prosecutors) on factors that are considered appropriate in sentencing, such as seriousness of offense of conviction and prior criminal record. The Committee based its findings primarily upon a statistical analysis of the most recent sentencing data collected by the Pennsylvania Commission on Sentencing (PCS). The analysis (Kramer/Ulmer study) was conducted by John H. Kramer and Jeffrey T. Ulmer, professors of Sociology and Crime, Law and Justice at The Pennsylvania State University. In addition to the study, the Committee analyzed testimony from the six public hearings and also examined other literature on the issue, including studies by other state task forces.

Prior Research on Sentencing Disparities in Pennsylvania

The Kramer/Ulmer study builds upon previous research by Professors Kramer and Ulmer, and other of their colleagues, on race and gender disparity in sentencing in Pennsylvania. That earlier research found, among other things, that racial and gender disparity existed statewide, although the amount and nature varied widely throughout the Commonwealth, and that the precise effects of race and gender on sentencing depended upon the interaction among those two factors and the defendant's age.[11] The present study was undertaken both to update the prior research and to analyze

sentences that reflect major revisions to the sentencing guidelines in 1994 and 1997,[12] as well as the major legislation on crime and criminal justice that resulted from a special legislative session in 1995. In addition, the study includes an analysis of the sentencing of Latino defendants, unlike all but one of the prior studies.[13]

The present study analyzed the 1997–2000 data for sentences under the 1997 Pennsylvania sentencing guidelines, focusing on possible disparities in sentencing based upon defendant characteristics of race, ethnicity, and gender, both singly and interactively. That is, in addition to studying the main effects of a particular defendant characteristic (i.e., race), Kramer and Ulmer also analyzed the interactive effects of race or ethnicity and gender, as well as the interactive effects of race/ethnicity, gender, and age. The study examined overall disparity in sentencing (i.e., the decision whether to incarcerate and the length of incarceration); disparities in departures from the guidelines; disparities in sentencing in Philadelphia County and in Allegheny County; relationships between socio-demographic characteristics of counties and disparities in sentencing; and changes in patterns of disparity in sentencing between the early and late 1990s. This chapter focuses primarily on the first and last sets of findings: overall disparity in sentencing and changes in patterns of disparity in sentencing.

SYNOPSIS OF FINDINGS

> *After controlling for legally prescribed factors and mode of conviction, the study found that the defendant status characteristics of race, ethnicity, gender, and age definitely affect sentencing outcomes of all kinds.*
>
> —Kramer/Ulmer

Among the findings of the Kramer/Ulmer study were the following:

1. Courts rely primarily on the legally prescribed factors, i.e., the type and seriousness of offense and the defendant's prior criminal record, in determining sentences for defendants. (These may, however, reflect persistent structural inequalities.)
2. In sentencing, the mode of conviction matters. Defendants who were convicted following a trial—especially a jury trial—were substantially more likely to be incarcerated and received substantially longer prison terms than those who entered guilty pleas.
3. Nevertheless, after controlling for legally prescribed factors and mode of conviction, the study found that the defendant status characteristics of race, ethnicity, gender, and age definitely affect sentencing outcomes of all kinds.
    - Gender is the most consistently influential variable among defendant status characteristics, especially when analyzed in interaction with race, ethnicity, and age. Women are both less likely to be incarcerated than men and to receive shorter sentences than men, with young African American and young white females receiving the most lenient sentencing outcomes. The gender disparities that appeared are not necessarily unwarranted, however, as gender might correlate with other factors that may be viewed as legitimate considerations in sentencing, such as family responsibilities and role in the offense. (Information about such considerations was not available.)
    - Race alone has a minor effect on sentencing disparity, but in combination with gender and age shows more complex effects. Specifically, the role of race in sentencing outcomes depends upon gender and, to a lesser extent, age. Overall, African Americans are slightly more likely to be incarcerated than whites and received

slightly longer sentences. African Americans had a 1.2 percent greater probability of incarceration and received sentences that were, on average, 1.3 months longer than whites. When the researchers studied the interactive effects of race, ethnicity, gender, and age, however, they found that the effects on sentencing differed "dramatically" by gender and by age. Specifically, young African American males, ages 18–29, had a 4.8 percent greater probability of incarceration and received sentences that were, on average, 4.3 months longer than whites. Older African American males, ages 30 and over, had a 4.1 percent greater probability of incarceration and received sentences that were, on average, 3 months longer than whites. In contrast, young African American females were sentenced more leniently than all male groups, with incarceration odds less than half of those of the reference group of young white males. The terms of incarceration for young African American females, on average, were 15 months shorter than those of the reference group.

Older Latino males continue to be the most severely punished category of defendants and young Latino males continue to be the second most severely punished.

—Professors John Kramer and Jeffrey Ulmer

- Ethnicity—specifically, Latino ethnicity—also makes a difference in sentencing, although, again, the effects differ as ethnicity interacts with gender and age. Overall, Latino defendants were more likely to be incarcerated and received slightly longer sentences than non-Latino defendants. Latinos had a 5.9 percent greater probability of incarceration and received sentences that were, on average, 5.3 months longer than whites. However, when ethnicity is differentiated by age and gender, the differences are more pronounced. Young Latino males, ages 18–29, had a 7.6 percent greater probability of incarceration and received sentences that were, on average, 6.7 months longer than whites. Older Latino males, age 30 and over, had a 9.7 percent greater probability of incarceration and received sentences that were, on average, 8.3 months longer than whites. Just as with African American females, Latina females were sentenced more leniently than Latino males. Young Latina females had incarceration odds of 11.3 percent lesser probability than 50-50,

lower than all white/other defendants, and their terms of incarceration were, on average, 9.9. months shorter than whites/others. Older Latina females were sentenced slightly more harshly than their younger counterparts, with incarceration odds of 7.8 percent lesser probability than 50-50, and their terms of incarceration were, on average, 6.9 months shorter than whites/others.

4. The patterns of disparity in sentencing have changed over time. The overall trend is toward less disparity, although the experience of African American males is an exception. Specifically:

   - The trend is toward decreasing disparity for Latino defendants, although older Latino males continue to be the most severely punished category of defendants and young Latino males continue to be the second most severely punished. Sentencing patterns for Latina women, in contrast, have "completely reversed,"[14] with Latina women now receiving more lenient sentences than the reference group, as opposed to the more severe outcomes they received in the early 1990s.
   - The trends are markedly different for African American men and African American women. African American men have experienced a moderate increase in sentencing disadvantage, while African American women have gained a relative sentencing advantage compared to other groups. Although African American defendants are less disadvantaged than Latino defendants in sentencing decisions, the disparities between African American and white defendants have grown. African American men receive somewhat more severe outcomes than white men, while young African American women are the most leniently sentenced category of defendants.

RESEARCH METHODOLOGY— KRAMER/ULMER STUDY

The study analyzed sentencing data from 1997–2000 made available through the general release policy of the PCS, using only cases sentenced under the 1997 Pennsylvania Sentencing Guidelines. The researchers focused on two key decisions by the sentencing court: 1) incarceration decision ("in/out"); and 2) length of incarceration (in months).[15] The PCS data is particularly detailed and includes, among other data, information on legally prescribed variables (PCS offense gravity score, PCS prior record score, and type of offense); defendant status characteristic variables (age, race/ethnicity, gender); and mode of conviction.

In their multivariate analyses, Kramer and Ulmer first examined the main (or direct) effects of each of the defendant status characteristics of race, ethnicity, and gender on incarceration and length, along with the effects of all of the other control variables. They then examined the interactive effects on the same sets of outcomes, looking first to race, ethnicity, and gender, and second to race, ethnicity, gender, and age.

The researchers applied the following methods of analysis:

First, they examined the descriptive statistics for the variables to be used in the analysis (i.e., sentencing outcome variables, defendant characteristic variables and control variables). The results show the number of defendants in each race, ethnicity, and gender category (i.e., number of white, African American, Latino, male, and female defendants) and in each race/ethnicity/gender/age category (i.e., number of young African American males, older white females, etc.), as well as the proportions incarcerated and mean sentence lengths for each race (African American/non-African American), ethnic (Latino/non-Latino), and gender (male/female) group.[16]

Next, the researchers conducted multivariate analyses of the data, by which they analyzed the effects of race, ethnicity, gender, and age (singly and in combination) while controlling for other variables, which included legally prescribed factors (offense type and severity, prior record), case processing variables (guilty plea or trial conviction), court size (medium or large), and sentencing year. The purpose of the multivariate analyses was to examine the association of race, ethnicity, and gender, in combination with age,

aside from any influence those other variables might have; this method avoided mistaken attribution of any disparities that were found. As Professors Kramer and Ulmer explain: "These analyses answer the question, what effects do race, ethnicity, and gender have on sentencing outcomes above and beyond the influence of other variables?"[17]

It was determined that this study would not officially control for the application of a mandatory minimum sentence, although it should be noted that, when the researchers initially did so, the results did not differ substantially from those reported here.[18] This decision was made because of the Committee's concern that controlling for mandatory minimums might mask the racially disparate effect of the mandatory minimums themselves. In this regard, at least one public hearing witness suggested that the mandatory sentences approved by the Pennsylvania legislature were "biased and unfair."[19] This witness noted that mandatory sentences for drug and gun crimes disproportionately affect African Americans and that this disparity combines with inequities at other levels in the criminal justice system, leading to a prison population that is disproportionately African American.[20]

To examine recent trends in sentencing disparity—in other words, the changes in race, ethnicity, and gender sentencing patterns between the early and late 1990s—the researchers first ran identical analyses of the data for the years 1989–1992 for the main effects of defendant characteristics and the interactive effects of race/ethnicity/gender/age, and then compared those results with the results for the corresponding analyses of the 1997–2000 data.

SPECIFIC STUDY FINDINGS

DESCRIPTIVE STATISTICS

The study first sets forth the statistics for all included variables, such as sentencing outcomes, legally prescribed variables, and defendant characteristics. These statistics were prepared for use in the subsequent analyses and do not specifically address the questions on which the Committee was focused (i.e., the existence and extent of unwarranted race, ethnic and gender disparity in sentencing outcomes, and trends in sentencing disparity). The statistics regarding the number of defendants in each race, ethnicity and gender category revealed the following: there were 128,557 white defendants (about 64 percent); 58,541 African American defendants (29 percent); 12,732 Latino defendants (6.3 percent); and 1,330 defendants of other races or ethnicities (0.7 percent). The defendants included 170,396 men (83 percent) and 34,658 women (17 percent).

EFFECTS OF RACE, ETHNICITY, GENDER AND AGE

MAIN EFFECTS

Controlling for the influence of variables other than the defendant characteristics of race, ethnicity, gender and age, the researchers then examined the main effects of each defendant characteristic—that is, the effect of race, ethnicity, or gender alone on sentencing outcomes. They found differences based on race, ethnicity, and gender, although those were not the strongest influences on incarceration and sentence length. The strongest influences were, in descending order: offense gravity, prior record, offense type, conviction by jury trial, and being sentenced in a large urban court.

The effects of race, ethnicity, and gender were statistically significant, although smaller than the effects of the legally prescribed variables. African Americans and Latinos were sentenced somewhat more harshly than whites, while men were sentenced more harshly than women. Specifically, the results showed a "statistically significant but substantively small difference" between the sentencing outcomes of African Americans and whites; African Americans had a 1.2 percent greater probability of incarceration and received sentences that were, on average, 1.3 months longer. The differences for Latinos were greater, with 1.3 Latinos incarcerated for every one white, and the average length of incarceration for Latinos 5.3 months longer than for whites. Women were incarcerated

less frequently and for shorter periods than men: their incarceration odds were about half those of men, and they were sentenced, on average, to about 14 months less than men.

The main effects of the defendant characteristics of race, ethnicity and gender alone are set forth below in Table 1.

TABLE 1
Main effects of race, gender and age@

Models:	**Incarceration**		**Incarceration Length** (in months)	
	Odds	(probability difference from 50-50)	Unstandardized effect	(standardized effect)
Constant	—		702.6	(—)
Selection bias correction factor			90.5	(1.56)**
Offense gravity score	1.32	(6.9 percent)**	7.3	(1.21)**
Prior record score	1.32	(6.9 percent)**	6.1	(.89)**
Offense types (other offenses=reference category):				
Homicide	.94	(-1.5 percent)	43.8	(.21)**
Rape	1.07	(1.7 percent)	16.3	(.05)**
IDSI	.78	(-6.2 percent)	11.2	(.03)**
Robbery	1.42	(8.7 percent)**	6.3	(.07)**
Weapons	.30	(-26.9 percent)**	-24.8	(-.20)**
Aggravated assault	.78	(-6.2 percent)**	-5.2	(-.06)**
Simple assault	.27	(-28.7 percent)**	-27.3	(-.62)**
Arson	.45	(-19.0 percent)**	-14.0	(-.05)**
Burglary	.65	(-10.6 percent)**	-8.5	(-.12)**
Criminal trespassing	.44	(-19.4 percent)**	-16.2	(-.17)**
Theft	.31	(-26.3 percent)**	-24.1	(-.73)**
Forgery	.40	(-21.4 percent)**	-18.8	(-.21)**
Drug felony	.45	(-19.0 percent)**	-15.7	(-.38)**
Drug misdemeanor	.16	(-36.2 percent)**	-35.6	(-.81)**

Models:	**Incarceration**		**Incarceration Length** (in months)	
	Odds	(probability difference from 50-50)	Unstandardized effect	(standardized effect)
Mode of conviction:				
By bench trial	1.32	(6.9 percent)**	7.7	(.10)**
By jury trial	2.11	(17.8 percent)**	19.3	(.19)**
By negotiated guilty plea	.79	(-5.9 percent)**	-4.6	(-.16)**
Female Defendant	**.51**	**(-16.2 percent)****	**-13.7**	**(-.41)****
African American Defendant	**1.05**	**(1.2 percent)****	**1.3**	**(.05)****
Latino Defendant	**1.27**	**(5.9 percent)****	**5.3**	**(.10)****
Defendant age	**1.00**	**( )****	**.1**	**(.05)****
Court size (medium = ref. cat.):				
Small court	.99	(-0.3 percent)	-.0	(-.00)
Large court	.50	(-16.7 percent)**	-13.5	(-.45)**
Sentencing year	.98	(-0.5 percent)**	-.3	(-.02)**
Chi-squared	36,347 (p<.0001)			
F			10,560 (p<.0001)	
Model accurate prediction rate	75 percent			
R-squared			.62	
N	173,338		173,337	

@ Reference category is white/other defendants

** statistically significant at .01 or less, and ** statistically significant at .001 or less*

INTERACTIVE EFFECTS OF RACE, ETHNICITY AND GENDER

Based upon earlier research showing that the effects of race, ethnicity, and gender were complicated and depended upon the interactions between race and gender or ethnicity and gender, the study then examined how the effect of race and ethnicity on sentencing outcomes differed for men and women. To do so, the researchers further specified the defendant categories examined above in order to analyze differences in sentencing outcomes for defendant subgroups of African American males, African American females, Latino males and Latina females, as compared to outcomes for all white/other defendants.

The main finding here was that the effects of race and ethnicity on sentencing differed markedly for men and women. African American and Latino men tended to be sentenced more severely than the reference group of white/other defendants, while African American and Latina women tended to be sentenced more leniently.

Both African American males and Latino males were more likely to be incarcerated, and for longer terms, than the reference group. Compared to whites, the incarceration odds for African American males were 1.22 (a five percent greater probability than 50-50) and their average sentences were four months longer. Latino males were even more likely to be incarcerated (1.45 Latino males for each white/other defendant, a 9.2 percent greater probability than 50-50) and for even longer terms (8.1 months longer than whites/others).

African American females and Latina females, on the other hand, were both less likely than whites to be incarcerated and, if incarcerated, were likely to receive shorter sentences. African American females' incarceration odds were 54 percent of white/other defendants (a probability 14.9 percent less than 50-50) and their average sentences were 12.2 months shorter than those of white/other defendants. The odds for incarceration of Latina females, at 70 percent, or an 8.8 percent lesser probability than 50-50, were also lower than the white/other defendants. Latina females were sentenced, on the average, to terms about eight months shorter than those of white/other defendants.

The interactive effects of race, ethnicity, and gender are set forth below in Table 2.

TABLE 2
Interactive effects of race, ethnicity and gender@

Models:	**Incarceration**		**Incarceration Length** (in months)	
	Odds	(probability difference from 50-50)	Unstandardized effect	(standardized effect)
The same control variables as in the main effects tables are included but not shown				
African American male defendant	**1.22**	**(5.0 percent)****	**4.2**	**(.14)****
African American female defendant	**.54**	**(-14.9 percent)****	**-12.2**	**(-.21)****
Latino male defendant	**1.45**	**(9.2 percent)****	**8.1**	**(.14)****
Latina female defendant	**.70**	**(-8.8 percent)****	**-7.8**	**(-0.50)****
Chi-squared	35,132 (p<.0001)			
F			10,319 (p<.0001)	
Model accurate prediction rate	75 percent			
R-squared			.63	
N	173,338		173,337	

@ Reference category is all white/other defendants

** statistically significant at .01 or less, and ** statistically significant at .001 or less*

INTERACTIVE EFFECTS OF RACE, ETHNICITY, GENDER AND AGE

Next, the researchers examined the interactive effects of race, ethnicity, gender, and age by analyzing the effect on sentencing outcomes of those characteristics in combination. That is, they compared outcomes for the reference category of white males ages 18–29 with outcomes for 11 remaining categories of defendants: African American and Latino males ages 18–29; African American, Latina and white females ages 18–29; and, separately, each of the same groups ages 30 and above.

In this analysis, the effects of the legally prescribed variables largely stayed the same as in the earlier analysis for the main effects of race, ethnicity, and gender. Again, the strongest determinants of incarceration and sentence length did not include a defendant's race, ethnicity, or gender, but instead were, in descending order: offense gravity score, prior record, offense type,

jury trial conviction, and being sentenced in a large urban court (Philadelphia or Allegheny County).

Nevertheless, the combined effects of race, ethnicity, gender, and age did make a difference in sentencing outcomes. Here the primary finding by the researchers was that "Not only do the effects of race and ethnicity on sentencing vary dramatically by gender, but also by age."[21] All male categories were sentenced more severely than the reference group of young white males, with older Latino males being sentenced most harshly. The odds of incarceration for older Latino males were one and one-half times those of young white males, and their sentences averaged about eight months longer. Young Latino males and young African American males were next in sentence severity, followed by older African American males and older white males, whose sentencing outcomes were about equal.

In contrast, all groups of female defendants were sentenced more leniently than all male groups, with young African American females being sentenced the most leniently. At 45 percent (a 19 percent lesser probability than 50-50), their odds of incarceration were less than half those of the reference group of young white males, and their terms of incarceration on average were 15 months shorter than those of the reference group.

Specifically, then, with respect to differences in sentencing outcomes, from the most to the least severe outcomes, the groups ranked as follows: 1) older Latino males; 2) young Latino males; 3) young African American males; 4) older white males; 5) older African American males; 6) young white males; 7) older Latina females; 8) older white females; 9) young Latina females; 10) older African American females; 11) young white females; and 12) young African American females.

The interactive effects of race, ethnicity, gender, and age are set forth below in Table 3.

TABLE 3
Effects for Race/Ethnicity/Gender/Age Categories@

Models:	**Incarceration**		**Incarceration Length** (in months)	
	Odds	(probability difference from 50˚50)	Unstandardized effect	(standardized effect)
Constant	—		775.4	(—)
Selection bias correction factor			90.3	(1.55)**
Offense gravity score	1.32	(6.9 percent)**	7.2	(1.21)**
Prior record score	1.32	(6.9 percent)**	6.1	(.88)**
Offense types (other offenses=reference category):				
Homicide	.96	(-1.0 percent)	44.0	(.21)**
Rape	.92	(-2.1 percent)	17.3	(.05)**
IDSI	1.23	(5.2 percent)	11.3	(.03)**
Robbery	1.43	(8.8 percent)**	9.0	(.11)**
Weapons	.29	(-27.5 percent)**	-26.3	(-.29)**
Aggravated assault	.80	(-5.6 percent)**	-4.9	(-.05)**
Simple assault	.27	(-28.7 percent)**	-27.2	(-.62)**
Arson	.45	(-19.0 percent)**	-13.9	(-.05)**
Burglary	.67	(-9.9 percent)**	-7.8	(-.11)**
Criminal trespassing	.44	(-19.4 percent)**	-15.9	(-.17)**
Theft	.31	(-26.3 percent)**	-23.7	(-.72)**
Forgery	.41	(-20.9 percent)**	-18.4	(-.20)**
Drug felony	.45	(-19.0 percent)**	-15.8	(-.39)**
Drug misdemeanor	.16	(-36.2 percent)**	-35.4	(-.80)**
Mode of conviction:				
By bench trial	1.32	(6.9 percent)**	7.7	(.10)**
By jury trial	2.10	(17.7 percent)**	19.3	(.19)**
By negotiated guilty plea	.80	(-5.6 percent)**	-4.5	(-.16)**
Young white female defendant	**.50**	**(-16.7 percent)****	**-13.7**	**(-.22)****

Models:	**Incarceration**		**Incarceration Length** (in months)	
Older white female defendant	**.67**	**(-9.9 percent)****	**-8.5**	**(-.17)****
Older white male defendant	**1.19**	**(4.3 percent)****	**3.2**	**(.11)****
Young African American male defendant	**1.21**	**(4.8 percent)****	**4.3**	**(.11)****
Young African American female defendant	**.45**	**(-19.0 percent)****	**-15.0**	**(-.16)****
Older African American male defendant	**1.18**	**(4.1 percent)****	**3.0**	**(.07)****
Older African American female defendant	**.57**	**(-13.7 percent)****	**-11.1**	**(-.15)****
Young Latino male defendant	**1.36**	**(7.6 percent)****	**6.7**	**(.09)****
Young Latina female defendant	**.63**	**(-11.3 percent)****	**-9.9**	**(-.05)****
Older Latino male defendant	**1.48**	**(9.7 percent)****	**8.3**	**(.09)****
Older Latina female defendant	**.73**	**(-7.8 percent)****	**-6.9**	**(-.03)****
Court size (medium=ref. cat.):				
Small court	.99	(-0.3 percent)	.0	(.00)
Large court	.50	(-16.7 percent)**	-13.6	(-.45)**
Sentencing year	.98	(-0.5 percent)**	1.1	(.04)**
Chi-squared	37,491 (p<.0001)			
F			8,662 (p<.0001)	
Model accurate prediction rate	75 percent			
R-squared			.62	
N	178,116		178,115	

@ Reference category is young white male defendants

** statistically significant at .01 or less, and ** statistically significant at .001 or less*

CHANGES IN RACE, ETHNICITY, AND GENDER SENTENCING PATTERNS BETWEEN THE EARLY AND LATE 1990S

This part of the study examined changes in sentencing patterns between the early and late 1990s, a period during which, as noted above, the sentencing guidelines underwent two revisions and the Legislature enacted major crime legislation. The researchers ran identical analyses of data for the years 1989–1992 and compared the results with the main analyses reported in Tables 5 and 7 to show direct and interactive effects, respectively, of race, ethnicity, and gender. While disparities appeared in the results for both time periods, the extent of the disparities differed by group for the two time periods.

CHANGES IN DIRECT EFFECTS OF RACE, ETHNICITY, AND GENDER

Overall, with respect to the "in/out" decision, the incarceration odds for African Americans did not differ significantly in comparison to those for whites for the two periods. However, the disparity in incarceration odds between Latinos and whites decreased somewhat between the two periods, and the effect of gender decreased modestly.

Slightly different results appeared with sentence length. The African American/white disparity grew moderately, with African Americans being given sentences that were, on average, 1.28 months longer in 1997–2000 than in 1989–1992. Average sentences in the later period were 2.6 months shorter for Latinos and six months shorter for women, which decreased the Latino/white disparity and increased the male/female disparity.

The results of the direct effects comparisons are presented in Table 4 set forth below.

TABLE 4

Differences in the direct effects of race, ethnicity, gender, and age on incarceration odds and length, 1989–1992 and 1997–2000

Incarceration	1997–2000 odds	1989–1992 odds	Difference
African American	1.05	1.04	.01
Latino	1.27	2.13	-.86 ***
Gender (female = 1)	.51	.58	-.07 ***

TABLE 4(a)

Length	1997–2000 length effect (in months)	1989–1992 length effect (in months)	Difference
African American	1.33	.04	1.28 ***
Latino	5.25	7.85	-2.61 ***
Gender (female = 1)	-13.69	-7.74	-5.96 ***

**** Indicates that the difference between the effects in the two time periods is statistically significant at p < .001.*

CHANGES IN INTERACTIVE EFFECTS OF RACE, ETHNICITY, GENDER, AND AGE

The results, in the following Table 5, present a complicated picture. Overall, the comparison shows that each category's differences in incarceration and length of sentence over time were statistically significant, although the direction of change differed for the different categories of defendants.

Incarceration odds

Five groups faced significantly greater odds of incarceration in 1997–2000 than in 1989–1992, while six groups' odds were significantly lower in the later period. The groups facing greater odds in 1997–2000 were young (ages 18 to 29) African American males, older (age 30 and above) African American males, older white males, older white females, and older African American females. The groups facing lower odds were young and older Latino males, young white females, young African American females, and young and older Latina females.

Latino groups

Especially noteworthy are the differences in incarceration patterns for Latino groups as compared to the reference group of young white males. While disparities persisted, overall the trend was one of decreasing disparity. Latina females, both young and older, went from a position of considerable relative disadvantage (incarceration odds more than two times greater than those of young white males in 1989–1992) to a position of advantage (odds of -1.4 for young and -1.55 for older Latina females in 1997–2000). Latino males continued in a position of relative disadvantage, although the disparity was much less pronounced in the later period than in the earlier; compared to the reference group, odds for older Latino males went from 2.75 to 1.5 times greater, while for young Latino males odds went from 1.9 to 1.3 times greater. With respect to sentence length, the results for Latina females again showed a trend toward improvement in position from one of relative disadvantage to one of advantage, with both

young and older Latina females receiving dramatically shorter sentences, by about 19 months, in 1997–2000 than in 1989–1992. While young Latino males did not experience a significant change in sentence length, sentences for older Latino males were about a month shorter in the later period than in the earlier period. It should be noted, however, that in both periods, both young and older Latino males each received substantially longer sentences than young white males.

Older white males, older African American males, young African American males

Three other groups—older white males, older African American males and young African American males—experienced an increased disadvantage in incarceration odds compared to young white males. Older white females and older African American females faced increased odds of incarceration in 1997–2000, but continued in a position of relative advantage, older white females going from 0.42 to 0.66 odds and older African American females going from 0.5 to 0.57 odds. Young white females and young African American females, on the other hand, increased their positions of relative advantage, young white females going from 0.56 to 0.5 odds and young African American females going from 0.62 to 0.45 odds.

TABLE 5
Differences in the interactive effects of race, ethnicity, gender, and age on incarceration odds and length, 1989–1992 and 1997–2000

Incarceration	1997–2000 odds	1989–1992 odds	Difference
Young African American males	1.19	1.06	0.13***
Young Latino males	1.34	1.86	-0.52***
Older African American males	1.17	0.77	0.40***
Older Latino males	1.48	2.75	-1.27***
Older white males	1.18	0.77	0.41***
Young white females	0.50	0.56	-0.06***
Older white females	0.66	0.42	0.24***
Young African American females	0.45	0.62	-0.17***
Older African American females	0.57	0.50	0.07***
Young Latina females	0.62	2.01	-1.39***
Older Latina females	0.71	2.26	-1.55***

Sentence length

Young African American males, older African American males, older white males, and older white females all received significantly longer sentences in 1997–2000 than in the earlier period, while six groups received significantly shorter sentences in the later period: older Latino males, young white females, young African American females, older African American females, young Latina females, and older Latina females. Sentence length for young Latino males did not differ significantly in the two periods.

Older African American males, young African American males and older white males

The increase in sentence length for older African American males in 1997–2000 was the largest for any group, going from nearly four months shorter (-3.7) than young white males to nearly three months longer (2.8). The sentences of young African American males, as compared to the reference group, went from 0.45 months longer to four months longer, while the sentences of older white males went from 2.7 months shorter to 3.1 months longer.

Female defendants

Three groups of female defendants received shorter sentences in 1997–2000 than in 1989–1992. Compared to the reference group, young white females went from 7.95 months shorter to 13.7 months shorter, while young African American females went from 7.7 months shorter to 15.1 months shorter and older African American females went from 10 months shorter to 11.3 months shorter. On the other hand, older white females were relatively less advantaged in the later period, going from sentences 11.8 months shorter in 1989–1992 to 8.5 months shorter in 1997–2000.

TABLE 5(a)

Length	**1997–2000 length effect** (in months)	**1989–1992 length effect** (in months)	**Difference**
Young African American males	3.97	0.45	3.52***
Young Latino males	6.43	6.33	0.1
Older African American males	2.77	-3.67	6.44***
Older Latino males	8.8	9.9	-1.1***
Older white males	3.1	-2.74	5.84***
Young white males	-13.7	-7.95	-5.75***
Older white females	-8.5	-11.8	3.3***
Young African American females	-15.1	-7.7	-7.4***
Older African American females	-11.3	-10	-1.3***
Young Latina females	-10.2	8.7	-18.9***
Older Latina females	-7.1	12.1	-19.1***

**** Indicates that the difference between the effects in the two time periods is statistically significant at $p < .001$.*

LIMITATIONS ON FINDINGS

Before stating conclusions, it is important to point out a number of limitations in the findings, primarily from information that was not available and therefore could not be taken into account, but that might have affected sentencing decisions and, furthermore, might correlate with race, ethnicity, and gender. It is also important to emphasize the complicated nature of the sentencing decision and the participation in the sentencing process of multiple actors, in addition to the court that makes the final decisions on incarceration and sentence length.

First, a number of facts were not available in the data reported by the PCS, either because the PCS does not collect such information or because the courts do not complete the PCS information sheets in full. The missing information that might have affected sentencing decisions includes charging decisions (i.e., what offenses to charge and whether to file a motion for application of a mandatory minimum sentence); type of counsel (i.e., private, court-appointed, public defender); and personal information about the offender such as employment status, socioeconomic status, role in the offense and family status and responsibilities. These facts might correlate with the defendant's race, ethnicity, or gender. In addition, access to similar information concerning victims of the offenses was not available, which again might implicate racial, ethnic, or gender bias.[22]

Disparate outcomes are not necessarily the result of intentional discrimination because bias can "creep into" decision-making in subtle and complicated ways. For example, the individual decision-maker may be influenced by unconscious racial, ethnic, or gender bias and stereotyping despite a sincere desire not to discriminate. (*See* i.e., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,* 39 Stan. L. Rev. 317 (1987). Moreover, patterns of disparity also may result from institutional practices that have become so familiar and entrenched that their differential impact on groups is not noticed. (*See* i.e., Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 Yale L.J. 1717 (2000). Whether or not the patterns are intentional, however, unwarranted disparate outcomes in sentencing present a serious problem that ought to be further examined and eliminated.

Further, in interpreting the findings reported here it is important to recognize the complex nature of the criminal justice process in which decisions made by various actors at different stages may affect the ultimate decisions whether to incarcerate and for how long. In particular, it is important to recognize the key role played by prosecuting attorneys. Prosecutors make the decisions about which offenses to charge and whether to seek application of mandatory minimums. In addition, prosecutors' plea agreements are, as Professors Kramer and Ulmer point out, "crucial in determining sentences, as well as the application of sentencing guidelines, in the overwhelming majority of cases."[23] Therefore, a thorough examination of unwarranted disparity in sentencing should focus not only on judges, but also on decisions made by prosecutors.

PUBLIC HEARING TESTIMONY

Several of the witnesses who testified at the Committee's public hearings, including four members of the state Legislature, focused on the issue of sentencing disparities in the state criminal justice system.

All of the witnesses who testified before the Committee on this issue expressed deep concern about the disparity in treatment of minorities in the state criminal justice system. Alfred Blumstein, professor of urban systems and operations research at Carnegie Mellon University, testified that in the past 20 years, the incarceration rate of African Americans in state and federal prisons has risen from seven to eight times that of whites.[24] Blumstein discussed the results of his landmark 1983 study on racial disproportionality in incarceration, in which he concluded that differential involvement of the races in arrests (for the types of crimes that lead to incarceration) accounted for 80 percent of the disproportionality, with the remaining 20 percent reflecting legitimate factors or discrimination.[25] He indicated that, when he revisited this issue ten years later,[26] he found "the severe racial disproportionality in prison was still with us" and that the "amount of disproportionality that could be explained by racial differences in arrest had dropped from 80 percent to 75 percent."[27] He linked the effect to the large increase in the proportion of drug offenders in prison populations. "It was this major shift in composition, a smaller percentage of the more serious offense types where arrest readily accounts for incarceration, and a massive growth in drug offenders where there is so much more discretion in response to the offending and where arrest is a poor indicator of representation in prison."[28] Blumstein also said that his current examination of this issue preliminarily indicates that the amount of racial disproportionality that can be explained by arrest "has declined still further."[29]

> *"If an offender is black or another minority, they are more likely to be seen as a criminal…more likely to be stopped and searched, arrested, and charged… more likely to be prosecuted and face a harsher charge in court, more likely to be refused bail… more likely to receive a longer sentence than a white person receives…*
>
> —State Representative Ronald Waters

Other witnesses emphasized that the unfair treatment of minorities is not confined to the sentencing phase but occurs at all stages of the criminal justice process, beginning with the initial stop by police and continuing through incarceration. State Representative Ronald Waters, of Philadelphia, summed up the situation:

> "If an offender is black or another minority, they are more likely to be seen as a criminal. They are more likely to be stopped and searched, arrested, and charged rather than just being cautioned. They are more likely to be prosecuted and face a harsher charge in court, more likely to be refused bail. Minorities are more likely to go to prison than to get a community service sentence, more likely to receive a longer sentence than a white person receives convicted of the same crime. They are more likely to be subjected to the racial abuse of discrimination by prison officers and other inmates."[30]

Another witness traced the racial disparity in sentencing to the imposition of mandatory jail sentences for crimes overwhelmingly committed by minorities. Malik Aziz, executive director of Ex-Offenders, Inc. in Philadelphia, stated that, "Sentencing becomes biased and unfair when the courts know the make-up of a certain crime is almost the same 90 percent of the time on these crimes, and the legislators know that make-up as well."[31] He cited "drug and gun-related crimes" as examples of those offenses for which mandatory sentences are imposed and for which many African American inmates are incarcerated.[32]

The Reverend Leonard Smalls, former chaplain at the Graterford State Correction Institution and past president of the Pennsylvania Prison Chaplains Association, testified to the devastating impact incarceration has upon the minority community. "If you take these percentages of black males…who range between the ages of 18 and 36, out of the community and lock them up for five years, you surely cripple the future of family life, you cripple family structures, you cripple economic development in that particular community, you cripple social behavior and you obliterate the possibility of community stabilization in the next 10 years."[33]

Alternatives to incarceration and meaningful rehabilitation programs in prison were cited by several witnesses as necessary to prevent recidivism.[34] Smalls testified that the typical profile of a minority prison inmate is an

individual with poor reading and math skills and "unsal[e]able job skills" who was unemployed at the time of his arrest.[35] He indicated that such a person is released from prison with the same deficits and with "no possible way of making a successful re-entry into the community."[36]

Finally, several witnesses urged that efforts be made to stop the practice of racial profiling whereby racial and ethnic minorities are singled out for prosecution.[37] Witnesses recommended the implementation of "clearly defined standards for dealing with prosecutorial abuses."[38] Indeed, State Representative Harold James, of Philadelphia, identified several bills he has introduced in the Pennsylvania Legislature to address the issue of racial profiling and prosecutorial misconduct.[39]

OTHER TASK FORCE FINDINGS

The Committee reviewed many of the reports prepared by other state task forces on the issue of racial and ethnic disparities in the criminal justice system. Two remarkably consistent themes emerged from the review. First, there was a deep-seated perception among minorities that bias is the cause of overrepresentation of minorities in our prisons. Second, the reports found that discrimination occurs at all stages of the criminal process, from initial arrest through bail decisions, charging decisions, plea bargaining, sentencing, and treatment during incarceration. A summary of some findings of the reports follows.

CALIFORNIA

The Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts was filed in January 1997. The committee devoted one chapter to sentencing issues based upon a finding of "a persistent public concern that subtle racial and ethnic biases play a part in sentencing decisions."[40] The overrepresentation of racial and ethnic minority groups—especially African American—was cited as the major reason for the public concern. As one cause of racial disproportionality in prisons, the committee pointed to the "uneven application of the nation's and the state's drug laws" that has "disproportionately affected African American and other minorities."[41] Other factors identified by the committee included poverty, which was called a frequent "companion of minority status;"[42] poor legal representation by overburdened public defender offices who put pressure on clients to plead guilty; bias in police conduct; and the abuse of prosecutorial discretion.

In its survey of judges, district attorneys and public defenders, the committee concluded that a significant number of judges and district attorneys could not disagree with the statement that race and ethnicity has an effect on plea bargaining, conviction, and sentencing.[43]

NEW JERSEY

The Final Report of the New Jersey Supreme Court Task Force on Minority Concerns, issued in June 1992, concluded that minorities are more likely than non-minorities to be brought into the criminal justice system and are more likely to remain in the system once they are there.[44] To reach its conclusions about racial and ethnic overrepresentation in the criminal justice system, the task force relied on the results of a symposium of nationally known authorities on criminal justice system disparities held at Rutgers University, a survey of judges and chief court administrators and

a series of public hearings. The New Jersey prison profile mirrors the Pennsylvania profile, with African Americans in both states accounting for 63 percent of the state prison population and 12 percent of overall state population.[45] The task force also found drug abuse arrest figures in the minority community to be a strong indicator of racial disparity in prisons. It found, for instance, that African Americans accounted for 52 percent of the arrests for drug abuse.[46] Latinos were 9 percent of New Jersey's adult population, but were subject to 12 percent of all arrests for drug abuse.[47] By contrast, whites represented 76 percent of the adult population but accounted for less than 48 percent of the total arrests for drug violations.[48] The task force also received considerable testimony at its public hearings about discriminatory conduct in all aspects of law enforcement, which contributes to the overrepresentation of minorities in prisons. This perception was supported by the task force's survey of opinions of judges and court managers. In response to two questions regarding prosecutorial discretion, 30 percent suggested there was some discrimination in the exercise of prosecutorial discretion.[49] Further, 47 percent of the responding judges and court managers agreed that there were small increments of discrimination against minorities at each step of the criminal justice process.[50]

MICHIGAN

The Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts issued its report in 1989. The task force conducted public hearings and surveyed judges and attorneys. With regard to sentencing, the task force concluded that there was a perception of a disparity in prosecutorial decision-making based upon the race and ethnicity of both the accused and the victim. The perceptions were based upon the belief that:

- White male prosecutors exercised broad discretion;
- Warrants were sometimes issued for inappropriate police searches that targeted minority populations without probable cause;
- Minority people were more likely to be charged with a more serious crime than non-minority people for similar offenses and records;
- Minority defendants were more likely to be pressured into plea-bargaining by the use of multiple charges; and
- Dispositional alternatives to trial, including plea-bargaining opportunities, were disparately available to minority and white defendants.[51]

Further, the task force concluded that conviction and acquittal rates might be affected by race or ethnicity of a defendant and/or victim.[52] The task force had reviewed an analysis of Michigan Sentencing Guidelines data, which concluded that race/ethnicity were not significant factors in sentencing when the only variables taken into account were severity of offense and prior record. The report, however, noted the failure of the analysis to address other factors that might impact upon minority populations in the system, such as arrest, exercises of prosecutorial discretion, pretrial detention, and the effect of the race/ethnicity of the victim and the adjudicator. The task force concluded by requesting that the sentencing guidelines project analyze the incidence of departures from guidelines with regard to minority populations.[53]

CONNECTICUT

The State of Connecticut Judicial Branch Task Force on Minority Fairness issued its report in April 1996. Sentencing disparity was among the issues the task force studied. It cited a court disposition study of cases in 1991, which found that whites were significantly more likely to be placed on probation while similarly situated minorities were sentenced to incarceration.[54] The task force found no significant differences in length of prison sentence by race/ethnicity among those sentenced to incarceration when other factors were controlled.[55] Another study cited by the task force, the Hartford Institute study of 1983–84 felony defendants, however, did find that Latinos sentenced to incarceration were given longer sentences than others.[56] The task force also reported that a large number of participants in its public hearings and focus groups perceived that sentences were biased in favor of whites.[57]

NEW YORK

The report of The New York State Judicial Commission on Minorities, issued in 1991, found a "widely held perception that discrimination accounts for some portion of the overrepresentation of minorities in the criminal justice system."[58] The report cites 1990 statistics showing that minorities accounted for more than 80 percent of the prison population in New York and more than 90 percent in New York City.[59] Drawing on research undertaken by the New York Division of Criminal Justice Services (DCJS) in 1988, the commission found support for the perception that minority defendants were given harsher sentences than white defendants.[60] The study concluded that significant racial disparity existed in cases when the defendant had no prior record and was charged with a misdemeanor offense,

but not when the defendant was charged with a felony and had some prior criminal justice involvement.[61] The most consistent pattern found by the DCJS findings, the commission reported, was the imposition of fines for whites and jail sentences for African Americans and Latinos in cases where the defendants had similar backgrounds and were charged with similar misdemeanors.[62] The DCJS study also found that when data for the state's ten most populated counties were separately analyzed, racial disparities that were obscured in the statewide data became apparent.[63] Overall, the DCJS study found that the probability of incarceration was generally higher for minorities than it was, under certain circumstances, for whites.[64] In surveys of judges and litigators, the commission also uncovered additional evidence of disparate treatment in the sentencing phase of the criminal process. The surveys asked a series of questions regarding the frequency with which white defendants receive preferential treatment in the criminal courts. Overall, 44 percent of the judges and litigators answered that white defendants were "often/very often" less likely to receive a prison sentence than African American defendants.[65] Differences of opinion were found to exist among litigators from different racial/ethnic groups, but a substantial proportion of each group said they had witnessed biased sentencing "on a regular basis."[66] The surveys also uncovered the perception among the respondents that minority defendants were afforded a narrower range of dispositional alternatives.[67] The charge of racially biased sentencing was also expressed repeatedly at the commission's public hearings.[68]

OHIO

The Ohio Commission on Racial Fairness produced its report in 1999. Among the topics studied by the commission was disparate sentencing in the criminal justice system. The commission conducted personal interviews and reviewed other reports and statistical data and concluded that, "Many minorities perceive that Ohio's criminal justice system discriminates against them because of their race or minority status."[69] The commission noted that this perception is "not unique to Ohio, but represents the views of many minorities throughout the United States."[70] The commission stated that, while it recognized that racial discrimination did not account for all differences in treatment of white people and minorities, "a factual basis for this perception clearly exists."[71] The report noted that African Americans were arrested, convicted, and sentenced to prison in Ohio almost 10 times as frequently as whites and that the incarceration ratio of African Americans to whites was 9.8:1, which was 28 percent higher than the national average.[72] The commission indicated that its efforts to empirically

validate the information obtained from testimony on this topic had been frustrated by the failure of judges and court administrators to respond to a request for information, data, and comments that would have enabled the commission to consider whether race had a critical influence on the sentencing patterns of Ohio's trial courts.[73] Consequently, the commission urged the court system to make a commitment to a "process of regular and ongoing data collection, analysis, and reporting, as well as both agency and individual accountability to eliminate the excuse of 'lack of information' as a convenient shield for those who would hide their inability or unwillingness to assure equal treatment to all those involved our state's criminal justice system."[74]

WASHINGTON

The Washington State Minority and Justice Task Force Final Report, issued in 1990, found that "a large proportion" of district attorneys and public defense attorneys contacted through a survey "expressed a clear concern over the treatment of ethnic and racial minorities in the legal system."[75] Further, the task force found that while the majority of both prosecutors and public defenders indicated that they had not perceived any racial or ethnic prejudice in their county courts, nearly half of the responding public defenders expressed the belief that there was bias in Washington courts. A few prosecutors responded that there were more problems with bias of jury members than court officials. Several public defenders simply stated that minorities were not treated the same as whites.[76] Further, while the majority on both sides said racial or ethnic prejudice did not play a role in the criminal justice system, nearly half of the public defenders felt that bias did occur in criminal prosecution.[77] Examples cited by the respondents included the belief that "blacks and other minorities are often prosecuted more harshly and get lesser plea bargains," and that blacks and other ethnic minorities "are perceived as more dangerous and get more severe sentencing."[78]

APPELLATE REVIEW

Another factor influencing disparities in sentencing is Pennsylvania's standard of appellate review of sentencing decisions which is generally considered more restrained than the practice in other jurisdictions.[79] Kevin Reitz, professor of law at the University of Colorado Law School, in his study of sentencing guideline systems and sentence reviews, describes the Pennsylvania appellate process in highly critical terms, characterizing its standards of review as "overdoing appellate restraint" and a product of the courts' opting "to play only a *de minimis* role in the enforcement of the guidelines."[80] He also notes that "participants in the Pennsylvania system complain that the appellate courts have virtually abdicated their sentence review function."[81] The dominant concern with such limited appellate review, notes Reitz, is "appellate indifference to disparity." [82]

In his study of sentencing guideline systems and sentence reviews, [Professor Kevin Reitz] describes the Pennsylvania appellate process in highly critical terms, characterizing its standards of review as "overdoing appellate restraint" and a product of the courts' opting "to play only a de minimis role in the enforcement of the guidelines."

Kramer and Ulmer note that, given the Commonwealth's severely restricted appellate review, no common law of sentencing has developed, and therefore, "The appellate process fails to buttress the key purpose of sentencing guidelines—to reduce sentencing disparity."[83] Although a higher standard of substantive appellate review would increase the number of sentencing appeals, the professors point out that, "Other states with sentencing guidelines such as Minnesota and Washington have established higher standards for departure, with no obvious deleterious effect on the number of appeals."[84] Further, it is their view that such a change would not result in the high number of appeals seen in the federal system, because the Pennsylvania guideline system is far simpler than the federal guidelines system.[85]

RECOMMENDATIONS

TO THE SUPREME COURT OF PENNSYLVANIA

The Committee recommends that the Court:

1. Include programs on the impact of race, ethnicity, and gender bias in sentencing at judicial training sessions.[86]
2. Include in such judicial training sessions, education on how the use of specific offender characteristics, such as employment, family responsibilities, and role in the offense, can potentially contribute to unwarranted racial, ethnic, and gender disparities in sentencing.[87]
3. Strengthen the formal standards of accountability to which sentencing judges are held through adoption of a broader standard of appellate review for sentencing decisions.
4. Strengthen and expand the collection of data on sentencing decisions.[88]

TO DISTRICT ATTORNEYS

The Committee recommends that district attorney's offices:

1. Institute training programs for prosecuting attorneys on the influence of race, ethnicity, and gender bias on charging and plea bargaining decisions.[89]

ENDNOTES

[1] U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 1983* and *Prison and Jail Inmates at Midyear 2000*, 2001.

[2] U.S. Department of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics, 2000.

[3] U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Prison and Jail Inmates at Midyear 2000*.

[4] Pennsylvania Department of Corrections Monthly Institutional Profile, August 31, 2002; Pennsylvania Bureau of Corrections 1981 Annual Statistical Report.

[5] U.S. Department of Justice, Bureau of Justice Statistics, Race of Prisoners Admitted to State and Federal Institutions, 1926–1986, February 1994, p. 14, Table 7.

[6] Human Rights Watch, World Report 2002, p. 4.

[7] Pennsylvania Department of Corrections, Annual Statistical Report 2000; U.S. Census Bureau, 2000.

[8] Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs* (May 2000), Table 5, citing Bureau of Justice Statistics, Correctional Populations in the United States, 1996.

[9] John Kramer and Darrell Steffensmeir, *Race and Imprisonment Decisions*, 34 The Sociology Quarterly 357 (1993).

[10] *Id*.

[11] Findings from previous studies are summarized in Table 1 to the Report Prepared for the Pennsylvania Supreme Court Committee on Race and Gender Bias by John H. Kramer and Jeffrey T. Ulmer; Appendix Vol. I [hereinafter Kramer/Ulmer Report]. In addition, Professor Kramer discussed this research in his oral and writte0n testimony before the Committee at the public hearing in Pittsburgh on November 29, 2000.

[12] 204 Pa. Code § 303.1, *et seq*.

[13] The lack of earlier analysis of the sentencing of Latino defendants was due to the small number of Latino defendants in the data used.

[14] *See* Kramer/Ulmer Report, *supra* at 22.

[15] The study also examined a number of other questions that will not be discussed in detail in this report. First, it examined disparities in the decision whether to depart from the guidelines (above or below), using procedures similar to those applied to the in/out and length of incarceration data. The results for departures "largely parallel[ed]" the results for the other two decisions, and are reported in the Appendix to the Kramer/Ulmer Report. (*See* Kramer/Ulmer Report, *supra* at 10) Second, the study examined separately disparities in sentencing in Philadelphia County and Allegheny County, the Commonwealth's two large urban court systems. Disparities were found in both of these counties, although the sizes of the disparities, as well as the rank orderings of the race/ethnicity/gender/age categories for incarceration chances and sentence length differences, showed patterns that were different from those for the Commonwealth overall. (These findings are reported and discussed at pp. 8–10 and Tables 8 and 9 of the Kramer/Ulmer Report). Third, the study examined whether socio-demographic characteristics of counties (poverty rate, unemployment, percent African American, percent Latino, violent crime rate, property crime rate) influenced the effects of race, ethnicity, and gender on sentencing. The researchers found "only three statistically significant, but mostly rather modest, interaction effects" which indicated that "the greater the Hispanic population in a county, the less disparity between Hispanic males (younger and older) and young white males" in sentencing. (*See* Kramer/Ulmer Report, *supra* at 10–11.)

[16] *See* Kramer/Ulmer Report, *supra* at Tables 3 and 4.

[17] *Id*. at 6.

[18] *Id*. at 6, n. 2.

[19] Testimony of Malik Aziz, Philadelphia Public Hearing Transcript, p. 228 [hereinafter Aziz Testimony].

[20] *Id*. at 227–232.

[21] *See* Kramer/Ulmer Report, *supra* at 10–11.

[22] Moreover, evidence from the capital sentencing context suggests a real possibility that the victim's status characteristics, such as race, ethnicity, and gender, might affect sentencing outcomes. In a study of capital sentencing in Philadelphia, for example, David C. Baldus and his colleagues found "strong race-of-victim effects" on the finding of mitigating circumstances: "When the victim was white, juries were significantly more likely to reject all mitigation than when the victim was not white." (*See* Chapter 6 of this report on the Death Penalty, describing findings reported in David C. Baldus, et al., *Racial Discrimination and the Death Penalty in the Post*-Furman *Era: an Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638 (1998). *See also Id.* at 1675–1710 (discussing race-of-victim findings). Many earlier studies of capital sentencing patterns across the country—most notably a major study of racial influences in capital sentencing in Georgia by Professor Baldus and his colleagues that was discussed by the United States Supreme Court in *McCleskey v. Kemp*, 481 U. S. 279, 107 S. Ct. 1756 (1987)—had found that defendants who kill whites are more likely to receive a death sentence than defendants who kill non-whites. *See* Randall L. Kennedy, *McCleskey v. Kemp*: *Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388, 1396–1400 (discussing earlier Baldus study and several other studies).

[23] *See* Kramer/Ulmer Report, *supra* at 16, noting that over 95 percent of all sentencing cases are guilty pleas.

[24] Testimony of Professor Alfred Blumstein, Pittsburgh Public Hearing Transcript, p. 201 [hereinafter Blumstein Testimony].

[25] Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations*, 73 Journal of Criminal Law and Criminology 1259–1281 (1983).

[26] Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 University of Colorado Law Review 743 (1993).

[27] Blumstein Testimony, *supra* at 203.

[28] *Id*. at 204.

[29] *Id*.

[30] Testimony of State Representative Ronald Waters, of Philadelphia, Harrisburg Public Hearing Transcript, p. 36.

[31] Aziz Testimony, *supra* at 228.

[32] *Id*. at 227–229.

[33] Testimony of the Reverend Leonard Smalls, Philadelphia Public Hearing Transcript, p. 365 [hereinafter Smalls Testimony].

[34] Testimony of State Representative LeAnna Washington, Harrisburg Public Hearing Transcript, p. 32–33; Smalls Testimony, *supra* at 368.

[35] Smalls Testimony, *supra* at 364.

[36] *Id*. at 368.

[37] Testimony of State Representative Jewell Williams, Harrisburg Public Hearing Transcript, p. 39 [hereinafter Williams Testimony]; Testimony of State Representative Harold James, Harrisburg Public Hearing Transcript, p. 41 [hereinafter James Testimony]; Written testimony of State Representative William R. Robinson, November 29, 2000.

[38] Williams Testimony, *supra* at 39.

[39] James Testimony, *supra* at 41.

[40] Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts, p. 174.

[41] *Id*. at 175–176.

[42] *Id*. at 176.

[43] *Id*. at 181–182.

[44] New Jersey Supreme Court Task Force on Minority Concerns, Final Report (June 1992), p. 110.

[45] *Id*. at 119–120.

[46] *Id*. at 124.

[47] *Id*. at 125.

[48] *Id.*

[49] *Id.* at 129–131.

[50] *Id.* at 131–132.

[51] Report of Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts, p. 9.

[52] *Id.*

[53] *Id.*

[54] Report of the State of Connecticut Judicial Branch Task Force on Minority Fairness, p. 38.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 39.

[58] Report of the New York State Judicial Commission on Minorities, p. 139.

[59] *Id.*

[60] *Id.* at 162.

[61] *Id.*

[62] *Id.* at 163.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 170.

[66] *Id.*

[67] *Id.* at 171–174.

[68] *Id.* at 170.

[69] The Report of the Ohio Commission on Racial Fairness, p. 36.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 37.

[73] *Id.* at 41.

[74] *Id.* at 44.

[75] Washington State Minority and Justice Task Force Final Report, p. 151.

[76] *Id.* at 151–152.

[77] *Id.* at 152.

[78] *Id.* at 153.

[79] *See generally* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 Nw. U.L. Rev. 1441, 1471–80 (1997).

[80] *Id.* at 1471.

[81] *Id.*, *citing* Joseph A. Del Sole, *Appellate Review in a Sentencing Guidelines Jurisdiction: The Pennsylvania Experience*, 31 Duq. L. Rev. 479 (1993), and Ivan S. DeVoren, *Judicial Discretion in Sentencing—Commonwealth v. Devers*, 519 Pa. 88, 546 A.2d 12, (1988), 62 Temple L. Rev. 729 (1989). Commentators point particularly to three decisions of the Supreme Court of Pennsylvania as shaping this minimalist view of appellate review: *Commonwealth v. Tuladziecki*, 513 Pa. 508 (1987), in which the Court interpreted the procedural rules to limit review of discretionary aspects of sentences and stated that a purpose of the Sentencing Code was to limit "any challenges to the trial court's evaluation of the multitude of factors impinging on the sentencing decision to exceptional cases," *Id.* at 513; *Commonwealth v. Sessoms*, 516 Pa. 365, 376–77 (1987), in which the Court held that courts need only "consider" the guidelines; and *Commonwealth v. Devers*, 519 Pa. 88 (1988), in which the Court held that the sentencing court was not required to state its reasons for imposing a sentence, for "Where pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors," *Id.* at 101–02.

[82] Reitz, *supra* at 1471.

[83] *See* Kramer/Ulmer Report, *supra* at 16.

[84] *Id*.

[85] *Id*.; *see also* Reitz, *supra* at 1472 (expressing view that Pennsylvania guidelines system is "much simpler than its federal counterpart").

[86] Kramer and Ulmer suggest in their report that making judges aware of disparity as a focal concern and addressing the link of race to employment, education and other factors might sensitize judges to unintended race and gender effects. Training in recognition of bias related to race, ethnicity, and gender, and in ways to recognize and resist biased decision-making, would help sentencing courts to realize the egalitarian ideals to which they, and the court system as whole, aspire. *See* Kramer/Ulmer Report, *supra* at 15; *see also* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 Cal. L. Rev. 733 (1995).

[87] Under Pennsylvania's sentencing guidelines, courts are given discretion to consider a number of specific offender characteristics aside from race, ethnicity, and gender. These factors, which include family responsibilities, employment, and role in the offense, may correlate with some of the observed disparities in sentencing. Indeed, the problematic nature of these factors has been recognized by other jurisdictions.

For example, the Minnesota Sentencing Commission finds the consideration of employment status in sentencing to be inappropriate because it would result in racial disparity. *See Dale G. Parent, Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines* (1988); *see also State v. Carter*, 545 N.W.2d 695, 698 (Minn. Ct. App. 1996) (stating that "social factors such as employment history or educational attainment are not qualifying factors for departure from guidelines") (citing Minn. Sent. Guidelines II.D.C., d.), *rev'd on other grounds*, 569 N.W.2d 169 (Minn. 1997). *Cf.* U.S.S.G. Ch. 5, Part H, intro. cmt. (stating that the guidelines, pursuant to 28 U.S.C. sec. 994(e), incorporate the view that "defendant's education, vocational skills, employment record, family ties, and responsibilities, and community ties" "are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range," although, unless expressly stated, "this does not mean that the Commission views such factors as necessarily inappropriate to the determination of a sentence within the applicable guideline range"); U.S.S.G. secs. 5H1.2, 5H1.5, 5H1.6, 5H1.11, and 5H1.12.

Further, as John Kramer noted in his oral testimony at the Pittsburgh public hearing, judges may be using factors such as a defendant's education level as a "predictor" of dangerousness, without knowing either the role of education in recidivism or the racial impact of taking education into account. As a result, he said, "There's an awful lot of flying by the seat of our pants in those terms." He suggested that judges be informed of the value of such information and the effect of considering it. *See* Testimony of John Kramer, Pittsburgh Public Hearing Transcript, pp. 110–112.

[88] As discussed in the chapter, the findings with respect to bias in sentencing are limited in part by the lack of information. Among the data that the researchers were unable to analyze was information concerning charging decisions, type of counsel, offender information such as employment status, socioeconomic status, role in the offense and family status and responsibilities, and similar information concerning the victim of the offense. (In addition, information about type of counsel is to be collected on the current PCS forms, but in most cases is left blank.) Each factor might correlate to race, ethnicity, or gender, and future studies of disparities in sentencing would benefit greatly from the collection and analysis of the relevant information. It is therefore recommended that efforts be undertaken to improve provision of the currently requested information; and that the PCS be authorized to collect additional information of the kind suggested above.

[89] Judges are not the only actors in the criminal justice system who influence sentencing. In many respects, prosecutors play as important a role, and in negotiated plea agreements, prosecutors may be even more important than judges. There is no reason to think that prosecutors are any less susceptible than judges and other individuals to biases based upon race, ethnicity, and gender, whether conscious or unconscious. Therefore, it is not enough to focus on judges alone in educating actors within the criminal justice system on the operation of biases based upon race, ethnicity, and gender, and the ways to avoid being influenced by those biases.

5 INDIGENT DEFENSE IN PENNSYLVANIA

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INTRODUCTION

Recognizing the vital importance of legal representation for individuals accused of crime, the Supreme Court of Pennsylvania, through case law and court rule, has liberally interpreted the right to counsel. Indeed, in many respects the right to counsel under Pennsylvania law is greater than the protection provided under the United States Constitution. The Supreme Court of Pennsylvania, for example, extends the right to counsel to a broader range of proceedings than are covered by the U.S. Supreme Court's holdings. Likewise, the Supreme Court of Pennsylvania has held that the right to counsel attaches at the time of arrest, whereas the U.S. Supreme Court has ruled that the right attaches only at the initiation of formal adversarial proceedings, such as indictment or other charging document or arraignment. The Supreme Court of Pennsylvania also has provided criminal defendants with other procedural rights more expansive than those guaranteed in the U.S. Constitution, such as the right to a 12-person jury and a unanimous verdict. Meaningful representation by counsel is essential if those rights are to be fulfilled.[1]

Notably, Pennsylvania, South Dakota, and Utah are the only three states that provide no state funds to ensure that indigent citizens are afforded adequate criminal defense services.

—The Spangenberg Group

Despite the expansive procedural rights afforded under law, indigent criminal defendants in Pennsylvania are not assured of receiving adequate, effective representation. Notably, Pennsylvania, South Dakota, and Utah are the only three states that provide no state funds to ensure that indigent citizens are afforded adequate criminal defense services. Pennsylvania also does not provide any statewide oversight of indigent defense systems.

The study reported here—the first-ever comprehensive statewide study of indigent defense services in Pennsylvania—indicates that Pennsylvania is generally not fulfilling its obligation to provide adequate, independent defense counsel to indigent persons. Contributing factors include the Commonwealth's failure to provide sufficient funding and other resources, along with a lack of statewide professional standards and oversight. In

addition, efforts to improve the indigent defense system have been impeded by the lack of reliable, uniform statewide data collection.

The impact of the deficiencies in indigent defense programs in Pennsylvania falls disproportionately upon racial and ethnic minorities. As discussed in greater detail in this report's chapter on Sentencing Disparities, minority males are severely overrepresented in the American justice system. In 1991, African Americans comprised only about 12 percent of the entire U.S. population[2] but comprised 46 percent of the country's state prison inmates.[3] As one report noted in the early 1990s, nearly one in every four African American men in the United States between 20–29 years of age was under the control of the criminal justice system—whether in prison or jail, on probation, or on parole.[4] Currently, in Pennsylvania, racial and ethnic minorities account for 66 percent of the state prison population but only 12 percent of the Commonwealth's population.[5]

Given these statistics, the deficiencies in indigent defense programs will disproportionately impact on the lives of minority group members. Public defenders are the only counsel to which many of the poor, who are disproportionately members of the communities of color, will have access. Arguing that a failure to ensure the adequacy of public defender programs produces a disproportionate impact not only on the poor, but also on racial minorities, Charles Ogletree, Jesse Climenko Professor of Law, Harvard University Law School, writes:

> "Moreover, failure to provide adequate assistance of counsel to accused indigents draws a line not only between rich and poor, but also between white and black. For the first time in our nation's history, the number of people who are incarcerated in jails and prisons surpasses one million.[6] Recent reports indicate that unprecedented numbers of African-Americans, particularly young males, are involved in the criminal justice system.[7] When discussing the inadequacies of the current system of providing counsel for the accused poor, one cannot ignore the correlation between race and poverty. If the criminal justice system deprives the poor generally of the right to a fair trial, that burden will fall disproportionately on communities of color because of the greater incidence of poverty in these communities and, hence, their greater reliance on public defender services."[8]

Focus of Inquiry

The Committee identified the indigent criminal defense system as an area of substantial concern for two major reasons: First, with approximately 80 percent of all criminal defendants in Pennsylvania being represented by public defenders or court-appointed counsel,[9] it was clear that the quality of indigent defense counsel affects the legitimacy of the system as a whole. Second, and more specific to its mission, the Committee recognized that racial minority groups in Pennsylvania are disproportionately represented in the criminal justice system. It is the Commonwealth's most vulnerable citizens, including the poor, minorities, and women, who feel most acutely the impact of inadequate legal representation.

In the initial stages of its study on indigent defense, the Committee determined that Pennsylvania provides neither state funding for, nor statewide oversight of, indigent defense services, and that the Commonwealth maintains no centralized records of indigent defense expenditures, resources, caseloads, or office organization. Consequently, the Committee decided to undertake a comprehensive examination of indigent defense representation in Pennsylvania. The topics about which information was sought included:

- The manner in which the various counties provide representation to indigent defendants;
- The qualifications and appointment process of attorneys accepting indigent defense cases;
- The funds spent on indigent defense;
- The resources available to public defenders and others representing indigent defendants;
- The point in the legal process at which counsel is appointed; and
- The training and supervision of defense attorneys for indigent defendants.

Sources of Data

In order to conduct a comprehensive examination of this issue, the Committee commissioned The Spangenberg Group (TSG) to review Pennsylvania's indigent defense system. TSG, a nationally recognized research and consulting group with substantial experience in evaluating the delivery of indigent defense services, produced an exhaustive report, including findings and recommendations. The full report can be found in Appendix Vol. I.

In addition to the Spangenberg inquiry, the Committee also sought information through a survey that was sent to all county court administrators and public defender offices in Pennsylvania. Additional information came from citizens who testified at the Committee's public hearings.

Background: Organization of indigent defense system in Pennsylvania

In Pennsylvania, funding for indigent defense is provided at the county level. By statute, each county is required to appoint a public defender through its county executive or county commissioners.[10] The relevant statutory authority for the operation of public defender offices is found at 323 PA Code § 1.4-424 and is set forth below:

1. (County) Council shall appoint a Public Defender, learned in the law and admitted to the practice of law in the Commonwealth, who shall exercise those powers and duties assigned and/or granted to this office by law, this charter, or by ordinance;
2. The Public Defender may appoint such number of assistants, including a first assistant, to assist him in the discharge of his duties. The Public Defender shall determine the number of assistants who shall perform on a full-time basis; and
3. The Public Defender shall prepare annual budget requests based on staffing and compensation levels which support full-time operations to the extent required, subject to the budgetary approval of Council. The Public Defender may employ part- time assistants.

As a result of the minimal guidance given to establish the public defender offices, they vary from county to county.

In addition to public defenders, indigent defendants may be represented by court-appointed counsel if the public defender has a conflict of interest. Certain counties, including Philadelphia, also appoint counsel in homicide cases. The individual county provides funding for all court-appointed counsel.

SYNOPSIS OF FINDINGS AND RECOMMENDATIONS

Despite the U.S. Supreme Court's statement in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that "lawyers in criminal courts are necessities, not luxuries," there are serious deficiencies in the criminal justice system in many counties in Pennsylvania, and the problems they create for indigent defense are many. Pennsylvania has no mechanism in place to hold accountable either the lawyers who represent the poor or the county and judicial officials who administer indigent defense systems. The absence of guidelines for the appointment of counsel has resulted in minimal quality control. In addition, the flat fee paid to appointed counsel can be a disincentive to effective preparation and advocacy; the low compensation rates create little incentive to develop expertise in criminal defense. Moreover, the sparse resources available for support services, coupled with exploding and unmanageable caseloads, allow indigent defense counsel little time, training, or assistance for conferring with clients in a meaningful manner, researching relevant case law, reviewing client files, conducting necessary pre-trial investigations, securing expert assistance or testimony or otherwise preparing adequately for hearings and trials. Compounding these deficiencies is the lack of political independence afforded public defenders whose budgets are controlled by local county politicians.

The Committee recommends that Pennsylvania institute statewide funding and oversight of the indigent defense system by establishing an independent Indigent Defense Commission and appropriating state funds for the support of indigent defense. The Committee further recommends that the Court develop uniform, binding indigent defense standards and that court administrators be directed to explore alternative programs that would allow earlier resolution of cases and diversion of non-violent defendants into innovative programs outside of the court system. It is also recommended that chief public defenders play a stronger role in establishing standards for guiding, training, supervising, and evaluating assistant public defenders. Public defenders should also engage in greater community outreach and public education, increase the diversity among their staffs, and develop mutually beneficial relationships with law schools through programs such as internships for law students. The Committee also recommends that trial courts refrain from moving cases through the system too quickly, at the expense of proper legal defense for indigent persons.

RESEARCH METHODOLOGY

THE STATEWIDE INDIGENT DEFENSE SURVEYS

Pennsylvania keeps no centralized records of indigent defense expenditures and caseloads. The Committee, therefore, attempted to gather such information by designing and distributing two surveys that asked a broad range of questions related to the delivery of indigent defense services. The surveys, which were sent to all county public defender offices and to court administrators in all county Courts of Common Pleas, sought budgetary and expenditure figures for public defender offices and assigned counsel programs; information on the compensation of public defenders and assigned counsel; and specific organizational features of each county's indigent defense systems. The texts of the surveys are found in Appendix Vol. I.

Although survey responses were received from 44 of the 67 counties—42 of 66 public defenders and 50 of 61 court administrators—there was a great deal of variance in the quality of the data.[11] For example, many respondents provided current detailed information, while others failed to provide any quantitative information beyond the rates paid to court-appointed counsel or the salaries paid to chief public defenders.

The Committee shared the responses to these surveys with TSG for use in its study of indigent defense in Pennsylvania. Findings based upon the survey responses are reported later in this chapter.

Taken as a whole, the survey responses drew profiles of how legal representation is provided to indigent defendants in Pennsylvania and of the variations by county. From the responses, TSG derived information concerning total indigent defense expenditures and the different structures of the counties' indigent defense systems. Specifically, TSG derived information on:

- Organization—the source of the public defender's budget, how the annual budget request is prepared, salaries, who oversees the office, who appoints public defenders to the office, and how the office assigns its caseload;
- Caseload—the number of cases and the types of cases handled by the public defender office in a given year. (Notably, however, 15 offices failed to provide any caseload information because they have no mechanisms in place by which to track caseloads. Only five offices were able to break their caseloads down into types of cases.);
- Staffing—the number of public defenders, paralegals, legal secretaries, social workers, investigators and other support staff, including clerks,

receptionists, administrative assistants and computer systems administrators; and

- Expenditures—the method in which the office allocates its money, particularly in homicide cases and those in which conflict counsel are appointed, and adequacy of funding for providing quality representation.

THE SPANGENBERG GROUP STUDY

The Spangenberg Group research team gathered on-site qualitative and quantitative criminal public defender data from 12 of the Commonwealth's 67 counties. The 12 counties were Bucks, Centre, Clarion, Crawford, Dauphin, Erie, Huntingdon, Lycoming, Montgomery, Philadelphia, Union, and Warren. The sample sites included three of Pennsylvania's four most populous counties, plus nine others that were selected on the basis of population size, demographic diversity, percentage of minority population, poverty rates, and crime rates. The sample sites were also representative of the Commonwealth's three geographic regions (East, Central, West).[12] Table 1 shows the demographic breakdown of the sample counties:

TABLE 1
County-by-County Demographics

County	Population (1998)	Square Miles	Density	Race				Gender		Income Per Household
				% White	% Black	% Hispanic	% Other	% Male	% Female	
Bucks	597,635	607	984.6	91.1%	3.3'	2.3%	3.3%	49.1%	50.9%	$54,664
Centre	135,758	1,108	122.5	90.6%	2.6'	1.7%	5.1%	51.1%	48.9%	$38,108
Clarion	41,765	602	69.4	97.8%	0.8'	0.4%	1.0%	48.3%	51.7%	$30,562
Crawford	90,366	1,013	89.2	96.6%	1.6'	0.6%	1.2%	48.7%	51.3%	$31,749
Dauphin	251,798	525	479.6	75.6%	16.9'	4.1%	3.4%	48.0%	52.0%	$41,140
Erie	280,843	802	350.2	89.8%	6.1'	2.2%	1.9%	48.8%	51.2%	$35,341
Huntingdon	45,586	874	52.2	92.8%	5.1'	1.1%	1.0%	52.3%	47.7%	$31,879
Lycoming	120,044	1,235	97.2	93.6%	4.3'	0.7%	1.4%	48.9%	51.1%	$32,767
Montgomery	750,097	483	1,553	85.3%	7.5'	2.0%	5.2%	48.3%	51.7%	$55,580
Philadelphia	1,517,550	135	11,241.1	42.5%	43.2'	8.5%	5.8%	46.5%	53.5%	$28,897
Union	41,624	317	131.3	87.6%	6.9'	3.9%	1.6%	55.3%	44.7%	$36,528
Warren	43,863	883	49.7	98.4%	0.2'	0.3%	1.1%	49.0%	51.0%	$33,863
Selected Counties	3,916,929	8,584	1268.3	86.8%	8.2'	2.3%	2.7%	49.5%	50.5%	$37,590
State	12,281,054	44,817	274.0	84.1%	10.0'	3.2%	2.7%	48.3%	51.7%	$37,267

Source: U.S. Census

The research team focused on gathering qualitative and quantitative data regarding the manner in which each county provides representation to its indigents; the qualifications and appointment process of attorneys accepting indigent defense cases; the money spent on indigent defense; the resources (including funds for investigators, expert witnesses, technology, and support services) available to public defenders and others representing indigents; the point in proceedings at which counsel is appointed; and the training and supervision of indigent defense attorneys. Each of the factors has a bearing upon the quality of representation afforded indigent defendants.

Prior to the site visits, The Spangenberg Group obtained the results of the Committee's mail survey of indigent defense costs and expenditure information, as referenced in the preceding discussion on the statewide indigent defense surveys. TSG also collected all available caseload data relating to court appointments for each criminal court in the sample counties. Unfortunately, the lack of reliable county data was a major obstacle to the study and analysis of the Commonwealth's indigent defense system.

To gain perspective on the status of Pennsylvania's indigent defense system, TSG also compared the Commonwealth's expenditure data with similar data from six comparable states. In these analyses, TSG treated the Defender Association of Philadelphia differently from offices in the other sample counties because it differs markedly from other public defender systems. Including Philadelphia in the overall analysis would skew the picture of the indigent defense situation in Pennsylvania. The differences between the systems in Philadelphia and other counties are elaborated upon further later in this chapter.

In addition to the collection of quantitative data in each sample county, there were two qualitative components to TSG's site work. First, members of the project team observed criminal court proceedings in all 12 sample counties, providing a first-hand view of how the system operates in each county. The observers paid special attention to defendants' first appearances and arraignment courts. The site assessments also drew upon substantial in-depth interviews with judges, court staff, public defenders, court-appointed counsel, prosecutors, jail officials, and county policy-makers. Follow-up phone calls were made to clarify information and to

interview criminal justice personnel who had been unavailable during the site visits.

Findings from TSG's study are reported in full at Appendix Vol. I to the Committee's Report. The findings are also summarized later in this chapter.

PUBLIC HEARING TESTIMONY

During the Committee's public hearings, witnesses testified to problems and challenges facing indigent defense counsel in Pennsylvania, and some witnesses made specific recommendations for improvements and reforms in the system. This report will refer to specific testimony where it illustrates or relates to the discussion of other components of the indigent defense study.

INDIGENT DEFENSE EXPENDITURES IN PENNSYLVANIA

Although, as discussed above, the lack of adequate recordkeeping hampered respondents' ability to provide the Committee with complete information in all areas under examination, TSG was able to develop estimates of the total indigent defense expenditures in Pennsylvania and to compile structural evidence on the counties' indigent defense systems. The findings are summarized below and are elaborated in greater detail in the TSG report, Appendix Vol. I, at Part III, pp. 824.

DEFENDER ASSOCIATION OF PHILADELPHIA

One of the most striking findings based upon survey responses was the disparity in funding and organization between the Defender Association of Philadelphia and defender offices in the rest of the Commonwealth. Among the characteristics TSG found to be unique to the Philadelphia office were its relatively high level of funding; the greater political independence afforded the office due to its structure as a non-profit corporation; the levels of specialization and training of attorneys; and its large legal and support staff. In addition, the Philadelphia office is distinguished by the fact that it follows the Criminal Division Rules in appointing counsel to cases. [13]

First, TSG found that although inadequate, the office was funded at a considerably higher level than all other defender offices in the Commonwealth. Although Philadelphia has 12.4 percent of the population of Pennsylvania and 11 percent of the criminal cases prosecuted in the Commonwealth's Courts of Common Pleas, the Defender Association's 2000 budget represented about 33 percent of the total indigent defense expenditure in the Commonwealth that year. As reported in the survey responses, the amount spent per capita in Philadelphia on indigent defense was $17.23 (defender) and $5.15 (court-appointed counsel), as compared with averages in other responding counties of $3.34 and 85 cents, respectively.[14]

The Defender Association office is also structured differently from public defender offices elsewhere in the Commonwealth, nearly all of which are county agencies overseen by county commissioners. The Defender Association (nearly 60 years old) is an independent non-profit corporation and a purchase-for-services contractor with the city of Philadelphia. Therefore, the Association has much greater control over its own budget and expenditures than other public defender offices. Moreover, the chief

and first assistant defenders are appointed by the board of directors rather than serving at the pleasure of county commissioners. This governing structure insulates the office from political pressures. The board has groups of directors representing the city government, the organized bar, and the community.

Further, the Defender Association stands out among state public defender offices by allowing for a greater degree of attorney specialization and providing a far higher level of training and practice resources. The office is organized into practice units that correspond with types of cases or various stages of cases.[15] In the specialized practice units, a case is assigned to a single lawyer who handles it through disposition. In addition, the training unit provides new attorneys with a full-year training program, including a three-week intensive period. Working under a full-time director of training, the unit produces resource materials in various substantive and practice areas for office attorneys.

The Defender Association is the largest and best-staffed defender office in the Commonwealth, with 202 attorneys and 265 support staff, including paralegals, legal secretaries, social workers, investigators, and other administrative staff. In fact, of the total number of staff reported by all survey respondents throughout the Commonwealth, the Defender Association accounted for the vast majority of staff in each category.[16] In addition, the office is free of the burden of screening applicants for eligibility for court-appointed services. Philadelphia courts perform this duty; in other Pennsylvania jurisdictions, clients are generally screened by public defender offices.

Despite its advantages over other defender offices in the Commonwealth, there are serious deficiencies in the operation of the Philadelphia Defender Association office which need to be addressed.[17] These include:

- An extremely high caseload of 100,000 to 150,000 open cases;
- Very low salaries for staff attorneys;
- Insufficient and outdated computerization;
- Inadequate general operations resources, especially in comparison with the district attorney's office; and
- Problems in administrative organization and case management caused by the reluctance of the district attorney's office to share information electronically.[18]

OTHER RESPONDING COUNTIES

Quite a different picture was painted by the survey data for the other responding counties, where county commissioners retained a high degree of control over indigent defense, the levels of funding and staffing were far inferior to those in Philadelphia and the caseload burdens were far greater.

In all other responding counties, the budgets of public defenders' offices were overseen by county commissioners. In addition, 74.4 percent of the responding counties' chief public defenders were county employees. In the remaining 25.6 percent of the public defender offices, all or some of the lawyers were either county employees or under contract with the county.

Salaries for public defenders throughout the Commonwealth were generally low, although public defenders in more populous areas reported being paid more than their counterparts in small localities. Some part-time public defenders were paid more in smaller counties, but TSG speculates that the reason for this may be that some small counties hire only one chief public defender who is part-time but responsible for all of the office's cases. That person is paid more than the average part-time defender because of the increased responsibilities. Table 2: Public Defender Salaries in Pennsylvania in FY 2000 set forth below presents these statistics.

TABLE 2
Public Defender Salaries in Pennsylvania in FY 2000

Position	Chief Public Defender	Average Full-Time Attorney	Average Part-Time Attorney	Starting Salary for Entry Level Attorneys*
Population Greater than 100,000				
Number of respondents	17	10	5	17
Average	$59,030	$42,807	$2,4728	$33,758
Median	$56,000	$44,700	$23,000	$35,000
Range	$34,726—$93,000	$28,000—$51,000	$20,000—$34,000	$24,000—$40,495
Population Less than 100,000				
Number of respondents	21	5	9	9
Average	$34,342	$32,000	$25,272	$26,752
Median	$32,500	$31,000	$23,000	$27,000
Range	$17,708—$50,000	$28,500—$38,500	$11,975—$42,000	$12,000—$38,000

** The respondents who reported that they employed both full-time and part-time public defenders did not indicate different starting salaries for these two groups.*

Part-time attorneys are used extensively in public defender offices. Many of the responding offices were staffed entirely by part-time attorneys or by a combination of full- and part-time attorneys; only 11 of the 37 offices responding to this question did not employ part-time defenders. Moreover, all offices that employed part-time staff permitted those attorneys to handle criminal cases in their private practices.

The ratios of support staff to attorneys revealed serious gaps in support services available to public defenders in Pennsylvania. For example, the ratio of paralegals to attorneys was very low in most responding counties. The survey revealed that Philadelphia employed 76 of the 77 social workers employed by public defender's offices in Pennsylvania; the 77th worked in Allegheny County, which had only one position. In addition, fewer than half of the 38 responding counties had an investigator on staff.[19]

Information on caseloads was difficult to compile and compare. Many respondents did not provide any caseload information, while many who did were unable to break down their caseloads by case type. An additional complication was the lack of a uniform definition of "case." Some counties define a case as a charge or multiple charges resulting from one criminal incident, while others define each client served as a case. Using survey responses, TSG was not able to extract reliable data on the types of cases, or make meaningful assessments of what constituted a case in Pennsylvania public defender offices. This difficulty is noteworthy because it points out a serious deficiency in public defender offices across the Commonwealth: the lack of a mechanism in place by which to track caseloads. More specific information on caseloads was acquired during the on-site phase of the study, which is summarized later in this chapter.

The survey also collected information on budgets and expenditures, and TSG supplemented the survey figures with information gathered from the site visits. Forty of 44 respondents were able to provide budget information, but only 19 were able to provide expenditure information. For those who did not specify expenditure figures, however, TSG was able to extrapolate them from budget information. Based upon these figures, TSG estimated that the cost per capita of indigent defense in Pennsylvania for FY 2000 was $6.44.[20] See Table 7 for these data.

COUNTIES THAT SUPPLIED DATA

Table 3 shows county populations, public defender budgets and budget per capita for the counties that provided information.

TABLE 3
Available County Public Defender Budget and Budget-per-capita in Pennsylvania Excluding Philadelphia in FY 2000

(42 counties in all, listed in descending budget-per-capita order)

County	Population	Budget	Budget-per-capita
Dauphin	251,798	$1,542,670	$6.13
Pike	46,302	$267,156	$5.77
Huntingdon	45,586	$248,973	$5.46
Monroe	138,687	$745,845	$5.38
Delaware	550,864	$2,949,000	$5.35
Mercer	120,293	$533,426	$4.43
Chester	433,501	$1,827,550	$4.22
Allegheny	1,281,666	$4,841,000	$3.78
Crawford	90,366	$336,233	$3.72
Forest	4,946	$17,708	$3.58
Bucks	597,635	$2,130,000	$3.56
Erie	280,843	$953,164	$3.39
Potter	18,080	$61,159	$3.38
Venango	57,565	$190,000	$3.30
Luzerne	319,250	$973,465	$3.05
Berks	373,638	$1,120,602	$3.00
Cumberland	213,674	$630,411	$2.95
Lycoming	120,044	$349,579	$2.91
Centre	135,758	$390,999	$2.88
Clarion	41,765	$120,200	$2.88
Clearfield	83,382	$224,396	$2.69
Lehigh	312,090	$820,598	$2.63
Snyder	37,546	$96,357	$2.57
Wayne	47,722	$120,000	$2.51
Somerset	80,023	$197,525	$2.47
Cambria	152,598	$371,660	$2.44
Indiana	89,605	$212,182	$2.37
Carbon	58,802	$136,496	$2.32
Lebanon	120,327	$278,375	$2.31
Wyoming & Sullivan	34,636	$80,000	$2.31

County	Population	Budget	Budget-per-capita
Warren	43,863	$101,000	$2.30
Mifflin	46,486	$106,246	$2.29
Montgomery	750,097	$1,701,400	$2.27
Blair	129,144	$290,599	$2.25
Bradford	62,761	$138,700	$2.21
Juniata	22,821	$50,000	$2.19
Washington	202,897	$416,576	$2.05
Bedford	49,984	$100,915	$2.02
York	381,751	$723,451	$1.90
Montour	18,236	$31,747	$1.74
Columbia	64,151	$95,207	$1.48
Tioga	41,373	$50,000	$1.21
Total	7,952,546	$26,572,570	
Average	189,347	$632,680	$3.34

Table 4 represents expenditure figures for assigned counsel in the responding counties.

TABLE 4
Available County Expenditure and Cost-Per-Capita for Assigned Counsel in Pennsylvania Excluding Philadelphia in FY 2000

(30 counties in all, listed in descending cost-per-capita order)

	Population	Expenditure	Cost-per-capita
Huntingdon	45,586	$106,000	$2.33
Blair	129,144	$261,189	$2.02
Adams	91,292	$126,736	$1.39
Dauphin	251,798	$347,061	$1.38
Lancaster	470,658	$628,660	$1.34
York	381,751	$487,000	$1.28
Centre	135,758	$164,464	$1.21
Allegheny	1,281,666	$1,520,635	$1.19
Westmoreland	369,993	$382,539	$1.03
Bradford	62,761	$60,791	$0.97
Mercer	120,293	$105,000	$0.87
Cambria	152,598	$121,375	$0.80

	Population	Expenditure	Cost-per-capita
Potter	18,080	$14,065	$0.78
Erie	280,843	$213,994	$0.76
Delaware	550,864	$400,000	$0.73
Northampton	267,066	$179,101	$0.67
Venango	57,565	$37,000	$0.64
Lehigh	312,090	$194,164	$0.62
Mifflin	46,486	$27,878	$0.60
Lebanon	120,327	$68,556	$0.57
Indiana	89,605	$48,033	$0.54
Armstrong	72,392	$35,000	$0.48
Susquehanna	42,238	$20,203	$0.48
Chester	433,501	$204,100	$0.47
Beaver	181,412	$71,288	$0.39
Bucks	597,635	$213,256	$0.36
Elk/Cameron	41,086	$14,642	$0.36
Montgomery	750,097	$265,345	$0.35
Clearfield	83,382	$16,000	$0.19
Carbon	58,802	$6,636	$0.11
Total	7,496,759	$6,340,711	
Average	249,892	$211,357	$.85

COUNTIES THAT DID NOT SUPPLY DATA

Ideally, an estimate of the cost of indigent defense in Pennsylvania would be the sum of expenditures for public defender offices and assigned counsel, plus court funds earmarked for hiring investigators, translators and expert witnesses on behalf of indigent defendants. Unfortunately, such information was not available. Estimates for FY 2000, however, could be drawn from the budget and expenditure information collected by the Committee surveys that were distributed to public defenders and court administrators. The survey distributed to public defenders drew responses from 41 counties. TSG supplemented the data with on-site research from two more counties, bringing the total to 43 counties that collectively represent 77 percent of Pennsylvania's population and 21 of the 30 counties with populations over 100,000.

As mentioned above, inclusion of Philadelphia statistics would skew any statewide estimate. Therefore, the following procedure was used in making the estimate:

1. Figures for total population and public defender budget of the 43 reporting counties were compiled;
2. The Philadelphia County population and public defender budget were subtracted from the totals of the reporting counties;
3. The aggregate budget-per-capita of the reporting counties, excluding Philadelphia, was calculated;
4. The total budget of the 24 non-reporting counties was estimated by using the calculation of per-capita cost submitted by the responding counties minus Philadelphia;
5. The budgets of the 43 reporting counties (including Philadelphia) were then added to the estimated budget of the 24 non-reporting counties; and
6. The resulting figure represents TSG's estimate of the total expenditure on Public Defender Offices in Pennsylvania for FY 2000. Table 5 presents these calculations.

TABLE 5
Estimate of Public Defender Budget and Budget-per-Capita in Pennsylvania for FY2000

	Reporting Counties	Reporting Counties Excluding Philadelphia	Non-reporting Counties	Total
Population	9,470,096	7,952,556	2,810,958	12,281,054
Budget	$52,712,533	$26,572,570	$9,392,499 (estimate)	$62,105,033 (estimate)
Budget-per-Capita		$3.34		$5.06 (estimate)

The same procedure used to estimate the statewide expenditure for public defender offices was used to estimate the expenditure for assigned counsel in Pennsylvania.

Table 6 presents these calculations.

TABLE 6

Estimate of Assigned Counsel Expenditure and Cost-per-Capita in Pennsylvania for FY2000

	Reporting Counties	Reporting Counties Excluding Philadelphia	Non-reporting Counties	Total
Population	9,014,309	7,496,759	3,266,745	12,281,054
Expenditure	$14,161,103	$6,340,711	$2,776,733 (estimate)	$16,937,836 (estimate)
Cost-per-capita		$0.85		$1.38 (estimate)

Table 7 represents the estimate for the total indigent defense expenditure in Pennsylvania, not including the cost of expert witnesses and investigators hired by the court at the request of court-appointed counsel.

TABLE 7
Estimated Cost of Indigent Defense in Pennsylvania for FY 2000

	Public Defender Offices	Assigned Counsel	Total
Expenditure	$62,105,333	$16,937,836	$79,043,169
Cost-per-capita	$5.06	$1.38	$6.44

INDIGENT DEFENSE EXPENDITURES IN PENNSYLVANIA COMPARED WITH SIMILAR STATE SYSTEMS

To put the $6.44 per capita expenditure for indigent defense in Pennsylvania in perspective, TSG turned to comparisons with other states. This comparative analysis is limited by the many variables among the states in funding, organizational structure, demographics, and state laws. As stated earlier, Pennsylvania, South Dakota, and Utah are the only three states whose indigent defense system is funded entirely at the county level, and Pennsylvania alone employs public defender offices as the primary indigent defense provider at trial. In addition, few states have comparable populations and maintain accurate data.

TSG selected Georgia, Indiana, Kentucky, Louisiana, Ohio, and Virginia for comparison, based upon criteria that included population size and a consideration of other variables.[21] In each of the six states, interviews were conducted with state officials, court employees and members of the indigent defense community in order to obtain current information on indigent defense expenditures in FY 2000. Table 8 sets forth the state and county indigent defense expenditure and per capita cost of indigent defense in each state.

TABLE 8
State and County Indigent Defense Expenditure and Cost-Per-Capita in Selected States

State	Population (2000)	State Expenditure (2000)	County Expenditure (2000)	Total Expenditure (2000)	Fiscal Year	Total Expenditure-Per-Capita	Percentage of State Funds
Pennsylvania	*12,281,064*	*$0.00*	*$79,043,169*	*$79,043,169*	*2000*	*$6.44*	*0%*
Ohio	11,353,140	$60,063,023	$34,203,699	$94,266,722	2000	$8.30	63.7%
Georgia	8,186,453	$6,306,727	$40,581,423	$46,888,150	2000	$5.72	13.64%
Virginia	7,078,515	$61,900,000	$0.00	$61,900,000	2000	$8.74	100%
Indiana	6,080,485	$10,400,000	$24,000,000	$34,400,000	2000	$5.66	30.2%
Louisiana	4,468,976	$7,500,000	$37,017,000	$44,517,000	2000	$9.96	16.8%
Kentucky	4,041,769	$25,845,330	$2,987,000	$28,832,330	2000	$7.13	89.6%

When expenditures per capita for indigent defense were compared, Pennsylvania ranked fifth of the seven states with $6.44 per capita. While straight comparisons of the figures would be misleading because of a variety of factors, Pennsylvania's low ranking is indeed cause for concern because the Commonwealth is characterized by factors that typically result in greater cost per capita for indigent defense.

Among these factors is the fact that Pennsylvania has a death penalty and a larger death row population than any of the comparison states. It also has five of the nation's 70 largest metropolitan areas with populations over 600,000 within or largely within its borders. By statute, Pennsylvania must have a public defender's office in every county, which typically results in a greater cost per capita. Furthermore, almost a third of the indigent defense expenditure in Pennsylvania was spent in Philadelphia County; after discounting that amount, TSG estimated the cost per capita of indigent defense in Pennsylvania at $4.13—the lowest among the seven states.

INDIGENT DEFENSE IN PENNSYLVANIA: SPECIFIC FINDINGS

TSG found serious deficiencies in the indigent defense system in Pennsylvania, largely as the result of inadequate state funding and oversight.

"Pennsylvania's indigent defense system is characterized by a lack of state standards, supervision, and accountability."

—The Spangenberg Group

PENNSYLVANIA HAS NO SYSTEMATIC DATA COLLECTION.

Policymakers need complete and accurate data if they are to make informed decisions about improving public legal defense systems. One of the biggest challenges TSG encountered in conducting this study was the lack of systematic data reporting, collection, and maintenance. In particular, information concerning caseloads was woefully inadequate. Many of the smaller counties could not even estimate their caseloads; other counties collected certain data, but could not break down the data into types of cases. Even Philadelphia, the largest county in the Commonwealth, uses a strictly manual case tracking system.[22]

A LACK OF SUPERVISION AND ACCOUNTABILITY HAS RESULTED IN A DETERIORATION OF PROFESSIONAL STANDARDS FOR INDIGENT REPRESENTATION.

Pennsylvania's indigent defense system is characterized by a lack of state standards, supervision, and accountability. The Commonwealth maintains no binding workload standards for indigent defense providers; no uniform standards for representation of indigent defendants; no written indigency guidelines; no standards for eligibility and compensation of assigned counsel; and no guidelines for approving requests for investigators and psychologists.[23]

INDIGENT DEFENSE RECEIVES INADEQUATE RESOURCES TO PROVIDE ADEQUATE REPRESENTATION

Support services, such as interpreters, investigators, expert witnesses, and current research materials, are essential to quality representation. (*See* i.e., *Ake v. Oklahoma*, 470 U.S. 68 (1985), which holds that due process requires that the defense be provided expert assistance if it is necessary for a fair trial);

Standard 5-1.4 of the American Bar Association's *Standards for Criminal Justice: Providing Defense Services* (3d. ed.), which states, in part, "The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation.") In Pennsylvania, however, the rapidly increasing caseload for public defenders has not been accompanied by a corresponding increase in resources for indigent defense. As a result, public defenders have had neither the material resources nor the time to prepare cases adequately with the assistance of support services. Although many public defenders are zealous advocates for their clients, there is a wide disparity from county to county in the resources they have available to them. Significantly, there is a marked difference between the resources available to the prosecution and to indigent defense attorneys in terms of salaries, technology, support staff, investigators, and other critical resources.

TSG noted, in particular, that representation of indigent clients was adversely affected by serious inadequacies in the following areas:

Investigation

Most court-assigned lawyers and many public defenders do not make use of investigators and therefore do not conduct independent investigations of cases. In counties that do employ investigators, they may spend most of their time on such matters as indigency screening and serving subpoenas.[24] Exacerbating the defense attorney's inability to prepare an adequate defense without independent investigation is the ability of district attorneys to draw upon such resources.[25]

> *The lack of resources also prevents defense counsel from hiring experts…In Erie County [The Spangenberg Group] were informed that a case that might require a psychologist and forensic expert might exhaust the whole budget…*

Experts

The lack of resources also prevents defense counsel from hiring experts. TSG cited cases illustrating the dearth of expert assistance: "In Warren County, an attorney could recall only one case in which he had an expert witness. A lawyer in one county told us that as a pharmacist's son he felt competent to testify on pathology. In Erie County we were informed that a case that might require a psychologist and forensic expert might exhaust the whole budget…In Clarion County, in the prior six months, a total of one expert had been used."[26]

Technology

Technological shortcomings plagued public defender offices in all of the sample counties except Centre County. Nearly all the counties reported having no computers, or few computers; public defenders in the remaining counties often had out-of-date computers that in some cases had been donated by district attorney's offices. Most counties did not have computerized case management or tracking systems, despite having unwieldy caseloads and using horizontal representation systems[27] that make proper file tracking and management critical. Public defenders had to rely on paper filing systems that were both labor-intensive and difficult to maintain.[28]

Training and supervision

Training is indispensable in achieving quality representation. Few offices, however, offered significant legal training opportunities to attorneys. Aside from Philadelphia, which has a rigorous training program for new attorneys and provides regular training to senior attorneys, none of the county public defender offices visited by TSG has a formal training or mentoring program.[29] Further, most offices other than Philadelphia also lack formal evaluation and supervision procedures. Aside from mandatory CLE requirements, indigent defense counsel generally do not participate in professional development courses, and when they do they often must pay all or part of the cost themselves. Given the lack of training and supervision, attorneys often perform inadequately or "burn out" and move on to other more lucrative practices. [30]

Social workers and administrative staff

Aside from Philadelphia, public defender offices in the sample counties suffered from inadequate support services from social workers and secretarial staff. Some rural counties did not have access to even a part-time social worker. The lack of sufficient secretarial assistance is a serious impediment to legal representation, because attorneys must devote their time to administrative and clerical tasks rather than legal work, and they may also "cut corners" by, for example, cutting down on motion practice.[31]

Privacy

TSG observed that defense attorneys had a difficult time meeting professional standards of confidentiality because of a shortage of private spaces in jails, prisons, and courthouses where they met with clients. In some courthouses, for example, defense attorneys were forced to meet clients in areas where their conversations were fully audible to prosecutors and law enforcement officers.[32]

Access to research

Most counties in the sample suffer from inadequate legal research facilities. Not surprisingly, public defenders in those counties engage in very little or no legal research. Few public defender offices have their own law libraries; if there is a library, its holdings are generally meager and outdated. Except in Philadelphia, public defenders and assigned counsel generally have no access to new developments in the law.[33] The lack of adequate computer resources exacerbates difficulties in conducting research.

Remuneration

Salaries for public defenders are seriously inadequate, especially when contrasted with the salaries of lawyers in district attorney's offices. In Centre County, for example, the district attorney makes $116,000 per year and the chief public defender makes $57,000.[34] Even in counties where starting attorneys in the two offices begin at the same salary, severe salary disparities are evident as district attorneys and public defenders move into more senior ranks. Public defenders find it difficult to pay back their student loans; that fact, coupled with the general inadequacy of resources, has a demoralizing effect upon many young public defenders. They leave their jobs as a result, creating a serious attrition problem for most public defender offices, including Philadelphia's.[35]

Several chief public defenders corroborated this finding in testimony at the Committee's public hearings. In Wilkes-Barre, Michael Muth, chief public defender of Monroe County, discussed the low salaries paid to public defenders and district attorneys and the disparity in training resources between the two offices.[36] He further noted that the federal Perkins student loan program allows loan forgiveness for prosecutors (as "state and local government employees who are deemed 'essential' to the enforcement of criminal law"), but does not extend this benefit to public defenders.[37]

Ellen Greenlee, chief of the Defenders Association of Philadelphia, testified in Philadelphia about the low level of funding for the public defender's office and the disparity in training resources between public defenders and district attorneys.[38] In addition, M. Susan Ruffner, director of the Office of the Public Defender of Allegheny County, made similar points in her testimony in Pittsburgh.[39]

LAWYERS REPRESENTING INDIGENT DEFENDANTS IN PENNSYLVANIA OFTEN HAVE UNMANAGEABLE CASELOADS FAR EXCEEDING PROFESSIONAL GUIDELINES.

Defense counsel for indigents in Pennsylvania struggle with heavy caseloads…In Bucks County, for example, the public defender's caseload in 1980 was 4,173 cases. In 2000, the same number of attorneys handled an estimated 8,000 cases.

—The Spangenberg Group

In 1973, the Supreme Court of Pennsylvania invalidated Rule 301 of Pa.R.Cr.P. 1(c), which limited the number of cases that busy defense lawyers should accept. (*See Moore v. Jamieson*, 306 A.2d 283 (Pa. 1973).) At the same time, however, the American Bar Association's *Standards for Criminal Justice: Providing Defense Services* (3d. ed.) states that defense attorneys should not "accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special consideration should be given to workload created by representation in capital cases."[40]

Nevertheless, defense counsel for indigents in Pennsylvania struggle with heavy caseloads, partly because county criminal case filings have increased without commensurate increases in staffing. In Bucks County, for example, the public defender's caseload in 1980 was 4,173 cases. In 2000, the same number of attorneys handled an estimated 8,000 cases. Similarly, in Monroe County, Muth testified at the Wilkes-Barre public hearing that the public defender office's caseload rose from 1,984 cases in 1998 to 2,782 in 2000, a 39 percent increase in three years. During that period, the staff size remained the same.[41]

These staggering caseloads create numerous difficulties for counsel, resulting in inadequate representation of their many clients. Among the problems created are:

- Poor attorney-client contact, as attorneys fail to meet personally with their clients to receive and communicate vital information;
- Inadequate preparation, as attorneys, for example, fail to conduct interviews or investigations, file no motions or file the same boilerplate motions in every case, fail to act in a timely manner on important information, fail to pursue issues, or "cut corners" in their work; and
- High numbers of ineffective assistance of counsel claims based upon these types of failures.[42]

PROCESSES AND PRACTICES RELATING TO THE APPOINTMENT AND REIMBURSEMENT OF ASSIGNED COUNSEL RESULT IN POOR QUALITY REPRESENTATION OF INDIGENT DEFENDANTS.

The American Bar Association's *Standards for Criminal Justice: Providing Defense Services* provides specific standards for the appointment of assigned counsel, prescribing that there be systematic methods for distributing assignments as well as sufficient advice and assistance available to support the work of assigned counsel.[43] In many of the counties that TSG visited, these standards were not being met.

TSG found that all counties except Philadelphia lacked a formal screening process for making court appointments. In most of the counties visited by TSG, appointments were made through an informal word-of-mouth network among judges and court administrators. TSG observed other problems that compounded this deficiency, including the absence of minimum standards of experience and performance; allegations of favoritism in the appointment process; and inadequate supervision and training of assigned counsel. Most counties pay assigned counsel a flat fee (per year in most counties and per case in Philadelphia), creating a disincentive for counsel to devote time to a particular case. As a result, attorneys are not taking the time to visit clients in jail, file motions, conduct effective investigations, or respond to mail from clients. As one judge said, the flat-fee system "does not attract the best and brightest."[44]

THE PRACTICE OF HORIZONTAL OR ZONE REPRESENTATION IS PREVALENT AS A FORM OF CASE MANAGEMENT, YET IT SERIOUSLY COMPROMISES THE QUALITY OF REPRESENTATION.

In many counties that TSG visited, public defenders employ a horizontal or zone representation system for cases other than homicides. Under this system, attorneys are assigned to courtrooms first and clients second. Therefore, an individual client may be represented by several different public defenders before a case is resolved. This system has several disadvantages, all of which adversely affect the quality of representation: it hinders the development of attorney-client rapport; it creates gaps in representation that could leave a client without assistance of counsel at critical stages in a case; it allows attorneys to avoid responsibility for case preparation and planning; it creates the potential for important information to be lost as a case passes from one attorney to the next; it results in the loss of investigation time; and it undermines clients' respect for and trust in both the attorneys and the system as their cases are rotated among different counsel at various stages.[45]

THE PREVALENCE OF PART-TIME PUBLIC DEFENDERS COMPROMISES THE QUALITY OF REPRESENTATION BY CREATING CONFLICTS OF INTEREST FOR ATTORNEYS.

American Bar Association standards articulate clearly the importance of a full-time public defender who can manage the office with no conflicts of interest; the standards also contain clear and uniform guidelines that enable part-time defenders to avoid conflicts of interest. (*See* Commentary to Standard 5-4.2 of the American Bar Association *Standards for Criminal Justice: Providing Defense Services* (3d. ed.).)

Nevertheless, in several mid-sized and rural counties, both the chief public defender and some assistant public defenders work part-time while maintaining private law practices. This situation, at a minimum, creates the appearance that the part-time defenders attend more closely to paying, private cases than to the cases of indigent defendants.[46]

PUBLIC DEFENDERS AND ASSIGNED COUNSEL IN PENNSYLVANIA LACK PROFESSIONAL INDEPENDENCE.

Whether defense counsel for indigents are public defenders or assigned counsel, they are generally subject to political pressures. TSG found that chief public defenders in all counties except Philadelphia are appointed by the local county commissioners, and may therefore have obtained their positions through political connections. In addition, the dependence on county funding allows county commissioners to control the public defenders' budgets and sometimes interfere in the operations of their offices.

Nor are assigned counsel free from political influence. The lack of uniform standards or oversight of appointment processes gives judges unfettered discretion in the selection of contract attorneys and the appointment of attorneys in specific cases. As a result, judges are free, for example, to appoint friends and acquaintances to cases rather than attorneys who may be more qualified or more experienced. In addition, appointed counsel might tailor their representation to avoid displeasing the judge, thereby preserving their chances for appointment in the future while predictably dampening their zeal to advocate for their clients. Aside from the conflicts created by the appointment process itself, the lack of standards and oversight means that there are no established and uniform procedures or mechanisms for holding attorneys accountable for the quality of representation. Judges, moreover, do not monitor attorneys' caseloads to insure that they are manageable, nor do judges mandate extra payments for attorneys when a threshold is exceeded.[47]

Muth, testifying at the Wilkes-Barre public hearing, noted the lack of "political capital" to be gained by county commissioners by giving money to the public defender's office rather than the district attorney's office.[48]

IN MOST COUNTIES, COUNSEL ARE NOT APPOINTED IN A TIMELY MANNER, DESPITE PENNSYLVANIA'S LIBERAL PROVISIONS CONCERNING THE TIME AT WHICH THE RIGHT TO COUNSEL ATTACHES.

As noted in the introduction to this chapter, Pennsylvania law provides that the right to counsel attaches at arrest and that the accused is entitled to the effective assistance of counsel at the preliminary hearing. In most counties, however, these liberal protections are not afforded to indigent defendants. In several counties defendants appear at critical stages without attorneys and are required to make important decisions concerning pleas and waivers of rights without the advice of counsel. Some defendants in minor cases proceed without a lawyer until they reach the preliminary hearing, or even the sentencing stage and beyond.[49]

PENNSYLVANIA LACKS UNIFORM, UP-TO-DATE FINANCIAL ELIGIBILITY GUIDELINES, AND MANY DEFENDANTS WHO NEED ASSISTANCE MAY NOT BE HELPED.

People who cannot afford counsel are falling through the cracks because of the lack of uniform, up-to-date indigency guidelines in Pennsylvania. Some counties have no standards, while others have standards that are out-of-date or fail to take into account expenses or other factors such as the size of the defendant's family. In some counties, illiteracy may prevent individuals from receiving assistance to which they are entitled. As a result of these problems, defendants who might otherwise qualify for assistance are not receiving it; some defendants who cannot afford counsel do not qualify for assistance; and some defendants are therefore forced to represent themselves.[50]

Christine Konzel, Erie County chief public defender, testified to her efforts to update the financial eligibility guidelines that her office uses. The guidelines date from the 1970s and require the office to refuse representation to some individuals whose income exceeds the guidelines but who cannot afford attorneys nonetheless. She expressed a desire for state guidance and funding to assist in developing new state guidelines.[51]

MOST COUNTIES HAVE A VERY LOW TRIAL RATE.

For reasons that include the explosion in criminal case filings and expanding populations, the various actors in the criminal defense system place a premium on efficiency and speed in the disposition of cases. Judges express their approval of lawyers who move cases through, and show their impatience with lawyers who hold things up by defending too passionately. District attorneys, being "stats driven," also prefer to dispose of cases quickly by offering defendants attractive plea bargains. As noted above, there are many disincentives that keep defense lawyers from engaging in time-consuming advocacy. The result is a system in which most cases are pleaded out rather than tried.[52]

IN SOME COUNTIES, THE PUBLIC DEFENDER OFFICE LACKS STRONG, ENGAGED LEADERSHIP.

Interviewees in some counties expressed the view that their chief public defenders and assistant defenders were not engaged in important aspects of the public defender function. Among the complaints were that chief defenders did not take the lead in advocating for greater funds and resources, even allowing for the complexities of such advocacy within a county-controlled environment. Further, very few chief public defenders had sought out or expended the effort needed to obtain other sources of funding, such as grants. Finally, in at least one county TSG visited, the chief defender did not know such basic information as whether conflict counsel are paid by the hour or whether there is a cap on their compensation.[53]

PUBLIC DEFENDER OFFICES STRUGGLE WITH ATTRITION.

High caseloads, inadequate resources and low salaries together create difficulties in attracting and retaining young attorneys who often carry large law school loans. The indigent defense system, therefore, is losing good young lawyers to the private sector. Budget increases are not likely in most counties because many chief public defenders, fearing reprisals from the county, prefer not to make aggressive demands for additional resources.[54]

Both Chief Defender Ellen Greenlee of Philadelphia and Chief Defender Michael Muth of Monroe County testified to the difficulty of recruiting attorneys to work for the low salaries their offices are able to offer.

RECOMMENDATIONS

TO THE SUPREME COURT OF PENNSYLVANIA

The Committee recommends that the Court:

1. Develop uniform binding indigent defense standards to meet indigent defense quality concerns regarding conflicts of interest, contracting for services, attorney eligibility, training, and workload.[55]
2. Direct court administrators to explore innovative programs that seek to resolve cases earlier or to divert non-violent defendants into counseling or other alternative programs instead of the court system.

TO TRIAL COURTS

The Committee recommends that the trial courts:

1. Refrain from moving cases through the system at the expense of proper legal defense for indigent persons.[56]

TO THE LEGISLATURE

The Committee recommends that the Legislature:

1. Establish an independent Indigent Defense Commission to oversee services throughout the Commonwealth and to promulgate uniform, effective minimum standards. The Commission should report to the Court one year from the date of appointment.[57]
2. Appropriate funding for indigent defense services from Commonwealth funds and adopt adequate uniform attorney compensation standards.[58]

TO COUNTY PUBLIC DEFENDER OFFICES

The Committee recommends that the public defender offices:

1. Increase diversity of staff, particularly attorneys, and establish clear anti-bias policies for personnel.[59]
2. Develop relationships with local law schools and initiate cooperative arrangements to attract law students to public defense work early in their careers.[60]
3. Along with the Pennsylvania Defenders Association, investigate whether applicable student loan programs, including the Perkins program, permitting student loan forgiveness for prosecutors, can be extended to public defenders.

ENDNOTES

[1] For a more complete discussion of the right to counsel under Pennsylvania law, *See* The Spangenberg Group, *A Statewide Evaluation of Public Defender Services in Pennsylvania*, pp. 5–7, May (2002), attached in Appendix Vol. I [hereinafter Spangenberg Report].

[2] Bureau of Census, Department of Commerce, Press Release, March 11, 1991, p. 2.

[3] Bureau of Justice, U.S. Department of Justice, Survey of State Prison Inmates 1991, p. 3 (1993).

[4] Marc Mauer, *Young Black Men and the Criminal Justice System: A Growing National Problem* (1990) [hereinafter Mauer *Young Black Men*].

[5] Pennsylvania Department of Corrections, Annual Statistical Report 2000; U.S. Census Bureau 2000.

[6] Marc Mauer, *Americans Behind Bars: A Comparison of International Rates of Incarceration,* p. 3 (1991).

[7] Mauer, *Young Black Men, supra*.

[8] Charles J. Ogletree, *An Essay on the New Public Defender for the 21st Century, Toward a More Effective Right to Assistance of Counsel,* 58-WTR Law and Contemp. Probs. 81, 83 (1995).

[9] Bureau of Justice Statistics Special Report, *Defense Counsel in Criminal Cases*, November 2000; Bureau of Justice Statistics, February 1996.

[10] Nationwide, three different models are employed for providing legal representation to individuals who are accused of crimes and unable to afford counsel: (1) the assigned counsel model, involving the assignment of indigent criminal cases to attorneys on a systematic or an *ad hoc* basis; (2) the contract model, involving a private bar contract with an attorney, a group of attorneys, a bar association, or a private non-profit organization which provides representation in some or all of the indigent cases in the jurisdiction; and (3) the public defender model, involving a public or private non-profit organization with full or part-time staff attorneys and support personnel. *See* Spangenberg Report, *supra* at 29–30.

[11] Forty-two of the 66 surveys sent to public defenders were returned, and 50 of the 61 surveys sent to court administrators were returned. Two of the surveys were discarded due to contradictory information. Therefore, 48 of 61 court administrator surveys and 42 of 66 public defender surveys were used in TSG's analysis.

[12] West (Clarion, Crawford, Erie, Warren); Central (Centre, Huntingdon, Lycoming, Union); East (Bucks, Dauphin, Montgomery, Philadelphia). Excluding Allegheny County, these counties comprise approximately 35 percent of Pennsylvania's remaining population of 10,760,075. *See* Spangenberg Report, *supra* at 2.

[13] *See* Spangenberg Report, *supra* at 4, n. 2.

[14] *Id.* at 12, Table 3-1.

[15] These units or divisions include: Municipal Court Unit, Preliminary Hearing and Felony Waiver Division, Special Defense/Homicide/Death Penalty Unit, Major Trial Division, Juvenile Court Division, Juvenile Special Defense Unit, Probation/Parole and Sentencing Alternatives Unit, Appeals Division, Motions Unit, Mental Health Division, Child Advocacy Unit, Federal Court Division, and Federal Capital Habeas Unit. The Child Advocacy and Mental Health units have growing civil practices. The Defender Association has a growing civil practice in its Child Advocacy and Mental Health Units. It represents only 20 percent of those defendants who receive court-appointed counsel in homicide cases. *See* Testimony of Ellen Greenlee, Philadelphia Public Hearing Transcript, p. 297 [hereinafter Greenlee Testimony].

[16] *See* Spangenberg Report, *supra* at 10–11.

[17] Greenlee Testimony, *supra* at 298–303, 314.

[18] Testimony of Charles Cunningham, Philadelphia Public Hearing Transcript, pp. 314–316.

[19] For detailed results and ratios, s*ee* Spangenberg Report, *supra* at 16–18.

[20] *See* Spangenberg Report, *supra* at 24, Table 3–10.

[21] The criteria were population greater than 4 million, death penalty state, indigent defense system organized at county or regional level, public defender used as indigent defense provider in a number of counties, large number of counties, and reliable budget data available. *See* Spangenberg Report, *supra* at 25–26.

[22] *See* Spangenberg Report, *supra* at 64.

[23] *Id.* at 63–64.

[24] Testimony of Christine Konzel, Erie Public Hearing Transcript, pp. 128–130 (noting that the two full-time investigators in her office do intake and serve subpoenas, and conduct investigations in less than 10% of cases) [hereinafter Konzel Testimony].

[25] *See* Spangenberg Report, *supra* at 69–70.

[26] *Id.* at 70.

[27] Horizontal representation is the term used to define the practice of assigning a public defender to a particular courtroom to handle all cases in that courtroom on a particular day, rather than being assigned to defend a particular client who may have several hearings in different courtrooms over the course of an extended period of time. Under this system, an individual client may be represented by several different public defenders before a case is resolved.

[28] *See* Spangenberg Report, *supra* at 71.

[29] *Id.* at 72.

[30] *Id.*

[31] *Id.* at 72–73.

[32] *Id.* at 73.

[33] *Id.*

[34] The Committee did receive testimony during a public hearing that in one county in Pennsylvania, the salaries of the public defender and the district attorney are nearly equivalent.

[35] *See* Spangenberg Report, *supra* at 74.

[36] Testimony of Michael Muth, Wilkes-Barre Public Hearing Transcript, pp. 136–139, 142–143 [hereinafter Muth Testimony].

[37] Written Testimony of Michael Muth, p. 4.

[38] Greenlee Testimony, *supra* at 302.

[39] Testimony of M. Susan Ruffner, Pittsburgh Public Hearing Transcript, pp. 22, 33–34 [hereinafter Ruffner Testimony].

[40] Standard 5-5.3(a) ABA Standards for Criminal Justice: Providing Defense Services (3d. ed.); <http:www.abanet.org/crimjust/standards/defsvcs_toc.html>.

[41] Muth Testimony, *supra* at 139–142.

[42] *See* Spangenberg Report, *supra* at 59–61.

[43] Specifically, Standard 5-2.1 provides:

> The plan for legal representation should include substantial participation by assigned counsel. That participation should include a systematic and publicized method of distributing assignments. Except where there is a need for an immediate assignment for temporary representation, assignments should not be made to lawyers merely because they happen to be present in court at the time the assignment is made. A lawyer should never be assigned for reasons personal to the person making

assignments. Administration of the assigned-counsel program should be by a competent staff able to advise and assist the private attorneys who provide defense services.

[44] *See* Spangenberg Report, *supra* at 66–67.

[45] *Id.* at 64–65.

[46] *Id.* at 74–75.

[47] *Id.* at 62–63.

[48] Muth Testimony, *supra* at 139.

[49] *See* Spangenberg Report, *supra* at 75–76.

[50] *Id.* at 77–78.

[51] Konzel Testimony, *supra* at 117–118 and 126–127.

[52] *See* Spangenberg Report, *supra* at 76–77.

[53] *Id.* at 79.

[54] *Id.* at 76.

[55] One of the most notable developments in the delivery of indigent defense services in the past ten years has been the adoption of standards and guidelines for attorney eligibility, workloads, conflicts of interest, indigency screening, attorney performance, and administration of indigent defense systems. Standards and guidelines have been adopted at all levels, by state and local legislation, state supreme court rule, national, state, and local public defender organizations, indigent defense commissions, and other entities, including the American Bar Association. *See* American Bar Association *Standards for Criminal Justice: Providing Defense Services* (3d. ed.); <http:www.abanet.org/crimjust/standards/defsvcs_toc.html>.

Greater oversight and accountability are needed in Pennsylvania. The Spangenberg Group Report's study found one or more counties failed to comply with national or local guidelines in each of the following areas: conflicts of interest standards, contracting standards, assigned counsel standards, attorney eligibility standards in death penalty cases, and indigent defense caseload standards. For discussion of each of these areas, *See* Spangenberg Report, *supra* at 85–91.

[56] The United States Supreme Court has stated that "an almost total preoccupation…with moving cases," an "obsession for speedy dispositions, regardless of the fairness of the result," and the "assembly line justice" that results, are inconsistent with the right to counsel. (*Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972). In courtrooms across the Commonwealth, however, the quality of justice for poor defendants is being compromised by the premium some judges have placed on the speedy disposition of cases. For example, defendants who have not yet retained counsel are sometimes pressured to proceed with an attorney not of their choosing or to "work something out" with the district attorney.

[57] The public defender office should be an independent entity, free from political or judicial control. Further, indigent defense in Pennsylvania suffers from a lack of a centralized authority to provide coordinated planning, oversight, and management. To address all of these concerns, Pennsylvania should establish an independent, state-level commission to oversee the delivery of indigent defense services. ABA standards maintain that establishing a board of trustees with responsibility for governance is an effective means of securing political independence for defender organizations. (*See* Standard 5-1.3(b) of the American Bar Association *Standards for Criminal Justice: Providing Defense Services* (3d. ed.);<http:www.abanet.org/crimjust/standards/defsvcs_toc.html>. More than half of the states have such commissions. (*See* Spangenberg Report, *supra* at 81-95*;* Appendix 2) Membership is typically broad-based, including former judges, legislators, former prosecutors, and experienced defense attorneys. It also should reflect the racial, ethnic, and gender composition of the client community. Such a commission can be created by the legislature or the courts, and may be part of the judicial or executive branches. Most of the states that have created such commissions ensure oversight by those directly answerable to the state citizenry by requiring that members be appointed by executive, judicial, and legislative representatives. Other members are generally appointed through statewide and local bar associations. Ideally, a statewide commission would

significantly increase the resources for, set meaningful standards for, and professionalize indigent defense services throughout the state. It would do so by promulgating and monitoring compliance with indigent defense standards, securing adequate financing to guarantee effective representation, overseeing the training of defense providers, conducting public education, and defending the system from attack. In particular, such a commission could help to improve Pennsylvania's indigent defense system by: ensuring the independence of the defense function by insulating county public defenders from political pressures; promoting a unified indigent defense voice to address defender concerns statewide; ensuring that effective minimum qualifications, training, workload, and contracting standards will be enforced; guaranteeing that indigent defense data will be collected and reported in a uniform manner; and studying the issue of quality representation, including the impact of race and gender on defense representation. For more detailed elaboration of the organization, functions, and benefits of such a commission, *see* Spangenberg Report, *supra* at 81–84.

[58] The creation of a state Indigent Defense Commission should be accompanied by state funding of indigent defense. As mentioned above, Pennsylvania is one of only three states with no state funding for indigent defense. The result of the dependence on county-level funding has been the under-funding of indigent defense, which in turn has led to inadequate attorney performance and poor morale among public defenders and contract attorneys. For discussion of a model of state funding that has been followed with success in other states (reimbursement by the state of a percentage of the counties' defense expenditure.) *See* Spangenberg Report, *supra* at 84–85.

[59] Minorities were disproportionately represented in the criminal justice systems of the sample counties. Therefore, to enhance public and client confidence, trust, and respect, efforts should be made to achieve better diversity among the staff of the public defenders' offices, particularly attorneys. Public defenders also should ensure that their staffs perform their duties without biases based upon race, ethnicity, gender, class, or disability. This can be encouraged by, for example, paying attention to candidates' attitudes toward diversity in the recruitment and selection of employees; providing diversity training for employees; establishing a clear anti-bias policy and disciplining individuals who violate it; and creating a fair and impartial mechanism to report and investigate claims of bias. *See* Ruffner Testimony, *supra* at 25–27.

[60] An arrangement that mutually benefits law students and public defender offices is an internship program, by which law students gain invaluable lessons in applying the law they have learned in the classroom and public defenders receive much-needed assistance in research and investigation. This will enhance their ability to recruit new attorneys and increase the pool of applicants.

6 RACIAL AND ETHNIC DISPARITIES IN THE IMPOSITION OF THE DEATH PENALTY

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INTRODUCTION

Few issues have engendered more passionate discourse than the role of the death penalty in contemporary American society. Often central to the debate is the concern for equal justice for those charged with capital murder. Pennsylvania has the nation's fourth largest death row,[1] with 245 inmates currently under sentence of death in the Commonwealth. Although Pennsylvania's minority population is 11 percent, two-thirds (68 percent) of the inmates on death row are minorities.[2] Pennsylvania is second only to Louisiana in the percentage of African Americans on death row.[3] While our courts and Legislature are committed in principle to the identification and elimination of discrimination in the administration of the death penalty, little has been done to facilitate a comprehensive study of capital charging and sentencing in Pennsylvania to determine what role, if any, race and ethnicity have played in capital punishment.

Pennsylvania has the nation's fourth largest death row, with 245 inmates currently under sentence of death in the Commonwealth. Although Pennsylvania's minority population is 11 percent, two-thirds…of the inmates on death row are minorities. Pennsylvania is second only to Louisiana in the percentage of African Americans on death row.

—U.S Bureau of Criminal Justice Statistics and Pennsylvania Department of Corrections

The Committee's goal was to provide a comprehensive framework to identify and, if found, to recommend ways to eliminate racial and ethnic discrimination in the imposition of the death penalty in Pennsylvania. The Committee was guided by the principle of equal justice in furthering this Commonwealth's long-standing commitment to ensure equal treatment under the law, and the awareness of a growing body of literature that links the enormous financial costs of the death penalty to the failure to afford fair trials to capital defendants.[4] Ensuring equal treatment is a principal component of a fair trial.

At the inception of its study of the death penalty, the Committee adopted three working principles. First, issues of racial and ethnic bias cannot be divorced from the issue of poverty. Unless the poor, among whom minority communities are overrepresented, are provided adequate legal representation, including ample funds for experts and investigators, there cannot be a lasting

solution to the issue of racial and ethnic bias in the capital justice system. Thus, the Committee also looked at such issues as adequacy of court-appointed counsel for the poor and availability of essential resources for their defense. Second, it was decided that the Committee's recommendations should be supported, to the extent possible, by empirical data. To this end, the Committee endeavored to collect existing statistical research on the death penalty and, where resources allowed, to undertake additional studies. Third, the Committee concluded that responsibility for ensuring equal justice could not be relegated to a single branch of government. The judicial, legislative, and executive branches should all assume a role in ensuring equal treatment for those charged with a capital offense.

The Committee reviewed existing studies on the imposition of the death penalty in Pennsylvania and elsewhere, conducted surveys of county public defender offices and court administrators, reviewed testimony from its public hearings, and used the findings from its study on the indigent defense system.

Based on existing data and studies, the Committee concluded that there are strong indications that Pennsylvania's capital justice system does not operate in an evenhanded manner.[5] At least one county, Philadelphia, has been extensively studied. After controlling for the seriousness of the offense and other non-racial factors, researchers there found that African American defendants were sentenced to death at a significantly higher rate than similarly situated non-African Americans; researchers further concluded that one third of African Americans on death row in Philadelphia County would have received life sentences if they were not African American. Race was also shown to be a major factor in capital jury selection, with the prosecution striking African Americans from the jury twice as often as non-African Americans, and with the defense doing just the opposite. Also, both sides routinely, but to a lesser degree, discriminate on the basis of gender, with the prosecution favoring men and the defense favoring women. The substantial racial impact found in Philadelphia capital cases argues strongly in favor of a large-scale, state-sponsored and state-funded research effort. Not until the Commonwealth undertakes a comprehensive data collection effort and subjects the data to rigorous analysis, can the question of the role of race and ethnicity in capital cases be fully addressed.

Researchers…concluded that one third of African Americans on death row in Philadelphia County would have received life sentences if they were not African American.

—Professors David C. Baldus and George Woodworth

The Committee also studied delivery of public defender and court-appointed counsel services to the indigent. To this end, the Committee retained The Spangenberg Group, nationally recognized experts in this field, to review the adequacy of public defender services in Pennsylvania. Using the American Bar Association standards[6] as a benchmark, the Committee concluded that delivery of these services is inadequate throughout the Commonwealth. With the exception of Philadelphia, there was a lack of effective standards for appointment of capital counsel.[7] No training specific to capital representation is required for attorneys by Pennsylvania counties. No county routinely appoints two lawyers on capital cases. No county effectively monitors performance of capital counsel. There is no statewide Capital Defender or Capital Case Resource Center. All Pennsylvania counties surveyed failed to compensate attorneys adequately and provide sufficient funds for experts and investigators.[8] Notably, however, Philadelphia County recently increased funding for court-appointed counsel fees.

The Work Group selected by the Committee to analyze this important issue was composed of criminal justice experts of many outlooks and professions, who were selected on the basis of their expertise, and without regard to their views on the death penalty. Its racially and gender-diverse membership was well-balanced and included current and former prosecutors and criminal defense lawyers, a judge, a police officer and an investigator.

The ability to prove discrimination where it exists is beyond the resources of most capital defendants and an avenue for redress in the courts remains elusive, particularly because federal constitutional doctrine fails to provide an effective remedy for racial and ethnic discrimination. Legislative initiatives that would allow the showing of a pattern and practice of disparate treatment to stand as proof of discrimination have failed. Therefore, to provide a means of proving discrimination, the Committee recommends passage of a Racial Justice Act or comparable legislation, as other states have done, which would permit a *prima facie* equal protection violation to be established by a statistical showing of disparate treatment.

THE NECESSITY FOR COMPREHENSIVE DATA COLLECTION

The creation and maintenance of a detailed database encompassing all factors which could influence capital decision-making is central to the development of any comprehensive plan to identify possible racial and gender discrimination in capital charging and sentencing. Currently, no governmental authority is systematically collecting data on capital charging and sentencing in Pennsylvania. Prior to 1998, the Supreme Court of Pennsylvania required judges to submit murder review forms for all cases resulting in a first-degree conviction to facilitate its statutorily mandated proportionality review.[9] The completed forms were submitted to the AOPC, along with supporting materials such as the verdict slip and trial court opinion. The AOPC then generated a computerized database for use in its internal proportionality reports and made the data available to litigants and other interested parties. However, in 1998, the Legislature repealed proportionality review[10] and the Court subsequently rescinded its order to submit the review forms.

Other state agencies involved in data collection do not collect sufficient information to permit a detailed study of capital sentencing. For example, the Pennsylvania Commission on Sentencing collects information on murder cases, if reported, but as first- and second-degree murder involves the imposition of mandatory sentences, the Commission has not enforced submission of the forms. Even if it were complete, this data would reflect only the disposition of the case and the age, gender, race, and prior record of the defendant and would not permit exhaustive analysis.

The Department of Corrections is a potential source for case lists and some background data on defendants but is otherwise of limited utility. Source materials are inconsistent; there is often no indication of how the conviction was obtained (plea, jury, non-jury) and procedural facts such as aggravating and mitigating factors presented and found cannot be accurately discerned.

The Committee quickly rejected a recommendation that the Supreme Court of Pennsylvania simply reinstate the order requiring submission of murder review forms, notwithstanding the repeal of proportionality review. It concluded that the review form, while sufficient to permit simple qualitative comparisons of cases with common aggravating and mitigating circumstances, is inadequate to allow an analysis of race effects. The Committee has two principal concerns with respect to reinstating the review forms. First, they are limited to first-degree convictions and thus address a very narrow universe of cases, and preclude review of

prosecutorial decisions to plead death-eligible cases to lesser degrees of murder. Second, they fail to reflect which mitigating circumstances were found, and the paucity of non-statutory factors collected (i.e., socioeconomic status of the defendant and victim and the brutality of the murder), factors which in theory might explain any observed disparities, severely undermines their utility.

The Committee concluded that any meaningful effort to assess the evenhandedness of a capital charging and sentencing system will require a comprehensive data collection effort, one administered under the auspices and authority of the Supreme Court of Pennsylvania. Large-scale data collection, dependent on the cooperation of the courts of the various counties, is beyond the ability of individuals to collect and maintain indefinitely. To this end, the Committee reviewed systems used by other states, particularly New York and New Jersey, both of which have ongoing data collection programs for capital cases.

New Jersey is a model state. The New Jersey Administrative Office of the Courts (AOC) has been collecting data on capital cases since 1989. It employs a comprehensive data collection instrument, with mandatory reporting requirements. A master appointed by the court oversees the process and resolves factual disputes between parties. The AOC dedicates staff to ensure judicial compliance and maintain the database.[11]

The Committee recommends that the Supreme Court of Pennsylvania retain a principal investigator to develop a research design and a plan to implement data collection, or alternatively, appoint a master to oversee the process, as in New Jersey. The research plan should include cost estimates and staffing requirements, design goals, a strategy for developing master case lists, case screening and coding protocols, finalization of a data collection instrument, and data entry and checking routines. The researcher should also develop a plan to analyze the data. Over the years, New Jersey has experimented with a number of alternative measures to test the impact of race and gender on capital decision-making. Several opinions of the New Jersey Supreme Court, as well as masters' and experts' reports, address the pros and cons of these various measures.[12] Ultimately, the decision as to which measures prove most enlightening will rest with the Supreme Court of Pennsylvania but the researcher should have the responsibility of presenting a full panoply of options to the Court.

A number of data collection instruments in use around the country were assembled and reviewed. The research resulted in a proposed model instrument (modified from the Philadelphia research), found at Appendix Vol. I.

EMPIRICAL RESEARCH IN PENNSYLVANIA AND ELSEWHERE

Three substantial studies have been conducted on the impact of race in capital jury selection, sentencing, and charging in Pennsylvania. An additional nationwide study, including a Pennsylvania component, addressed, among other topics, the adequacy of capital counsel as measured principally by reversal rates for ineffectiveness of counsel. Professor David C. Baldus of the University of Iowa Law School and his colleague, George Woodworth, professor of statistics, also of the University of Iowa, conducted two of these studies. Professor Baldus is the former Special Master for Proportionality Review in New Jersey and is widely recognized as one of the nation's leading death penalty researchers. The first Baldus study was an analysis of capital charging and sentencing in Philadelphia, a county responsible for more than half of Pennsylvania's death row.[13] The second was an analysis of jury selection in capital prosecutions, again in Philadelphia.[14] Professor Baldus summarized his research in public hearing testimony before the Committee on December 6, 2000. The third major study was conducted by Dr. William Bowers of Northeastern University as part of the 14-state Capital Jury Project, which he directs. The Pennsylvania portion of the research was conducted largely by his colleague, Dr. Wanda Foglia of Rowan University, who prepared an analysis for this Committee.[15]

In his testimony before the Committee, Baldus summarized four principal findings from his research in Philadelphia. First, in Philadelphia capital trials, African American defendants are at a higher risk of receiving the death sentence than are similarly situated non-African American defendants. Second, in the selection of capital juries, Philadelphia prosecutors and defense counsel systematically exclude venire members through the use of peremptory challenges on the basis of their race and gender, in spite of federal law prohibiting such discrimination. Third, this jury selection strategy skews jury sentencing decisions towards increasing the frequency of death sentences. It also enhances the level of race discrimination against African American defendants. Fourth, this skewing effect is principally the product of high prosecutorial strike rates against African American venire members that are not off-set or counteracted by high defense counsel strike rates against non-African American members.[16]

In the charging and sentencing study, Baldus first identified all of the death-eligible cases processed in Philadelphia between 1983 and 1994. In a large sample of these cases, he and his research team collected detailed information covering hundreds of variables, including the procedural facts of the case, aggravating and mitigating circumstances (both statutory and non-statutory), characteristics of the murder (the level of violence, wounds inflicted, weapons used), and a host of other factors which may have influenced the decision-makers. They also collected information on the race, gender, and socioeconomic status of the defendants and victims. With this data, Baldus was able to take into account the differing levels of criminal culpability for all the defendants in the study to see if the race effects could be explained by the gravity of the offense.

Baldus used standard statistical methodology in his analysis, the same methodology commonly used in employment discrimination cases, including logistic regression analysis that controls for a multitude of variables.[17]

Professor Baldus found substantial race-of-defendant effects in Philadelphia County. He likened the impact of being African American to being saddled with an extra aggravating factor, that is, on average, being African American increased the chance of a defendant receiving a death sentence to the same degree that the presence of the aggravating circumstance of "torture" or "grave risk of death" increased the chance of a non-African American getting a death sentence. Baldus concluded that one-third of the African Americans on death row in Philadelphia would have received life sentences were they not African American. When looking at death sentences returned for failure of the defendant to prove any mitigating circumstances, he also found strong race-of-victim effects. When the victim was white, juries were significantly more likely to find no mitigation than when the victim was not white.[18]

The second area of discrimination in capital trials in Philadelphia examined by Professor Baldus was that of jury selection; specifically, the use of peremptory challenges, the right conferred by rule or statute to strike a limited number of potential jurors for any non-racial, non-gender reason. In his study of jury selection in 317 capital trials, Professor Baldus found race to be an overwhelming factor. On average, prosecutors struck 51 percent of the African American venire members but only 26 percent of the non-African American venire members, a 25-percentage-point disparity. The study showed that defense counsel used their peremptory challenges in the opposite manner, favoring African American venire persons over non-African American venire persons in approximately the same proportions. The race effects persisted after controlling for legitimate juror characteristics such as occupation, education, neighborhood, and responses in *voir dire*, in a logistic regression

procedure. Specifically for prosecution strikes, the regression coefficient for African American venire persons was 1.5 with a related odds multiplier of 4.5 (significant at .0001).[19] For defense strikes, the inverse was true, a coefficient of -1.6 with an odds multiplier of .20 (significant at .0001).

Baldus also found that discrimination in the use of peremptory challenges had an impact on the verdicts of juries, one that was ultimately shown to have a discriminatory effect on outcomes. He first documented a distinct correlation between prosecutorial and defense counsel strike strategies and the final racial composition of juries. Then he determined that a relationship existed between the racial composition of juries and the frequency with which death sentences were imposed. Lastly, and most significantly, he found a strong association between the racial composition of the jury and the level of race-of-defendant discrimination in jury penalty trial sentencing. When the jury is predominately non-African American (eight or more non-African American jurors), the race of defendant disparity in death sentencing is twice as high—16 percentage points (.37 v. .21) versus eight percentage points (.26 v. .18)—as it is when the jury has a greater representation of African American (five or more African American jurors).

While defense jury selection practices have some countervailing effect, overall the prosecution is more successful in skewing the composition of juries, and its efforts have a substantial impact on the level of discrimination against African American death penalty trial defendants. Specifically, Baldus found that when the prosecution made a greater-than-average effort to strike African American venire members, the race-of-defendant disparity in death sentencing outcomes was enormous, a 24-percentage-point (.39 v. .15) higher death sentencing rate in the African American defendant cases when compared to the cases in which the effort to strike African American venire members was below average, a 4-percentage-point (.27 v. .31) lower death sentencing rate in the African American defendant cases.

The Bowers/Foglia research took a different, though complementary, approach. The Capital Jury Project, directed by Dr. Bowers with funding from the National Science Foundation, obtained data through detailed interviews with capital jurors. The Pennsylvania component of this 14-state study entailed interviews with 74 jurors reflecting 27 capital trials. Interviewers employed a common structured interview instrument, modified slightly to reflect factors peculiar to Pennsylvania. Jurors were asked a wide variety of open-ended and close-ended questions related to juror decision-making, including questions about the case, the parties (including the judge and lawyers), guilt and sentencing deliberations,

juror attitudes, and juror background. On average, each interview lasted three-and-one-half hours.

Because of the smaller sample size, Dr. Foglia could not completely replicate the analysis conducted in the nationwide study, as the various subgroups would produce too small a sample for statistically meaningful results. Using a similar approach, however, she confirmed in the Pennsylvania sample one of Bower's principal findings, which he styled the "white male dominance effect". This approach looks at the impact of overrepresentation of white males on sentence outcomes. Foglia reported a significantly higher death sentencing rate by Pennsylvania juries with six or more white males (100 percent v. 47 percent, significant at the .01 level).

Another area examined by the study was the tendency for premature decision-making among jurors. Jurors were asked whether they had decided on an appropriate punishment at four stages between the guilt deliberation and final vote. As in the principal study, Dr. Foglia found jurors were more likely to prematurely determine death as the appropriate punishment if the defendant was not white than if white (37 percent v. 8 percent, significant at .046). An alternative racial dichotomy, African American vs. non-African American, produced similar results which were nearly as significant (38 percent v. 16 percent, significant at .061).

In the national data, Bowers found racial differences in three areas related to juror perceptions of the case: lingering doubt about the defendant's guilt; impressions of the defendant's remorsefulness; and perceptions of the defendant's likelihood of committing criminal acts of violence in the future, or "future dangerousness." Although also limited by a small sample, Foglia found comparable disparities in the Pennsylvania sample. While most jurors did not harbor doubt about the guilt of the accused, among those jurors who reported some lingering questions after conviction, this doubt was much more likely to be a factor in sentencing if the defendant was white. Only for white defendants, did a substantial minority consider lingering doubt "very important" or "fairly important," meaning that despite finding them guilty these jurors still feared they might be executing an innocent defendant. If the defendant was white, 16.7 percent of the jurors characterized their lingering doubt as "very important" and 16.7 percent as "fairly important" compared to 1.9 percent and 11.5 percent respectively if the defendant was African American.

Bowers and Foglia also looked at perceptions of remorse and its impact as potential mitigation. As in the national study, African American jurors were more likely to find the defendant was remorseful. For example, of the African American jurors, 13 percent were sure the defendant was sorry and 13.3 percent thought the defendant was sorry. None of the white jurors reported being sure of the defendant's remorse and only 1.9 percent thought the defendant was sorry.

Another important death penalty study was conducted by Professor James S. Liebman of Columbia University School of Law, as reported in Liebman, Fagin, and West, *A Broken System: Error Rates in Capital Cases*, 1973–1995 (June 12, 2000) and a follow-up report released on February 21, 2002.[20] Between 1973 and 1995, approximately 5,760 death sentences were imposed in the United States. Liebman tracked the evolution of these cases in the appellate process, tallying reversal rates at each of three stages of judicial inspection, direct appeal, state post-conviction and federal habeas corpus. Of the 5,760 death sentences imposed in the study period, 4,578 (79 percent) were finally reviewed on direct appeal by a state high court. Of those, 41 percent were reversed because of "serious error," which Liebman defined as "error that substantially undermines the reliability of the guilt finding or death sentence imposed at trial." An additional 10 percent were reversed for serious error upon further state review in the post-conviction process. Finally, in the third stage of review, federal habeas corpus, the reversal rate was 40 percent. The combined error rate for all three stages was 68 percent.

Liebman also looked at the causes for the reversals. Of the serious error reversal, "egregiously incompetent defense lawyering," accounted for 37 percent of the state post-conviction reversals. Liebman also looked at the results of post-reversal proceedings as a measure of how serious the errors were. In other words, did they in fact undermine the truth-finding function? In his state post-conviction study, 82 percent of the capital reversals resulted on retrial with a sentence less than death (including 7 percent that resulted in acquittal on the capital offense). Liebman flatly concluded that, "High rates of error, and the time consequently needed to filter out all that error, frustrate the goals of the death penalty system."

In Pennsylvania, relatively few cases have undergone all three stages of review. Liebman reported, however, that as of 1995, the reversal rate on direct appeal in Pennsylvania was 29 percent.[21]

DELIVERY OF COUNSEL SERVICES TO INDIGENT DEFENDANTS

Capital defense is now a highly specialized field requiring practitioners to successfully negotiate minefield upon minefield of exacting and arcane death penalty law. Any misstep along the way can literally mean death for the client.

Parties on all sides of the death penalty debate have recognized the appointment of competent counsel in capital cases as an essential procedural safeguard to the fair and just administration of the death penalty.[22] The days of expecting a general practitioner to provide the standard of care required in a capital case are long gone. Capital defense is now a highly specialized field requiring practitioners to successfully negotiate minefield upon minefield of exacting and arcane death penalty law. Any misstep along the way can literally mean death for the client. The importance of ensuring good representation is magnified by the recent limitations Congress placed on federal review of state court convictions. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996,[23] which dramatically limited the scope and standard of review for federal courts hearing writs of habeas corpus. The Act made it more difficult for state prisoners to appeal district court denials of habeas relief, virtually eliminated second or successive federal petitions challenging a state criminal verdict, requires the federal courts to employ a standard of extreme deference to trial court findings, both factual and legal, and imposed a strict one-year statute of limitations on the filing of federal habeas corpus. The Act makes it much harder for the federal courts to remedy instances of ineffectiveness of capital counsel, reinforcing the necessity to provide adequate counsel in the first instance.

Capital trials require hundreds of hours of preparation. It is incumbent upon the courts to ensure that all persons charged with a capital offense receive qualified counsel, comprised of attorneys who are highly trained and skilled in capital representation. This is important, not only for the obvious goal of protecting the innocent from wrongful conviction, but also to carry

out the responsibility to present the prosecutors and juries with all relevant mitigation. Proper mitigation preparation represents an enormous commitment of time, energy, and resources. Scores of witnesses (i.e., family, friends, work colleagues, religious elders) must be interviewed, records located and obtained (i.e., school, medical, military) and experts consulted (typically, psychiatrists or other mental health experts). Investigators and mitigation specialists should be retained and, in many cases, experts as well.

Implementation of statewide minimum qualifications for counsel appointed to represent indigent capital defendants will increase the likelihood of adequate representation, reduce the incidence of wrongful convictions and reversals for ineffectivess of counsel, restore confidence in the outcomes of capital trials in the Commonwealth, and most importantly, help reduce the role that race plays in the imposition of the death penalty.

The Committee believed that two important criteria had to be evaluated in order to assure the appointment of well-qualified counsel to represent indigent capital defendants. The first step was to research minimum standards for capital counsel as established by the legal community, primarily the American Bar Association (ABA) and National Legal Aid & Defender Association (NLADA).[24] The second step was to survey delivery of indigent legal services to assess how well minimum standards were being met.

The ABA and NLADA standards largely parallel each other. They are detailed and comprehensive, but at the same time they are easily adapted across jurisdictions. Among the key provisions, these guidelines require appointment of two lawyers in every capital case, recommend use of an appointment authority insulated from the influence of court administration, contain specific minimum qualifications for lead and assistant counsel for each procedural stage of the case, forbid acceptance of appointments if counsel's workload is already excessive, require performance monitoring and procedures for removal from rosters if performance is inadequate, recommend provision of investigative, expert, and other necessary services, mandate that counsel be adequately compensated, require that lawyers undergo initial training to be eligible for capital appointments and periodic attendance at death penalty-specific legal education thereafter to remain eligible, as well as a long list of specific responsibilities for the actual preparation of the case.

The Spangenberg Group found that of the counties surveyed, only one met ABA standards for public defenders. Virtually every other county surveyed showed serious deficiencies in its ability to deliver services to capital defendants.

To assess the delivery of counsel services, the Committee retained The Spangenberg Group, nationally recognized experts in this field, to review the adequacy of public defender services in Pennsylvania. A survey was also conducted of Pennsylvania counties to develop data on court-appointed counsel services. This research was not limited to capital cases but included inquiries specific to capital representation. The Spangenberg Group concluded that "many counties in Pennsylvania are not meeting their constitutional, ethical, and professional obligation to provide fair and equal treatment to poor people accused of crime,"[25] and that funding inadequacies in the delivery of counsel services disproportionately affects minorities:

> "In Pennsylvania, racial minority groups are disproportionately represented in the criminal justice system and the quality of indigent defense impacts mostly on the minority communities in the State. The quality of representation has a direct correlation to the funding of the system. In turn, the quality of indigent representation has a disparate impact on the most vulnerable populations in the community, such as minorities and women."[26]

Specifically, the Spangenberg Group found that of the counties surveyed, only one[27] met ABA standards for public defenders. Virtually every other county surveyed showed serious deficiencies in its ability to deliver services to capital defendants. The following are a few examples of the deficiencies that were found: There are no specific guidelines for appointment of counsel, resulting in a lack of quality control over delivery of indigent services. Judicial administrators operate under systems that place a premium on dispositions rather than quality representation. Fee structures are inadequate and in some instances, actually discourage effective representation by building in financial disincentives to devote the necessary hours of preparation. The systems employed in most counties favor inexperienced and less-qualified lawyers, and discourage specialization in criminal defense. They uniformly fail to provide adequate funding for support services such as investigators and social workers.[28]

In the court-appointed systems, only one county has specific qualification requirements.[29] All counties, including Philadelphia, fell short in virtually every other area. Two lawyers are not routinely appointed. When a second attorney is requested and appointed it is often at a substantially reduced compensation rate. No county has formulated a comprehensive legal representation plan independent of court administration. Workload and performance are not monitored. Support services, such as investigators and experts, are intermittent and underfunded. No capital-specific training is required, either initially or continuing. Overall, compensation is insufficient.

Based on this analysis, the Committee concluded that delivery of capital counsel services for the indigent in Pennsylvania is inadequate. No county is providing representation that meets minimal ABA standards. To increase the likelihood that all capital defendants receive adequate representation, the Supreme Court of Pennsylvania should adopt minimum qualifications for all court-appointed counsel in capital cases in accordance with those recommended by the ABA.[30]

THE NEED FOR A RACIAL JUSTICE ACT

Despite compelling evidence of systemic race-of-defendant and race-of-victim discrimination in many jurisdictions, not a single capital defendant has been granted relief on equal protection grounds. Under federal constitutional doctrine, as defined principally by the United States Supreme Court's opinion in *McCleskey v. Kemp*,[31] traditional statistically-based evidentiary paths to prove discrimination have been closed. The McCleskey court, however, suggested that legislative action was required if such evidence was to be considered. If a capital defendant is in fact a victim of racial bias, he or she should be permitted to raise an inference of discrimination by showing a pattern and practice of disparate treatment. A Racial Justice Act or comparable legislation permitting such evidence would fulfill this goal.

In *McCleskey v. Kemp,* the United States Supreme Court addressed the claim that Georgia's death penalty was used in a racially discriminatory manner and that McCleskey, an African American man convicted of killing a white police officer, was a victim of this discrimination. The evidence illustrated the disparity in the imposition of death sentences in Georgia based on the murder victim's race and, to a lesser extent, the defendant's race.

After considering the statistical information supporting these allegations,[32] the Court narrowly (5-4) held that systemic evidence of racial disparity in the imposition of the death penalty, however compelling, failed to prove that McCleskey himself was a victim of discrimination. In rejecting McCleskey's claim, the Court suggested that, in the future, reliance on this type of evidence would require legislative authorization.[33]

In the aftermath of *McCleskey*, Congress considered allowing statistical proof to establish presumption of discrimination in capital sentencing cases. The Racial Justice Act, which was first proposed in 1988, see H.R. 4442, 100th Cong. (1988), was approved by the House of Representatives in both 1990 and 1994, but was ultimately felled by Senate opposition. The Act would have allowed a court to consider legitimate statistical data as evidence of racial bias in the imposition of the death sentence within a particular jurisdiction. Upon a demonstration of such bias by the defense, the burden would have shifted to the prosecution to demonstrate that race was not a significant factor in seeking the death sentence in the specific case. [34]

In 1998, Kentucky became the first jurisdiction to enact a Racial Justice Act. It states: "No person shall be subject to or given a sentence of death that was sought on the basis of race…A finding that race was the basis of the decision to seek a death sentence may be established if the court finds that race was a significant factor in decisions to seek the sentence of death in the Commonwealth [Kentucky] at the time the death sentence was sought."[35] The Act goes on to state that statistical and other types of evidence may be presented to prove that race was a factor in the decision to seek death. The passage of the Racial Justice Act in Kentucky revived legislative interest elsewhere. Legislators in Georgia,[36] North Carolina,[37] and Illinois[38] have recently introduced forms of a Racial Justice Act, although to date, only Kentucky has enacted one.

Despite the fact that a growing body of evidence reveals systemic discrimination in many jurisdictions, not a single capital defendant has been granted relief on equal protection grounds. A comprehensive solution to discrimination in the imposition of the death penalty requires that litigants have some avenue to prove their claims. The Committee recommends that the Legislature enact a Racial Justice Act to permit proof of an equal protection violation by showing a pattern and practice of discrimination.

STANDARDS FOR THE EXERCISE OF PROSECUTORIAL DISCRETION

No county prosecutor's office in Pennsylvania employs public guidelines defining standards and procedures for seeking the death penalty. Attempts to learn about the internal procedures were rebuffed by the Pennsylvania District Attorneys Association, which advised member counties not to cooperate with the Committee on this point.[39] Prosecutors are crucial decision-makers in the administration of the death penalty, and any comprehensive plan to identify and remedy discrimination in charging decisions requires their open and willing participation.

The Committee recommends the adoption of prosecutorial standards and procedures for seeking the death penalty. One such model can be found in the federal jurisdiction. The Department of Justice (DOJ) procedures for the authorization of the death penalty are set forth in Section 9-10.000 of the United States Attorney's Manual. These procedures were promulgated in 1995 and revised in 2001. Under the procedures, the death penalty may not be sought without prior written authorization of the Attorney General. A detailed death penalty memo must be prepared and sent to DOJ by the regional offices in every death-eligible case. The U.S. Attorney must give notice and an opportunity to be heard to defense counsel before deciding to request death penalty authorization. Within the Department of Justice, a committee considers each death-eligible case and recommends to the Attorney General whether the death penalty should be sought. The committee is required to "consider all information presented to it, including any evidence of racial bias against the defendant or evidence that the Department has engaged in a pattern or practice of racial discrimination in the administration of the Federal death penalty."[40]

The manual sets forth specific criteria to be considered and explicitly bars consideration of race and ethnic origin in the decision.

> "In determining whether or not the Government should seek the death penalty, the United States Attorney, the Attorney General's Committee, and the Attorney General must determine whether the statutory aggravating factors applicable to the offense and any non-statutory aggravating factors sufficiently outweigh the mitigating factors applicable to the offense to justify a sentence of death, or, in the absence of any mitigating factors, whether the aggravating factors themselves are sufficient to justify a sentence of death. To qualify for

> consideration in this analysis, an aggravating factor must be provable by admissible evidence beyond a reasonable doubt. Because there may be little or no evidence of mitigating factors available for consideration at the time of this determination, any mitigating factor reasonably raised by the evidence should be deemed established and weighed against the provable aggravating factors. The analysis employed in weighing the aggravating and mitigating factors that are found to exist should be qualitative, not quantitative; a sufficiently strong aggravating factor may outweigh several mitigating factors, and a sufficiently strong mitigating factor may outweigh several aggravating factors. Weak aggravating or mitigating factors may be accorded little or no weight. Finally, there must be substantial admissible and reliable evidence of the aggravating factors."
>
> "The authorization process is designed to promote consistency and fairness. *As is the case in all other actions taken in the course of Federal prosecutions, bias for or against an individual based upon characteristics such as race or ethnic origin may play no role in the decision whether to seek the death penalty."*

Department Of Justice Manual, Volume 7, 9-10.080, *Federal Prosecutions In Which The Death Penalty May Be Sought* (emphasis supplied).

A comprehensive plan for the elimination of discrimination requires that county jurisdictions adopt procedures designed to eliminate the risk of unequal treatment in the capital selection process.

CONCLUSION

Empirical studies conducted in Pennsylvania to date demonstrate that, at least in some counties, race plays a major, if not overwhelming, role in the imposition of the death penalty. In order to more effectively identify and eliminate discrimination in capital charging and sentencing, the Commonwealth should commit to a large-scale, ongoing data collection effort that is sufficiently detailed to account for aggravation and mitigation, both statutory and non-statutory, such as the one currently administered by the New Jersey Supreme Court.

There is a significant failure in the delivery of capital counsel services to indigent capital defendants in Pennsylvania, one that disproportionately impacts minority communities. The Commonwealth should adopt minimum qualifications for all court-appointed counsel in capital cases. Providing adequate capital counsel is an indispensable step to preventing discrimination. Likewise, ensuring that qualified and well-trained counsel are provided the necessary resources, such as funds for experts and investigators, and are themselves adequately compensated, is essential to the maintenance of an even-handed capital system.

Local district attorneys should adopt and publicize clear, well-defined standards for seeking the death penalty and ensure that defense counsel has an opportunity to argue and present evidence as to why the death penalty should not be sought.

Finally, the Legislature should enact a Racial Justice Act to permit proof of an equal protection violation by showing a pattern and practice of discrimination.

RECOMMENDATIONS

TO THE SUPREME COURT OF PENNSYLVANIA

The Committee recommends that the Court:

1. Pursuant to its inherent power to issue temporary stays of execution, declare a moratorium on the imposition of the death penalty in any case where the defendant's direct appeal has resulted in affirmation by the Supreme Court of Pennsylvania, pending the completion of a study investigating the impact of the race of the defendant and of the victim in prosecutorial decisions to seek the death penalty and in death sentencing outcomes. The moratorium should continue until policies and procedures intended to ensure that the death penalty is administered fairly and impartially are implemented.
2. Empanel a special commission to study the impact of the race of the defendant and of the victim in prosecutorial decisions to seek the death penalty and in death sentencing outcomes.
3. Direct the AOPC, or alternatively appoint a master, to undertake a comprehensive data collection effort covering all stages of capital litigation, including responsibility for completing the data collection instruments and maintaining the database and all supporting documentation. The Court should direct the AOPC, or master, to retain a principal investigator to review data collection efforts undertaken in other states and develop a research design and a plan to implement data collection. The cases to be reviewed should include those in which the death penalty was sought or could have been sought in all cases where the defendant was held for court on first-degree murder or murder generally.
4. Amend Rule 801 (former Rule 352) to require that a copy of the prosecutor's notice of intention to seek death be filed with the AOPC as well as the trial court to facilitate tracking of death-noticed cases.
5. Amend Rule 632 (former Rule 1107) to require retention of the jury questionnaire utilized at trial, which indicates the race and gender of the jurors, for the duration of the defendant's incarceration.
6. Mandate statewide standards for an independent appointment process of selecting capital counsel for all stages of the prosecution, including trial, appeal, and post-conviction hearings. The standards, at a minimum, should incorporate those recommended by the American Bar Association in its *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*.

7. Require that all capital counsel successfully complete, at a minimum, an annual continuing legal educational component specifically focusing on capital representation.
8. Promulgate reasonable minimum compensation standards for capital counsel throughout Pennsylvania and ensure that sufficient resources for experts and investigators are made available to counsel.
9. Require trial courts during *voir dire* in capital cases to explore fully, when requested by either party, views about race held by prospective jurors.
10. Promulgate a rule that allows for reasonable latitude by defense counsel and the Commonwealth to explore all potential sources of racial bias in *voir dire* of prospective capital jurors.
11. Require trial courts to charge capital juries, when requested by either party, that they may not consider the race of the defendant or victim in determining the appropriate sentence for the defendant.
12. Promulgate a rule that should a *prima facie* case of discrimination in the use of peremptory challenges be established, reasons invoked for the exclusion of the juror that do not substantially relate to his or her qualifications, fitness, or bias shall be viewed as presumptively pretextual.
13. Reduce the number of peremptory strikes in capital cases.
14. Promulgate a jury instruction stating "life means life with no possibility of parole" and require that it be given in all capital cases.

TO THE LEGISLATURE

The Committee recommends that the Legislature:

1. Enact a Racial Justice Act, like that of other states, that allows for the admission of evidence of a pattern and practice of disparate treatment in both the prosecutorial decision to seek the death penalty and in sentencing outcomes.
2. Enact a proportionality provision requiring the Supreme Court to review death sentences for proportionality.
3. Create and adequately fund a statewide independent Capital Resource Center, or its equivalent, to assist in, and where local resources are inadequate, undertake the representation of, capitally charged defendants and those currently under sentence of death. The assistance and/or representation should extend from arrest through trial and, if the defendant is sentenced to death, through the state and federal appeal and post-conviction process. The Capital Resource Center also should be charged with the responsibility of maintaining court

appointment lists of qualified capital counsel and of overseeing ongoing training programs for capital counsel.

4. Appropriate adequate funds to the Supreme Court for the administration of a comprehensive data collection effort covering all stages of capital litigation.
5. Enact legislation declaring a moratorium on the death penalty until such time as policies and procedures are implemented to ensure that the death penalty is being administered fairly and impartially throughout the Commonwealth.

TO THE ATTORNEY GENERAL AND DISTRICT ATTORNEYS

The Committee recommends that:

1. District attorney's offices adopt written standards and procedures for making decisions about whether to seek the death penalty.
2. The Attorney General empanel a statewide committee of county district attorneys to review each decision by a district attorney to seek the death penalty with the goal of ensuring geographic consistency in the application of the death penalty. The committee's review should commence as soon as possible after each filing of a notice of intention to seek the death penalty, and the result of its review should not be binding. The review committee should include, at a minimum, the Attorney General, the district attorneys of Philadelphia and Allegheny counties and the current president of the Pennsylvania District Attorneys Association, but otherwise be geographically representative of the Commonwealth.

TO THE GOVERNOR OF PENNSYLVANIA

The Committee recommends that the Governor of Pennsylvania:

1. Pursuant to his constitutional authority to grant temporary reprieves, declare a moratorium on the imposition of the death penalty in any case where the defendant's direct appeal has resulted in affirmation by the Supreme Court of Pennsylvania, pending the completion of a study investigating the impact of the race of the defendant, and of the victim, in prosecutorial decisions to seek the death penalty and in death sentencing outcomes. The moratorium should continue until policies and procedures intended to ensure that the death penalty is administered fairly and impartially are implemented.
2. Empanel a special commission to study the impact of the race of the defendant and the victim in prosecutorial decisions to seek the death penalty and in death sentencing outcomes.

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Jeremy P. White, *Establishing a Capital Defense Unit in Virginia: A Proposal To Increase The Quality of Representation For Indigent Capital Defendants,* 13 Cap. Def. J. 323 (2001).

Welsh White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Car*e, 1993 University of Illinois Law Review 323 (1993).

ENDNOTES

[1] Only California, Florida and Texas have more inmates on death row. See U.S. Department of Justice, Bureau of Criminal Justice Statistics, Capital Punishment 2000 (December 2001 NCJ 190598).

[2] As of March, 2002, there were 78 whites, 150 African Americans, 15 Latinos and two Asian Americans on death row. Execution List, Pennsylvania Department of Corrections (Updated 3/1/2002).

[3] *See* U.S. Department of Justice, Bureau of Criminal Justice Statistics, Capital Punishment 2000 (December 2001 NCJ 190598).

[4] *See* e.g. Liebman, Fagin, and West, *A Broken System: Error Rates in Capital Cases*, 1973–1995 (2002), where it was reported that of all death cases that had completed the appellate process the reversal rate was 68%, requiring in most instances new trial or sentencing proceedings.

[5] It is beyond the mandate of the Committee to resolve any disagreement about the validity of the research, a debate that invariably arises in our adversarial system. The Committee did conclude, however, that the research was conducted by highly regarded experts and is on strong methodological footing, and therefore cannot be ignored. At a minimum the alarming results of this work reinforces the Committee's call for the immediate initiation of additional statewide research. *See* Endnote 17 for further discussion of validity of Baldus study.

[6] *See American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (attached in Appendix Vol. I.).

[7] According to a recent survey of capital counsel standards, of the 38 states with a death penalty, Pennsylvania is one of 17 that does not have statewide standards. Twenty-one states have either a statute or court rule that establishes standards for competency of counsel at the trial, appellate and/or post-conviction level. Teresa Miranda, *NDAA Survey of Standards for Competency of Counsel In Capital Cases,* Prosecutor (May/June, 2002). According to the survey, the following states have statutes governing standards: Alabama, Georgia (rule and statute), Kansas (administrative regulation), Louisiana, New York, North Carolina (law requires the Supreme Court to adopt rules establishing standards), Texas, Virginia and Washington. States establishing standards by rule are: Arizona, Florida, Georgia (has a rule and a statute), Idaho, Illinois, Indiana, Montana, Nevada, North Carolina (rules established by the Commission on Indigent Defense Services which is housed in the Judicial Department), Ohio, Oregon (the rules are promulgated by the Indigent Defense Services Division of the State Court Administrator's Office), South Carolina, Tennessee and Utah.

[8] *See* The Spangenberg Group, *A Statewide Evaluation of Public Defender Services in Pennsylvania*, (May 2002). [hereinafter Spangenberg Report] The Report is attached in Appendix Vol. I.

[9] *See* Administrative Office of the Pennsylvania Courts, Review Form, Murder of the First Degree, attached in Appendix Vol. I.

[10] Act of June 25, 1997, No. 28, § 1 (Act 28).

[11] *See State v. Marshall*, 613 A.2d 1059 (1992) (referencing order of July 29, 1988, appointing Professor David C. Baldus of the University of Iowa Law School as Special Master to assist court in developing a system for proportionality review).

[12] *In re*: *Proportionality Review Project*, 122 N.J. 345, 585 A.2d 358 (1990); *In re*: *Proportionality Review Project*, 161 N.J. 71, 735 A.2d 528, (1999); *In re*: *Proportionality Review Project* (II), 165 N.J. 206, 757 A.2d 168, (2000); *State v. Marshall*, 613 A.2d 1059 (1992); *State v. Loftin* (Loftin II) 724 A.2d 129 (1999); *State v. DiFrisco* (DiFrisco III), 662 A.2d 442 (1995); *Report to the Supreme Court Systemic Proportionality Review Project,* Honorable David S. Baime, June 1, 2001(Baime III); *Report to the Supreme Court Systemic Proportionality Review Project,* Honorable David S. Baime, April 28, 1999 (Baime II). David C. Baldus, Special Master, *Death Penalty Proportionality Review Project, Final Report to the New Jersey Supreme Court* (Sept. 24, 1991).

[13] The first Baldus study is reported at David Baldus, et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638 (1998). Excerpts summarizing the findings are presented in Appendix Vol. I.

[14] The second study is reported at David C. Baldus, et al, *The Use Of Peremptory Challenges In Capital Murder Trials: A Legal And Empirical Analysis*, 3 U. Pa. J. Const. L. 3, 121–30 (February, 2001). Excerpts summarizing the findings are presented in Appendix Vol. I.

[15] *See* Wanda D. Foglia, J.D., Ph.D, *Report on Capital Decision-Making in Pennsylvania* (2002) attached in Appendix Vol. I.

[16] Testimony of David Baldus, Philadelphia Public Hearing Transcript, p. 77–78.

[17] The model building procedures employed by Baldus in his logistic regression models, though widely used in the social sciences, are not without their detractors. A recent articulation of these concerns is found in the work commissioned by the New Jersey Supreme Court for their ongoing proportionality review. *See* Special Master David S. Baime, *Report to the Supreme Court, Systemic Proportionality Review Project* (June 1, 2001). Special Masters subsequent to Baldus suggested that the while the Baldus models were suitable for proportionality review they should be modified if the inquiry is to focus on identification of race effects. *Id*. at 14. The concerns are largely technical, and reflect a problem found in all model building. On the one hand the investigator wants to account for all factors that may have influenced the outcome. On the other hand, models can become unstable if the number of independent variables is too large, particularly in a database with a limited number of observations. The final models often represent a compromise between these competing concerns. Experts retained by the New Jersey Supreme Court felt in light of the relatively few capital cases in New Jersey, the models should be more parsimonious, meaning fewer independent variables. *Id*. at 16–17. These concerns have less application to the Philadelphia research, where there are many more observations (death sentences) and consequently more room for the inclusion of independent variables which survive the screening process. Another innovation introduced in New Jersey is the substitution of rater-screened independent variables for the more common tests for statistical correlation as a screening tool. Acknowledging that the Baldus screening method is one commonly used by social scientists, it nevertheless sought to minimize the risk of variable misspecification by submitting a master list of potential independent variables to a team of judges to be rated for their expected influence. Those that survived, principally those where over half the judges rated the factor as "very important" were included in the model. *Id*. at 22–27. As with the parsimony issue, concerns about misspecification of the Philadelphia models were addressed by the use of four independent measures of culpability, one of which, the homicide severity study (using ex-capital jurors as raters), is similar to the Baime judge-rating method. Most significantly, the New Jersey Supreme Court continues to recognize the utility of multivariate regression for assessing the evenhandedness of its capital system.

However, the vast majority of attributions to the Baldus body of work have cited it with approval. Baldus is best known as the author of the famous "Baldus Study," which formed the evidentiary basis for the discrimination claim brought in *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987). *See e.g.*, Evan Tsen Lee & Ashutosh Bhagwat, *The McCleskey Puzzle: Remedying Prosecutorial Discrimination against Black Victims in Capital Sentencing*, 1998 Sup. Ct. Rev. 145, 146 ("The Baldus study is generally accepted within the social scientific community as thorough, carefully conducted analysis, and its results as almost certainly statistically valid."); Anderson E. Bynam, Casenote, *Eighth and Fourteenth Amendments—The Death Penalty Survives McCleskey v. Kemp*, 107 S. Ct. 1756 (1987), 78 J. Crim. L. & Criminology 1080, 1108 (1988) ("[T]he Baldus study is the most accurate and comprehensive statistical analysis of capital punishment ever completed."); Paul Brown, Book Note, *Analyzing Racial Bias Claims After McCleskey*, 23

Am. J. Crim. L. 231, 232 (reviewing Gregory Russell, *The Death Penalty and Racial Bias: Overturning Supreme Court Assumptions* (1994) (noting that "the [Baldus] study has generally been regarded as one of the most convincing and thorough in the field of death penalty research"); Stephen L. Wasby, *Justice Blackmun and Criminal Justice: A Modest Overview*, 28 Akron L. Rev. 125, 180 (1995) (describing the Baldus study as "a major social science study"); Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Loeb*, 79 Iowa L. Rev. 989, 1058 (1994) (describing the Baldus study as "monumental"); Deborah

W. Denno, Comment, *Human Biology and Criminal Responsibility: Free Will or Free Ride?*, 137 U. Pa. L. Rev. 615, 650 (describing the Baldus study as "a highly sophisticated study"); Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 Wm and Mary L. Rev. 21, 71 (1993) (describing the Baldus study as "famous" and consistent with studies in the field); Carol S. Steiker & Jordan M. Steiker, Review Essay, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 Yale L. J. 835, 864 (reviewing Beverly Lowry, *Crossed Over: A Memoir* (1992) (referring to the Baldus study as "the famous study" that set forth the disparities in the imposition of the death penalty based on the race of the victim); Carrie Menkel-Meadow, *Durkheimian Epiphanies: The Importance of Engaged Social Science in Legal Studies*, 18 Fla. St. U.L. Rev. 91, 98 (1990) (describing the Baldus study as "important" and central to developing a more sophisticated understanding of discrimination in the imposition of the death penalty).

Also since 1980, federal courts have cited Baldus' textbook, Baldus & Cole, Statistical Proof of Discrimination (1980) as authority 86 times, typically in the context of the use of statistics in the employment discrimination cases. The book has also been cited in the legal and social science literature 71 times. Most recently, Baldus' Philadelphia jury study was cited by Justice Breyer in his concurring opinion in *Ring v. Arizona*, 122 S. Ct. 2423, 2447 (2002), a case that invalidated death penalty statutes in four states.

[18] The Baldus/Woodworth findings from Philadelphia were consistent with studies from around the country. In 1990, the General Accounting Office (GAO) for the federal government undertook a review of all empirical studies on the issue of race in capital sentencing. After an extensive search, 28 studies were identified and analyzed. The results were consistent across data sets, time periods, states, and analytic techniques. The studies showed that race had its greatest impact in prosecutors' decisions whether to seek the death penalty. The review concluded that the race of the victim influenced the likelihood of a defendant being charged with murder and receiving the death penalty, with a race-of-victim effect indicated in 82% of the studies reviewed. See U.S. General Accounting Office, Death Penalty Sentencing (Feb. 1990). The studies examined by the GOA included David C. Baldus et al., *Equal Justice & the Death Penalty*, 154 Table 32 & 322 Table 53 (1990); Samuel R. Gross & Robert Mauro, *Death & Discrimination: Racial Disparities in Capital Sentencing* (1989); Barry Nakel & Kenneth A. Hardy, *The Arbitrariness of the Death Penalty* (1987); David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts,* 15 Stetson L. Rev. 133 (1986); Arnold Barnett, *Some Distribution Patterns for the Georgia Death Sentence,* 18 U.C. Davis L. Rev. 1327 (1985); Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion,* 41 Rutgers L. Rev. 27 (1988); William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes,* 26 Crime & Delinq. 563 (1980); Sheldon Ekland-Olson, *Structured Discretion, Racial Bias, and the Death Penalty: The First Decade After Furman in Texas,* 69 Soc. Sci. Q. 853 (1988); Linda Foley, *Florida After the Furman Decision: The Effect of Extra Legal Factors on the Processing of Capital Offense Cases,* 5 Behav. Sci & L. 457 (1987); Stephen P. Klein & John E. Rolph, *Relationship of Offender and Victim Race to Death Penalty Sentences in California,* 32 Jurimetrics J. 33 (1991); Elizabeth Lynch Murphy, *Application of the Death Penalty in Cook County*, 73 Ill. B.J. 90 (1984); Raymond Paternoster & Ann Marie Kazyaka, *The Administration of the Death Penalty in South Carolina: Experiences Over the First Few Years,* 39 S.C. L. Rev. 245 (1988); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & Soc'y Rev. 587 (1985); M. Dwayne Smith, *Patterns of Discrimination in Assessments of the Death Penalty: The Case of Louisiana,* 15 J. Crim. Just. 279 (1987); Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 Harv. L. Rev. 456 (1981); Richard Berk & Joseph Lowery, *Factors Affecting Death Penalty Decisions in Mississippi* (June 1985) (unpublished manuscript described in Baldus et al., supra note 59, at 258–60); Stephen P. Klein et al., *Racial Equity in Prosecutor Requests for the Death Penalty* (1987) (unpublished manuscript on file with author); Margaret Fae Klemm, *The Determinants of Capital Sentencing in Louisiana,* 1979–1984 (1987) (unpublished Ph.D. dissertation, University of New Orleans) (on file with the University of Iowa Law Library).

A number of other studies have been reported since 1990. *See State v. Cobb*, 663 A.2d 948 (Conn. 1995); *State v. Marshall*, 613 A.2d 1059 (N.J. 1992); Conference, *The Death Penalty in the Twenty-First Century*, 45 Am. U. J. Rev. 239, 341 (1995) (remarks of Harriet C. Ganson, Assistant Director of Tax Policy and Administration, U. S. General Accounting Office); Scott Anderson, *As Flies to Wanton Boys: Death Eligible Defendants in Georgia and Colorado*, 40 Trial Talk 9–16 (1991); Thomas J. Keil & Gennardo F. Vito, *Race and The Death Penalty in Kentucky Murder Trials:* 1976–91, 20 Am. J. Crim. J. 17 (1995); Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida,* 43 Fla. L. Rev. 1 (1991); Ted Rohrlich & Fredric N. Tulsky, *Not All L. A. Murder Cases Are Equal,* L.A. Times, Dec. 3, 1996, at A 1; Michael B. Blankenship & Kristie R. Blevins, *Inequalities in Capital Punishment in Tennessee Based on Race: An Analytical Study of Aggravating and Mitigating Factors in Death Penalty Cases,* 31 U. Mem. L. Rev. 823, 858 (2001); Baldus, et al., *The Disposition of Nebraska Capital and Non-Capital Homicide Cases* (1973-1999): *A Legal and Empirical Analysis, Amended Final Report* (2001).

[19] Of all factors in the model this was rivaled only by expressed scruples over the death penalty with a 1.9 coefficient and 6.5 odds multiplier, significant at .0001.

[20] Excerpts from the report are found in Appendix Vol. I.

[21] Liebman, Fagin, and West, *A Broken System: Error Rates in Capital Cases,* 1973–1995, A-49 (June 12, 2000) (Pennsylvania State Report Card).

[22] Justice Blackmun, dissenting in the denial of certiorari in *McFarland v. Scott*, 114 S. Ct. 2785 (1994); *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, American Bar Association (1989); *Standards for the Appointment and Performance of Counsel in Death Penalty Cases*, National Legal Aid & Defender Association (www.nlada.org/standards/death.htm).

Recently a number of prominent jurists and prosecutors have voiced concern over the quality of capital representation. U.S. Supreme Court Justice Ruth Bader Ginsburg criticized the inadequate funding available for those who represent poor people. "People who are well represented at trial do not get the death penalty," said Ginsburg. "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial." (Associated Press, 4/10/01.) Justice Sandra Day O'Connor also expressed reservations about the process. "Serious questions are being raised about whether the death penalty is being fairly administered in this country…Perhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used." (New York Times, July 5, 2001.) Former federal prosecutor Beth Wilkinson testifying before the United States Senate Judiciary Committee on June 27, 2001 said, "One of our paramount concerns is competent counsel for indigent defendants facing the death penalty. All of our citizens, regardless of ability to pay, and especially those facing capital punishment, should be well represented."

[23] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (1996) Codified in amendments to 28 U.W.C. §§ 2244-2267 (1996) [hereinafter AEDPA].

[24] *See American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, supra* (guidelines "enumerate the minimal resources and practices necessary to provide effective assistance of counsel," Introduction, Guidelines).

[25] *See* Spangenberg Report, *supra* at 81.

[26] *Id.* at 59.

[27] Defenders Association of Philadelphia.

[28] *See* Spangenberg Report, *supra* at Chapter VI (Findings and Recommendations).

[29] *See* Philadelphia County Court Rule 406 *et seq.* attached as Appendix Vol. I.

[30] One deficiency in the ABA and NLADA standards is their failure to call for adequate continuing legal education and peer review. Some jurisdictions have imposed substantially more stringent requirements. See, e.g., California's lengthy requirements in Appendix Vol. I.

[31] 481 U.S. 279, 319 (1987).

[32] Following the evidentiary hearing in *McCleskey*, District Judge J. Owen Forrester rejected McCleskey's race discrimination claim primarily on the ground that the Baldus study did not represent "good statistical methodology." 580 F. Supp at 379. However, the appellate courts, including the Supreme Court, assumed the validity of the study and resolved the issue on legal, not factual grounds. *See* 107 S. Ct. 1756, 1776 & n. 7 (1987); 753 F.2d 887, 898 (11th Cir.). Moreover, many scholars feel Forrester's opinion betrays a fundamental misunderstanding of the application of statistics to legal problems. Professor Richard Berk, a member of the National Academy of Sciences' Committee on Sentencing Research, testified that the Baldus study has "very high credibility" and "is far and away the most complete and thorough analysis of sentencing that has ever been done." Randall L. Kennedy, *McCleskey v. Kemp*: *Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388 (May 1988) (quoting the trial record at 1740), *See* also *Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 Stan. L. Rev. 27, 38–49 (1984); and Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 Am. Soc. Rev. 783 (1981) (critiquing the Forrester opinion).

[33] *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987).

[34] *See* Racial Justice Act of 1989, S. 1696, 101st Cong. §2922(b)(1) (1989).

[35] Ky. Rev. Stat. Ann. § 252.3 (2001).

[36] Georgia General Assembly, H.B. 324, (2001).

[37] North Carolina General Assembly, B.G. 140 § 15A-2010, (2001).

[38] Illinois General Assembly, H.B. 3396, (2001).

[39] Despite instructions to the contrary, three counties, including Allegheny, did complete the survey distributed on this topic by the Committee. The survey is attached in Appendix Vol. I.

[40] Department of Justice Manual, Volume 7, 9-10.050, *Federal Prosecutions In Which The Death Penalty May Be Sought, see* Appendix Vol. I.

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INTRODUCTION

Other state and federal task force reports, as well as the legal literature, have found that race and gender may affect the outcome in personal injury and wrongful death actions for women and minorities. This is partly due to a reliance on gender- and race-based tables to determine loss of future earning capacity. Claims brought by women and minorities may also be devalued by unconscious biases of jurors and the judiciary; particularly at risk are claims that involve intangible injuries or are related to non-market work performed in the home. All of these factors affecting damage awards and the evaluation of civil claims operate to the significant detriment of plaintiffs who are women or persons of color. Further, as observed by the Ninth Circuit Task Force in its report, The Effects of Gender in the Federal Courts, subtle forms of gender bias can be widespread in employment law litigation where "institutional impediments to female plaintiffs in civil rights cases also exist."[1] Such biases can be especially devastating for women of color who are caught in the double-bind of race and gender bias.

Focus of Inquiry

For its study of tort litigation, the Committee reviewed existing scholarly literature[2] and the reports of other state task forces around the country on the effects of race and gender in calculating tort damages. In a further effort to determine whether race and gender play a role in the outcome of tort claim litigation, the Committee also held roundtable discussion sessions with personal injury practitioners in Pittsburgh, Philadelphia and the Wilkes-Barre/Scranton area, and reviewed transcripts of the public hearings for testimony on tort litigation and on the use of statistical work-life expectancy tables in the calculation of tort damages.

The Committee also gathered anecdotal evidence of the difficulties faced in Pennsylvania by minorities and women in employment discrimination litigation. In order to gain a better understanding of potential problems in this area, the Committee held roundtable discussions for highly experienced employment discrimination attorneys practicing in Philadelphia and Pittsburgh. The Committee also reviewed the task force reports of other states and conducted an informal assessment of the administrative requirements for filing such claims under both Pennsylvania and New Jersey law, comparing litigants' access to the justice system in both states.

SYNOPSIS OF FINDINGS

Several common themes emerged from the research and investigation of the Committee. The most important was that the race and gender of the plaintiff can play a direct role in determining the value of personal injury and wrongful death cases, and as a consequence, the claims of minorities and women are often assigned a lower value than those of white males.

In addition to the use of outdated gender-based and race-based standardized tables, such as work-life expectancies, which underestimate lost earning capacity, the Committee determined that the devaluation of claims of women and minorities stems from several other sources including: 1) the lack of racial diversity in jury panels across the Commonwealth, which can foster situations in which gender-based and race-based stereotypes lead to a reduction of awards to women and minorities; 2) an undervaluation of damage awards for minority tort plaintiffs based upon the anticipated bias of the jury; 3) the lack of credibility accorded to female and minority witnesses and experts; and 4) the undervaluation of homemaker services.

Similar issues confront women and minorities in the trial of employment discrimination cases. In particular, employment discrimination plaintiffs have fewer remedies available to them in Pennsylvania state courts than other litigants. The language of the Pennsylvania Human Relations Act, as interpreted by the Supreme Court of Pennsylvania, precludes an award of punitive damages and a trial by jury. In addition, the Supreme Court has affirmed a denial of attorney's fees to a successful plaintiff. The effect of these interpretations has been to deter plaintiffs from filing their cases in state court. This is particularly detrimental to rural residents and minorities. If they desire a jury trial or if they cannot afford to hire an attorney without the prospect of an award of attorney's fees, plaintiffs have no other alternative except to take their claims to federal court. For rural plaintiffs, federal litigation involves a reduced likelihood of obtaining counsel and higher litigation costs due to their distance from federal courthouses. Minority plaintiffs are faced with the prospect of trying their racial discrimination cases before less racially diverse juries with whom they do not share a racial or cultural heritage. Moreover, in the Ninth Circuit study on the effects of gender in the federal courts, focus group participants reported that "most federal district court judges before whom they appeared are less receptive to employment discrimination cases of all types than they are to commercial cases with high monetary stakes."[3]

OTHER TASK FORCE FINDINGS

At least 11 other state task forces have published reports that discuss gender bias in civil damages.[4] The consensus of these reports is that women, as a class, receive civil damage awards that are often significantly diminished by gender stereotypes.

The Final Report of the Colorado Supreme Court Task Force on Gender Bias in the Courts, published in 1990, found that most attorneys who participated in the task force survey agreed that gender bias is prevalent in civil damage awards. One respondent stated:

> "In several cases I have handled, there has been the assumption by defense counsel, insurance adjusters, and settlement judges that a woman's claim for lost income or impairment of earning capacity is worth less than a man's…Men are almost universally referred to as the 'breadwinners' in these situations, women almost never are."[5]

Another Colorado attorney voiced the perception that women are simply "taken less seriously than men as personal injury plaintiffs," stating that "their pain is viewed as hysterical, and adjusters, defense attorneys and sometimes judges dismiss them."[6] The Colorado Report further noted a significant difference in perception among male and female attorneys regarding whether gender affects the way they are treated in settlement conferences. Fifty-eight percent of the women who responded to the Colorado attorney survey said their gender sometimes affects their treatment in settlement conferences while 83 percent of the men responding said it never did.[7]

In 1993, the Gender Bias Task Force of Texas survey respondents, public hearing participants, and regional meeting participants all reported that gender was a factor in how cases were tried and in the outcome of the trials.[8] Specifically, "two-thirds of female attorneys, half of female judges, and a substantial minority of male attorneys responding to the task force surveys thought that the gender of the litigant affects both the litigation process and case outcome."[9]

The negative effect of gender bias in civil damage awards is not confined to plaintiffs alone, however. In 1996, the Judicial Council of California Advisory Committee on Gender Bias in the Courts, for example, reported that disrespect for female witnesses and expert witnesses was common.[10] "One woman attorney believed that she received lower damages in a case

involving claims of emotional distress because her client, her client's treating physicians, and her experts were all women. She [believed] that the totality of the effect on the jury was to make her case less believable."[11] Some respondents to surveys circulated by the Oregon Supreme Court/Oregon State Bar Task Force on Gender Fairness in 1998 expressed concerns that a client's interests might suffer because of discrimination against a female attorney. One client wrote: "I felt a male lawyer would get a better result. I was discriminated against because I was a female."[12]

It is important to note that the outcome of civil cases can be affected by unconscious and often undetected prejudices of jurors. Yet there is very little quantitative evidence to support this position. For the most part, equality task forces have relied upon empirical evidence gathered through surveys, roundtable discussions, public hearing testimony and other personal accounts.

In the best-simulated empirical study to date of the effects of gender-based stereotypes upon jury deliberations, potential jurors on call in Seattle in 1989 were asked to review written summaries of hypothetical wrongful death cases. The only variables in the cases were the gender of the decedent and the employment status of the surviving spouse. The study found that both male and female jurors awarded substantially less in damages for the death of a woman than for the death of a man—an average of $251,607 versus $750,036. When researchers probed the jurors for an explanation, the jurors tended to exhibit different concerns based on the gender of the decedent. In cases involving male decedents, jurors were far more likely to consider future salary increases and promotions as well as the impact of inflation on their future earnings. In cases involving female decedents, meanwhile, jurors were more likely to award sums for pain and suffering. The researchers concluded that the results of the study could be traced to "stereotypes about employment remuneration based on longstanding discrimination against women in the workplace."[13]

Task force reports frequently cite another simulated empirical study conducted by the Gender Bias Committee of the Massachusetts Supreme Judicial Court in 1989. The study used two videotaped mock trials that followed identical scripts, except that the plaintiff was a woman in one videotape and a man in the other. Asked to indicate how they would decide the case and the amount of damages, female respondents were found to treat women and men equally. Male respondents over the age of 40, however, gave the man higher awards for both diminished earning capacity and pain and suffering.[14]

The Nebraska Supreme Court Task Force on Gender Fairness in the Courts examined a national database of more than 150,000 verified personal injury verdicts collected from all over the United States. In two out of three scenarios run in this national study, correcting only for the gender of the plaintiff, plaintiff's verdicts were higher for men than for women.[15]

In general, it seems clear that when damages are more closely linked to economic variables, men reportedly fare better, while women can sometimes fare better in other circumstances. Reports from task forces also noted "the existence of gender stereotypes that might have an impact in cases involving specific injuries."[16] Both the Minnesota Supreme Court Task Force for Gender Fairness in the Courts and the Report of the Illinois Task Force on Gender Bias in the Courts, for example, noted the widespread belief "that female plaintiffs are more likely to receive higher amounts for disfiguring injuries than male plaintiffs."[17] Over 80 percent of the attorneys surveyed by the Colorado Task Force indicated that women receive higher awards for disfigurement, compared to over two-thirds reporting that men receive higher awards for loss of future earning capacity.[18] Similarly, an Iowa jury awarded twice as much for invasion of privacy to the woman as to the man when a two-way mirror was found in the couple's motel room.[19] On the other hand, with respect to damages for loss of consortium, 50 percent of the attorneys surveyed by the Nebraska Supreme Court Task Force on Gender Fairness in the Courts "reported that husbands are awarded higher amounts for loss of consortium than their wives."[20]

Nebraska's Task Force also reported that, in a construction accident resulting in death, with a 30–39-year-old plaintiff with surviving children, "the probable verdict amount for a female was $650,000 with a 70% probability of a plaintiff's verdict," while the "probable verdict amount for a male plaintiff was $1,025,000 with a 78% probability of a plaintiff's verdict."[21] The Illinois Task Force Report indicated that male plaintiffs often benefit from perceptions that place a higher value on their loss of strength or their capacity to perform manual labor.[22]

Several state task forces have specifically discussed racial bias in tort cases involving minority plaintiffs, including the Washington State Minority and Justice Task Force and the New York State Judicial Commission on Minorities. An empirical study on racial equity and damage awards conducted by the Washington State Minority and Justice Task Force found

substantial disparities between settlement amounts in asbestos cases involving minority and non-minority plaintiffs. After controlling for type of disease, general occupation and age, the study found that minorities received statistically significant lower average settlements overall than non-minorities.[23]

As reported in the Report of the New York State Judicial Commission on Minorities, a Rand Corporation study of 9,000 civil jury trials in Cook County, Illinois, between 1960 and 1979 revealed that "among individual litigants, blacks lost more often than whites both as plaintiffs and defendants, and blacks received smaller awards."[24] More recently, studies of civil litigation in New York and Oregon revealed that judges, attorneys, and court personnel perceived that people of color received unequal treatment in the civil litigation process.[25] Commenting on both the New York study and a 1996 Connecticut report, one law review article observed that "Many attorneys, claims adjusters, and judges consider race when assessing potential risks in tort cases."[26]

In Iowa, the report from the Equality in the Courts Task Force noted the inherent problem in applying class-based generalizations for women as a group that do not fit the situation of the individual litigants. As a prime example of bias in the assessment of damages for female or minority plaintiffs, the report cited the use in tort litigation of actuarial tables or other race-based or gender-based data, a topic that is discussed in greater detail below.[27]

INEQUITIES IN PERSONAL INJURY AND WRONGFUL DEATH AWARDS TO WOMEN AND MINORITIES

THE USE OF GENDER-BASED AND RACE-BASED TABLES

There are three distinct problems with using race- and gender-based tables to compute work-life expectancy and wage losses. First, they are frequently outdated and represent patterns of employment that no longer hold true for women and minorities. Second, the use of separate tables for men and women and for whites and people of color relies on overly broad generalizations about women and minorities as a group. And third, the use of such tables is unsound as a matter of social policy because it perpetuates inequities in pay and other forms of employment discrimination experienced by women and minorities, and because use of the tables can serve to impoverish members of low- income groups who suffer disabling injuries from severe accidents.

"This means that if two children, a boy and a girl, with the same education prospects were each permanently disabled by an injury, the girl's award would be only 65 percent of the boy's award, a disparity attributable solely to gender."

—Professor Martha Chamallas

Professor Martha Chamallas, Robert J. Lynn Chair in Law, Moritz College of Law, The Ohio State University, has written numerous articles detailing the devaluation of women's claims in the courts. In one of her articles entitled, *The Architecture of Bias: Deep Structures in Tort Law,* Chamallas noted a study of wrongful death cases between 1984 and 1988, which found a significant disparity in jury awards for male/female decedents; the average male decedent was awarded $332,166 while the average female decedent was awarded only $214,923.[28] Further, she noted the severe negative consequences of using gender and race-specific data for tort plaintiffs in her article, *A Woman's Worth: Gender Bias in Damage Awards*, where she showed that the projected lifetime earnings, discounted to 1990 present value, of a female college graduate have been estimated to be $1,174,772, and that of a male college graduate, $1,815,850. "This means that if two children, a boy and a girl, with the same education prospects were each permanently disabled by an injury, the girl's award would be only 65 percent of the boy's award, a disparity attributable solely

to gender. The size of the male-female disparity is not surprising given the size of the current wage gap between men and women of all races…Relying on current wages means that predictions about future wages will be tied to present disparities. Use of these data also allows discrimination on one area—setting pay rates—to influence valuation in another area—calculating personal injury awards."[29]

EXPERT TESTIMONY AT PUBLIC HEARINGS

At two of the Committee's public hearings, the Committee heard from two esteemed Pennsylvania economists, Robert A. Wallace of Gannon University and James Kenkel of the University of Pittsburgh. Both testified about the use of race- and gender-based instruments for the calculation of civil damages.

Wallace testimony

Wallace, the director of the MBA program and assistant professor of finance in the Dahlkemper School of Business at Gannon University in Erie, PA, has testified extensively in wrongful death, personal injury, and wrongful termination cases. He practices "forensic economics," the application of economic theory to the problems of valuation presented by litigation.

In his testimony at the Erie hearing, Wallace noted that in assessing losses, the economist takes into consideration statistical information regarding the wronged party, although the statistical information is often limited and requires the use of estimates based on external data from sources such as government databases. The estimated work-life is the projected length of time that an individual is expected to participate in the workforce, an estimate influenced by age, gender, race, and education. Work-life estimates were published in 1982 by the Bureau of Labor Statistics (BLS) and most recently updated and expanded in 1986. In other words, as Wallace pointed out, the most recent federal estimates of work-life expectancy are more than 15 years old.

In work-life estimates, Wallace noted the importance of the Labor Force Participation Rate, which is the percentage of persons 16 years of age or older who are either employed or actively seeking employment. This rate is determined by using information collected by Current Population Studies (CPS), a monthly household survey conducted for the BLS. Wallace indicated that according to CPS data, the labor force participation for females has increased dramatically since the work-life estimates were last updated. Because the old set of figures significantly understates the length

of the work-life for women, earned income loss estimates for women are likewise understated, according to Wallace.

In the absence of official updates of the work-life estimates, economic researchers have created work-life tables based on unpublished CPS data. These tables show a large increase in work-life estimates for females. For example, a 25-year-old white woman engaged in the workforce is expected to work 24.9 years, according to the most recent BLS study estimates based on the 1986 figures. A 1998 update by Ciecka, Donley and Goldman estimated a work-life of 29 years for the same individual, representing a 16.5 percent increase. For both African American and Latina women, Ciecka, Donley and Goldman calculated a 12 percent rate increase from the BLS 1986 study to 1998. Wallace further noted that the outdated BLS work-life estimates also affect fringe benefit losses, which are often calculated as a percentage of earned income losses. Fringe benefits currently average more than 22 percent of wages, so the shortfall is substantial. Wallace testified that forensic economists generally must choose between outdated estimates and more current and accurate estimates that are not widely accepted in practice. Experts may be reluctant to use more current data, out of fear that the courts will reject any estimate of economic loss that is based on unofficial sources.

Kenkel testimony

"The problem of inaccurate life expectancy tables and work-life expectancy tables for females and minorities can be resolved through the use of a single inclusive table that incorporates the work-life estimates of all Americans as a starting point for calculating losses in work-life expectancy."

—Professor James Kenkel

Kenkel, a professor of economics at the University of Pittsburgh, has testified more than 500 times for plaintiffs and defendants in about 20 different states and in federal courts. At the Pittsburgh public hearing, Kenkel suggested that the problem of inaccurate life expectancy tables and work-life expectancy tables for females and minorities can be resolved through the use of a single inclusive table that incorporates the work-life

estimates of all Americans as a starting point for calculating losses in work-life expectancy. The difference in work-life calculations between men and women "is incredible," according to Kenkel. For example, an 18-year-old white man who just graduated from high school has a work-life expectancy of about 39 years. The data show that he will actually work 39 years. For a woman, the work-life estimate is about 28 years because of expectations that she will have children, then drop out of the workforce.

"The problem with this work-life table is that it's based on the experience of a woman who is basically like my mother," Kenkel testified. "When I was born, my mother said, 'I'm going to drop out of the workforce' and never went back to work again, which was the experience of everybody like her. My daughter is exactly the opposite. She has three little children, and five months after the kids were born, she went back to work. This work-life table does not take into account the change in the behavior of women."[30] Similarly, Kenkel noted the large disparity between white males and African American males in the work-life tables. While the tables show a difference in average life expectancy for white and African American males, Kenkel questioned why a white male and an African American male who were both age 40 and in perfectly good health should be distinguished from each other in terms of their life expectancies, and why a common life expectancy table could not be used to compensate fairly the members of both races who differ from the norm. Kenkel used the same analogy in reference to work-life estimates that assume an African American male will work for a shorter period time than a white male. Kenkel asked why, if both men were 40-years-old and had the same level of education, the African American male would necessarily have a shorter working life than the white male.

"The problem with this work-life table is that it's based on the experience of a woman who is basically like my mother," Kenkel testified. "When I was born, my mother said, 'I'm going to drop out of the workforce' and never went back to work again, which was the experience of everybody like her. My daughter is exactly the opposite."

—Professor James Kenkel

ECONOMIC EXPERT TESTIMONY FROM OTHER STATES

The Vermont Task Force on Gender Bias in the Legal System also sought testimony from economists in that state regarding the use of statistical tables in the determination of loss of future earning capacity and work-life expectancy. The testimony reviewed by the Vermont task force was remarkably similar to that of Drs. Gamble and Kenkel, set forth above. In its report, the task force stated that the testimony established that women's work-life expectancy and loss of future earnings are calculated from "patterns or trends developed one or two decades ago" and that the trends "do not reflect the increase in the number of women in the paid labor force during the past two decades."[31] Just as in Pennsylvania, the report went on to note that while the economic experts recognize that the historical trends relied upon are outdated and underestimate a woman's work-life expectancy or earning capacity, they frequently continue to rely on that outdated information. The report stated that the "credibility attributed to historical data within the field of economics operates as a disincentive to calculating new estimates premised on women's present economic and employment condition."[32] One expert who was quoted in the report explained the dilemma succinctly as follows:

> "I like historical data to back up what I am doing. However, if I see a young woman who is twenty-five entering the legal profession, and has in her own past, a very short history, but a history that is more typical of what [a] male's history is, then I will say, will she act like females have in the past, or is she part of a changing group. I can make that judgment as an expert witness and I think she behaves differently. However, I know when I do that and if this case gets to court, I will be challenged on that position…So there is a tendency to…just go with historical data and if it was a woman lawyer, I would not have her wages increased as rapidly as a male lawyer in the same position."[33]

ROUNDTABLE FINDINGS

In roundtable discussion sessions with personal injury and wrongful death practitioners from around the Commonwealth, attorneys in Philadelphia and in Pittsburgh raised the issue of the inequities inherent in the use of race-based and gender-based tables. The attorneys echoed the economists in expressing concern about the failure of U.S. Department of Labor statistics to reflect recent gains in work-life expectancy and income, especially for women, thereby perpetuating inequalities in pay rates and job opportunities experienced by women and minorities. Several participants

recommended that race-neutral and gender-neutral tables be used in calculating civil damages, and that a standard jury instruction be applied in civil cases to incorporate such tables as the approved method for calculating damage awards.

COMPENSATION FUND FOR VICTIMS OF SEPTEMBER 11

Most recently, the special master of the Federal Compensation Fund set up for the victims of September 11 dealt with the issue of using work-life expectancy tables to calculate damage awards for World Trade Center and Pentagon casualties. The master decided to base the awards on updated work-life expectancy tables by Ciecka, Donley and Goldman, [34] noting that "[t]hese are the most recent and generally accepted tables of work-life expectancy regarding the general population available."

Significantly, the special master also decided to use work-life expectancy for "all active males" to compute the awards for both men and women. The master took this approach because the use of male tables would result in higher awards for women without lowering awards for men, and would also "accommodate for potential increases in labor force participation rates of women."

The decisions of the special master appear to reinforce the expert testimony of Kenkel and Wallace by rejecting outdated gender-based and/or race-based tables as unfair to accident victims. Specifically, the special master's decision to use updated, unofficial data rather than the 1986 tables indicated the widespread belief that the 1986 tables had become inaccurate. By using male tables for both male and female victims, the master moreover assumed that the male award came closest to representing the true value of the injury.

CONSTITUTIONAL ISSUES RAISED BY THE USE OF RACE-BASED AND GENDER-BASED TABLES

Previous federal cases such as *Frankel v. United States* 321 F.Supp. 1331, 1337-38 (E.D. Pa. 1970) and *Caron v. United States*, 410 F.Supp. 378 (D.R.I. 1975) represent the traditional gender-based approach to calculating damages. In these two cases, the courts authorized diminished awards for women based upon the assumption that women work for fewer years compared to men, and that they earn less than men when they work outside the home.[35]

In the few reported cases relating to race-based tables, the outcome was similar to that of the gender-based cases. As Chamallas noted in her article, "The courts and the parties seemed to accept the race-based statistics uncritically and there was no discussion of whether race-neutral data would be preferable."[36] Courts have permitted experts to rely on race-based data to calculate work-life expectancy, and in one early case the court found that it was improper to base an estimate upon race-neutral data.[37]

The traditional approach to calculating damages, however, stands in tension with Constitutional principles. Since *Korematsu v. United States*, 323 U.S. 214, 223 (1944), any state action that explicitly classifies a group of people by race has been considered a violation of the Equal Protection Clause of the 14th Amendment. Such actions are automatically "suspect" and subject to "strict scrutiny," the stringent standard of review that requires the state to prove that the classification is necessary to further a compelling state interest. In its 1976 decision, *Craig v. Boren*, 429 U.S. 190 (1976) the Supreme Court, according to Chamallas, "settled upon an intermediate level of scrutiny to evaluate the constitutionality of gender classifications."[38] Gender-based classifications, in other words, must be demonstrated to be substantially related to an important government interest.

Thus, economic tables that are broken down by race and gender may, in fact, be unconstitutional. The use of race-based data to estimate the future earning capacity of an individual, in particular, does not warrant creating an exception to the ban on racial classifications. The argument for using such tables is usually portrayed as a method of accurately portraying reality for whites and African Americans in terms of work-life expectancy. However, the U.S. Supreme Court has already ruled that the government may not "neutrally" reflect private prejudices in drawing racial classifications. *See Palmore v. Sidoti*, 466 U.S. 429 (1984), in which the Court held unanimously that it was improper for the state courts to consider the race of the stepparent in a change of custody matter, despite the relevance of race to the issue of the best interests of the child. As Chamallas observed, "To the extent that *Palmore* prohibits the government from using racial categories, even when they function as good proxies for other legitimate variables, the objective of accuracy, such as in the use of race-based tables, is subordinated to the goal of racial equity."[39]

Similarly, the U.S. Supreme Court, using the prevailing intermediate scrutiny standard for explicit gender-based classifications, has struck down a number of statutes that presumed wives were economically dependent on their husbands and that conditioned financial benefits on a spouse's

gender.[40] The Court refused to allow gender to be used as a basis for assuming dependency, despite strong statistical evidence that most wives were, in fact, financially dependent on their husbands. The Court's approach in equal protection cases generally rejects overly broad generalizations while providing legal support for women in non-traditional roles. In *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978), for example, the Court concluded that an insurance plan violated discrimination principles by requiring women to make larger contributions to a pension fund because, as a group, they lived longer than men. In its decision, the Court rejected the tendency "to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals."[41] The U.S. Supreme Court has thus demonstrated its concern for individualized equity, providing strong support for an equal protection challenge to gender-based tables as a predictor of future earning capacity.

Because the constitutional guarantee of equal protection protects individuals only against government or state action, a finding of sufficient state action is required before any constitutional challenge can be raised.[42] Chamallas, who has written extensively on this subject, suggests that one possible reason there has not yet been a constitutional challenge to the use of race- and gender-based economic data is that counsel may believe there is no state action involved in this process.[43] In her 1994 article, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, she argues that state action is present when experts rely on gender-based or race-based tables in court:

> "The pivotal question then becomes whether admission of an expert's testimony based on race-based or gender-based statistics constitutes sufficient state action to permit such a constitutional challenge. My principal argument for finding state action is that it is impossible to separate the use of the statistics from the underlying legal standard in the case. When the court allows an expert to testify as to the plaintiff's future earning capacity, it makes a determination of relevancy and an implicit judgment about the substance of the common law of damages. The court's action authorizes the jury to base its decision on the race or gender of the plaintiff, in effect establishing a common law rule that the future earning capacity of a plaintiff depends upon the plaintiff's gender and racial classification. If such a standard were explicitly embodied in a statute, the legislation would clearly constitute state action. The outcome should not be different simply because the governing legal standard is a common law or nonstatutory standard…

> state action occurs when the opinion of the economist, admittedly a private actor, is transformed into an expert opinion, sanctioned by the state at the moment that the trial judge certifies the witness as qualified. Very much like the regulation of peremptory challenges, there are statutes and rules governing the use of experts, and permitting them to express opinions and draw conclusions that other witnesses may not."[44]

In support of her argument, Chamallas also cites the U.S. Supreme Court decision in *Edmonson v. Leesville Concrete Company*, 500 U.S. 614 (1991), where the Court held that the use of race-based peremptory challenges by a private litigant in a civil case was unconstitutional. The Court also found that the use of gender-based peremptory challenges was unconstitutional in *J.E.D. v. Alabama*, 511 U.S. 127 (1994).

There are signs that the doctrine is evolving with respect to these matters. The most significant case to confront the issue of gender-based and race-based statistics is *Wheeler Tarpeh-Doe v. United States*, 771 F. Supp. 427 (D.D.C. 1991). There, the United States District Court for the District of Columbia dealt with the issue of how to categorize the earning potential of a bi-racial male child. When the plaintiff's expert used census tables to determine the income of an American male college graduate, the defendant's expert argued that the appropriate measure was "the average earnings of black men, not those of all men."[45] The court refused to decide the issue of the child's race and rejected the use of race-based or gender-based statistics in the calculation of his damages. Ruling that only race-neutral and gender-neutral data should be used, the Court based its calculations of damages on the average earnings of all U.S. college graduates, without regard to sex or race.

ADDITIONAL FINDINGS

HOMEMAKERS' SERVICES ARE CONSISTENTLY UNDERVALUED BY THE COURTS.

Several state task forces studying gender bias issues have also examined the issue of the valuation of homemaker services as it affects the assessment of damages for female personal injury plaintiffs. The New Jersey Supreme Court Task Force on Women in the Courts concluded that homemakers were under-compensated for lost earnings because "They worked without wages and…[that] the substantive rules of law that guide judges and juries in fixing personal injury awards are so closely tied to wage-earning as to skew the outcomes for full- or part-time homemakers."[46]

Similarly, the Minnesota Gender Fairness Task Force concluded that it was "the clear consensus that homemakers receive less than the economic value of their services in actions involving claims for lost wages."[47] The task force report also commented on the effect that the under-valuation of homemaking services has upon employed women. A Minnesota attorney was quoted as reporting, for example, that "[w]here the homemaker, usually a female, also works outside the home, it has been very difficult to get the defense to recognize that they owe anything more than 10 to 15 hours per week for loss of value of those services in addition to wage loss. In practice, this means we routinely receive offers of $40 to $60 per week to compensate a working mother for the entire amount of time she spends each week performing her duties as a homemaker. This is patently absurd, but it is very pervasive."[48] Of the attorneys responding to the Colorado survey, "only 14 percent believed that homemakers always or almost always recover the economic value of their lost services, and over half of them believed that women employed outside the home receive higher awards for pain and suffering than homemakers do."[49]

The findings of the New Jersey, Minnesota, and Colorado gender bias studies were echoed by the Vermont Task Force on Gender Bias. The task force found that the data used by economists in computing future earning capacity and work-life expectancy for women frequently were based on historical analysis and did not reflect current and future trends in the workplace. [50] Furthermore, the report stated, "Judges agree that homemakers are not adequately compensated for their lost services."[51] The task force found that in response to its survey, "80.2 percent of attorneys stated that homemakers 'never', 'rarely' or 'sometimes' recover the value of these services; and half of the responding judges indicated that homemakers 'never' or 'rarely' recover the economic value of those services."[52]

Those findings from outside Pennsylvania are consistent with statements provided to the Committee by roundtable participants who expressed concern with the undervaluation of a female litigant's domestic work, such as childcare and housework responsibilities. Some attorneys also referred to a possible backlash developing among juries when presented with the cost of alternate day care for children as a means of assigning a specific monetary value to the childcare performed by women in their homes.

In an extensive article, *Turning Labor Into Love: Housework and the Law*,[53] Professor Katharine Silbaugh traces the transition in the past 30 years in the concept of the home as a site of consumption and leisure to

a site of production, concluding that, "housework produces wealth that is critical to a family's material well-being."[54] Silbaugh cites time use studies showing that, after paid work and unpaid work are added together, women perform more hours of work than men; women perform substantially more hours of unpaid housework; and unpaid housework accounts for a substantial percentage of women's overall work hours. Based upon these figures, she writes, "The heightened significance of the legal treatment of housework to women is apparent."[55] Silbaugh also highlights the transformation in economists' understanding of the economic value of housework, citing recent economic studies that estimate the value of housework in the U.S. as 24 to 60 percent the gross domestic product.[56] Finally, Silbaugh examines the legal response to home labor and concludes that the law—and women in particular—would benefit from a recognition of the full economic value of unpaid labor in the home.

THE LACK OF DIVERSITY IN PENNSYLVANIA JURIES CAN REDUCE AWARDS TO MINORITIES.

Participants in roundtable discussion sessions throughout the Commonwealth expressed concern about the lack of minority jurors in all jurisdictions except Philadelphia County. Speakers noted in particular the limited number of minorities in the jury pools and their intentional removal through the use of peremptory strikes.[57] One Pittsburgh attorney noted that, in the past five years, he has represented more than 20 African American plaintiffs in civil trials in state and federal courts. In all of the cases combined, out of hundreds of prosepective jurors, there were "no more than six African Americans present in the jury pools" and "only two African Americans were actually selected as jurors."[58] Another Pittsburgh participant stated that the majority of jurors in Allegheny County are from suburban areas and are older, white, and often unwilling or unable to set their prejudices aside. The consensus of the participants was that, at best, many white jurors failed to empathize with minority plaintiffs; at worst, the white jurors awarded lower damage awards to minorities on the assumption that the amounts would satisfy minority plaintiffs unaccustomed to large sums.

Roundtable participants also expressed concerns about the ineffectiveness of *Batson* challenges to remedy the lack of juror diversity. In addition, plaintiffs' attorneys reported receiving racist comments from defense attorneys about the consequences of the September 11 attacks and their implications for Arab or Muslim plaintiffs who might suffer backlash in civil litigation.

GENDER-BASED AND RACE-BASED STEREOTYPES AFFECT JURY DELIBERATIONS AND CAN SERVE TO REDUCE AWARDS TO WOMEN, ESPECIALLY WOMEN OF COLOR.

In 1998, the annual conference of the Pennsylvania Bar Association offered a panel entitled *The Impact of Gender in the Evolution of Tort Law* which explored "tough issues in devaluation of lives, of activities and the potential of women in courtrooms involved in civil cases." One of the panelists, Professor Regina Austin of the University of Pennsylvania Law School, spoke about a case in Florida where an African American female plaintiff sued the owner of a commercial vehicle who struck her car while changing lanes. When jurors were interviewed after a very small verdict was returned, they stated that they "did not want to award anything to a fat, Black woman on welfare who would simply blow the money on liquor, cigarettes, the lottery, or bingo."[59] Significantly, the plaintiff in that case was not on welfare and "there was little evidence presented as to her lifestyle, spending habits or leisure time."[60] Such damaging perceptions and misperceptions can also be found in Pennsylvania courts. The Honorable Frederica A. Massiah-Jackson, of the Philadelphia Court of Common Pleas, another panelist, told of the time she was assigned to review a Philadelphia case that had resulted in a hung jury. She explained that the file memorandum from another Philadelphia judge identified the reason for the hung jury:

> "According to all counsel, this was a racially divided jury that returned its verdict at the same time as the O.J. Simpson trial verdict. The plaintiff is (according to plaintiff's counsel) a grossly overweight female who did not present well to the jury."[61]

The courts have not yet acted effectively to curb the effects of gender and race bias in civil litigation. Indeed, plaintiffs' attorneys have sometimes been prevented from cautioning jurors not to allow their preconceptions or unconscious biases to influence their verdict. For example, in *Stanton v. Astra Pharm. Prods. Inc.,* 718 F.2d 553, 578–579 (3d Cir. 1983), the plaintiff's counsel made an explicit reference to race before an all-white jury in the Middle District of Pennsylvania, stating in part "[w]e were concerned about the effect of having black people come to an area where there are not many black people and expecting to get justice from a jury which is mostly white people."[62] The Third Circuit expressly disapproved of this approach, calling it "beyond the realm of appropriate advocacy." The decision went on, "[t]here must be restraints against blatant appeals to bias and prejudice. Justice must not be based on racial sympathy or animosity."[63]

This response is indicative of a general reluctance of the courts to confront racial bias in the courtroom. The Maryland Court of Appeals, however, has recognized that it is sometimes necessary to call attention to race in order to prevent racially-biased decision-making. In a 1995 decision, the Maryland court held that the trial court—in a case involving an African American defendant and white arresting officer as the only witness to the crime—had abused its discretion by refusing to ask a *voir dire* question regarding racial or ethnic bias.[64] Other courts have taken the view that "questions about race should not be asked if the case does not involve race as a central issue."[65]

Roundtable participants emphasized the potentially important role that the judiciary can play in setting a tone in the courtroom of zero tolerance of racial and gender bias. The consensus of the participants was that the judge should make an anti-discrimination warning at the outset of a case, rather than waiting to include the warning in jury instructions at the end of the trial.

THE INFLUENCE OF RACIAL BIAS ON SETTLEMENT NEGOTIATIONS IN CASES INVOLVING MINORITIES MUST BE OPENLY ACKNOWLEDGED.

"Many attorneys, [insurance] adjusters, and judges consider race when assessing potential risks in tort cases. They believe that race will affect the outcome of a tort case because they expect judges or jurors to reflect normal racism that governs most of our society's decision making."

—Professor Frank McClellan

Most roundtable participants agreed that the majority of the state judiciary did not exhibit overtly biased attitudes in the course of litigation. Some participants, however, particularly in Philadelphia and in Pittsburgh, expressed concern with the influence racial bias has upon settlement negotiations in cases involving minority plaintiffs. They described the pressure placed upon minority plaintiffs to reduce their settlement demands based upon the belief of the attorneys, insurance adjusters and the judges that jurors' racially-biased attitudes would influence the outcome of the trial and reduce the likelihood or the amount of a verdict for the minority plaintiff.

In his article, *The Dark Side of Tort Reform: Searching for Racial Justice*, Frank McClellan, professor of law at Temple University Law School, discussed the role played by race in ordinary tort cases and the neglect of this issue in the debate over tort reform. Professor McClellan emphasized the importance of a public acknowledgement of a widely shared perception that "many attorneys, [insurance] adjusters, and judges consider race when assessing potential risks in tort cases. They believe that race will affect the outcome of a tort case because they expect judges or jurors to reflect normal racism that governs most of our society's decision making."[66]

As an example of the influence that race has in the disparate treatment of plaintiffs during settlement negotiations, McClellan discussed a case in which he was involved as an attorney representing one white and one African American plaintiff, both physicians, with identical claims against a computer software company. The defendants were also represented by the same defense counsel. Despite the identical nature of the claims and facts of the cases, the defense made a settlement offer to the white plaintiff but not to the African American plaintiff. Defense counsel compounded the racist undercurrent permeating the case by asking why the referral of such a complex commercial case had been made to an African American attorney and remarking about how unusual it was. The referring attorney—an African American from a large firm—responded by informing the defense attorney that the attorney was experienced and he himself was African American. Defense counsel was reportedly taken aback by the comments, although the exchange had no apparent effect on his settlement negotiations strategy.

McClellan emphasized the importance of openly acknowledging that race does play a role in tort cases in order to effectuate true tort reform. He stated that in his experience and that of many other attorneys and litigants of color, "the race problem impacts on every aspect of a tort claim, adversely affecting lawyers, clients and the public conception of justice… the approach of pretending that race has nothing to do with tort law compounds the evil by allowing private bias to control."[67]

TESTIMONY BY WOMEN AND MINORITIES IS OFTEN DISCOUNTED BY COURTS AND JURIES.

As discussed above, surveys and empirical research both show that judges and juries have been known to discount the testimony of women and minorities, whether such testimony is on their own behalf, or as a witness or an expert.[68] The same theme emerged from roundtable discussions that examined the poor treatment of minority and female attorneys, witnesses and experts in the course of civil trials. Specifically, roundtable participants expressed concern about the lack of credibility given to women and minority witnesses and experts who testify in civil cases in Pennsylvania.

In the Philadelphia roundtable discussion, an attorney recounted a Delaware County case in which the testimony of a white plaintiff with brain damage was corroborated by a third-party African American witness. Also testifying for the plaintiff was a female expert witness. In interviews following the verdict, members of the all-white jury indicated that they had disregarded the testimony of both the African American witness and the female expert witness. With such cases in mind, attorneys say they take the race and gender of potential expert witnesses into consideration when choosing witnesses to put on the stand. An important consideration in the decision is the attorney's understanding of how a minority or female expert will be regarded by the jury and the court.

Female attorneys reported that some judges in Pennsylvania treat them with less respect—and address them less formally—than male attorneys. According to the female attorneys, the informality and lack of respect extend to female witnesses. The phenomenon is most common, the attorneys say, in the small, rural counties where female and minority attorneys are still rare. In the same vein, one attorney said judicial bias occasionally made it more difficult to have evidence entered into the record when representing minorities than when representing white clients. The perceptions of these female attorneys about their treatment by the judiciary echoes the experiences of the female attorneys who participated in the Committee's focus groups on perceptions of gender bias in the courtroom, discussed extensively in this report's chapter on Perceptions and Occurrences of Racial, Ethnic, and Gender Bias in the Courtroom.

INEQUITIES IN EMPLOYMENT DISCRIMINATION CASES

ROUNDTABLE DISCUSSIONS

Roundtable discussion sessions on employment discrimination litigation were also conducted by the Committee. These sessions were similar to the personal injury discussion sessions. Approximately 50 to 60 attorneys were invited to sessions in Pittsburgh and Philadelphia to discuss their perceptions of whether racial and gender bias has affected their practices and clients in employment discrimination litigation. Among the participants were some of the most highly regarded and experienced attorneys in this area of law in the Commonwealth. The focus of the discussion was state court employment litigation, rather than federal litigation that constitutes the bulk of cases handled by most employment lawyers. Clearly, more empirical research is needed on these issues and while anecdotal information is no substitute for that, the collective experiences of this distinguished group of practitioners who regularly represent the female and minority citizens of the Commonwealth in their claims of discrimination was considered by the Committee to be very valuable information for the Court to have. In particular, the manner in which this class of citizens is treated by the justice system speaks volumes about the fairness of the system and its responsiveness to complaints of inequitable treatment.

Several major themes emerged from these sessions:

EFFECTS OF PRECLUSION OF PUNITIVE DAMAGES, TRIAL BY JURY, AND ATTORNEY'S FEES UNDER THE PHRA

> *The consensus of the [roundtable] participants was that the PHRA should be amended to make these fundamental rights [to a jury trial and to recover punitive damages] explicit.*

The Supreme Court of Pennsylvania's decisions in *Hoy v. Angelone*, 554 Pa. 134, 720 A.2d 745 (1998) and *Wertz v. Chapman Township*, 559 Pa. 630, 741 A.2d 1272 (1999) were the subject of much discussion at the roundtables. In *Wertz*, the Court construed the Pennsylvania Human Relations Act to eliminate the right to a jury trial in cases brought pursuant to the Act. In *Hoy,* the Supreme Court concluded that the PHRA did not permit a recovery of punitive damages. It also affirmed a lower court's denial of attorney's fees to a successful plaintiff despite statutory language

that clearly indicates that attorney's fees should be awarded. The consensus of the participants was that the PHRA should be amended to make these fundamental rights explicit. The participants noted that, in their view, this interpretation is contrary to the broad interpretation given almost identical language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq., by the United States Supreme Court and other federal courts,[69] and by other state appellate courts which have broadly interpreted their corresponding statutes.[70]

The roundtable participants were particularly concerned with the effect of these decisions upon residents of rural counties. Attorneys reported being contacted on numerous occasions by rural plaintiffs who had valid claims under the PHRA but had been unable to secure representation from local attorneys. Those attorneys recognized the disadvantages to their clients of bringing cases into state court because of the absence of suitable remedies under the PHRA, particularly with regard to the right to a jury trial and the award of attorney's fees. The only other option for those plaintiffs was to pursue their claims in federal court, yet the distance from rural areas to the federal courts further reduces the likelihood of obtaining local representation. Frequently, local counsel is unfamiliar with federal court practice and/or cannot recover the travel expenses to a distant court. The same travel expenses, as a practical matter, prevent claimants from securing representation by urban attorneys. Many rural residents are low-wage employees who cannot afford to make the many trips associated with litigation of their claims. The result is that the rural claimants may not receive representation on otherwise meritorious cases due to the lack of state court remedies.

Additionally, roundtable participants noted that the language of the PHRA, coupled with the absence of an explicit statement of suitable remedies, has further limited the ability of minorities, in particular, to have a racially diverse jury decide their cases. The participants indicated that while there are serious problems with the lack of racial diversity on juries in the Commonwealth of Pennsylvania,[71] with the exception of Philadelphia County, it has been their experience that the federal system has far fewer minorities on its jury panels. Without access to state courts and their comparatively more racially diverse jury panels, minorities throughout the Commonwealth are denied the opportunity to try their employment discrimination claims before jurors who share their racial and ethnic heritage and their sensitivity to acts of racial discrimination.

EFFECT OF RESTRICTIONS ON ATTORNEY'S FEES ON LOW-INCOME CLAIMANTS

Many roundtable participants expressed concern for the individuals that the PHRA and the federal employment discrimination statutes were primarily intended to protect. Participants agreed that the expected amount of recovery is the major factor in an attorney's decision to accept a case. Because damages in such cases are based on employee wages, however, the lower the claimant's salary, the less likely the attorney is to take the case. White males—generally the higher wage earners— therefore have a greater chance of obtaining representation than do the women and minorities whom the laws were primarily designed to protect. Roundtable participants estimated that they turn down approximately two-thirds of potential cases because of their low value or because plaintiffs are unable to pay costs or a retainer. Many plaintiffs who have legitimate claims are thus left without representation.

Even higher-wage employees are often unable to afford employment litigation because of its complexity and the aggressive manner in which employers defend these cases. Participants remarked upon the vast number of motions that were filed by the defense in these cases. These types of litigation tactics, generally aimed at burdening plaintiffs' attorneys who commonly take those cases on a contingent basis, often serve to reduce the likelihood of a plaintiff obtaining representation on an otherwise valid claim.

Participants also emphasized that the lack of remedies in state court leads claimants to seek recourse in the federal court system. Participants reported that some of the federal judiciary believe employment cases "clog the circuit" and often involve emotionally charged parties who misinterpret facts. The roundtable participants also spoke of experiences in which they had their attorney's fees petitions substantially reduced by the federal bench, which further diminishes the likelihood of plaintiffs with legitimate claims obtaining representation.

COMPLEXITIES OF EMPLOYMENT DISCRIMINATION LAW

Employment discrimination law can be very complex and specialized, and roundtable participants reported that some members of the state judiciary lack a fundamental understanding of this difficult area of law. According to participants, the state judiciary's lack of familiarity fuels their tendency to grant summary judgment in favor of the defendant, making it difficult for plaintiffs to obtain relief. Roundtable participants also noted that the assignment system in most counties does not allow the trial judge to have any involvement with an employment discrimination case prior to the trial.

This exacerbates difficulties because the assigned judge is prevented from becoming familiar with the case and the law before the trial begins. Roundtable participants viewed this as a significant problem in employment discrimination cases.

Roundtable participants also remarked on the occasionally open hostility of some judges toward employment discrimination plaintiffs in particular counties. Participants speculated that the attitude might stem from crowded dockets, or perhaps the concern among the judiciary that it is bad policy to rule against employers in a Commonwealth where businesses are difficult to retain. Whatever the reason, the hostile attitude has a chilling effect, not only on plaintiffs and the exercise of their right to seek redress for their injuries, but also on attorneys who become less willing to take a case when the chances of success, regardless of the merits of the case, are diminished.

Some roundtable participants said judicial attitudes toward female plaintiffs in employment discrimination cases were as bad, or worse, than the negative attitude toward minority males. Participants observed that some judges assign far less credibility to female claimants than they do to males.

One roundtable participant noted an exception, describing his experience with one county's judiciary as "wonderful" while he was litigating a Section 1983 civil rights action.

COUNTY COURT EMPLOYEES

Roundtable participants expressed concern that the Court's decision in *Ison v. Erie County Courts*, 546 Pa. 4, 682 A.2d 1246 (1996), prohibiting the Pennsylvania Human Relations Commission from hearing a discharged court employee's claim, has left that class of employees with few options for seeking redress for the unlawful employment actions of their employers.

ADMINISTRATIVE REQUIREMENTS UNDER PHRA

New Jersey's Law Against Discrimination (NJLAD), N.J. Stat. Ann §10:5-1 *et seq*., serves as a useful counterpoint to the PHRA with respect to administrative restrictions. For example, before an action can be brought in Pennsylvania under the PHRA, an employee-claimant must first file an administrative complaint with the Pennsylvania Human Relations Commission (PHRC). In *Woodson v. Scott Paper Co.,* 109 F.3d 913 (3d Cir. 1997), the Third Circuit ruled that while an employee could proceed in court under Title VII without first filing with the PHRC, filing with the EEOC did not eliminate the requirement to initiate PHRC proceedings as required by the PHRA, further noting that the issue of

determining whether or not a claimant has initiated PHRC proceedings under the PHRA is a matter of state law. Under the PHRA, an employee claimant must initiate a proceeding by first filing an administrative complaint with the PHRC within 180 days of the alleged act of discrimination. There are no such prohibitive administrative requirements under the NJLAD. While it is possible to file with the New Jersey Division of Civil Rights within 180 days of the adverse action, and/or with the EEOC, for example, it is not necessary to do either. In addition, filing with the New Jersey Division of Civil Rights does not toll a claimant's time to file in state court, as a filing under the PHRA does in Pennsylvania. The NJLAD also permits punitive damages, places no caps on damage awards and provides for attorney's fees including the use of a contingency fee multiplier.

RECOMMENDATIONS

TO THE SUPREME COURT OF PENNSYLVANIA

The Committee recommends that the Court:

1. Adopt rules and jury instructions to eliminate the use of gender-based and race-based life expectancy or work-life tables in determining future earning capacity.
2. Direct judges to instruct jurors, at the beginning of each case, to refrain from allowing personal racial, ethnic or gender bias to influence their deliberations.
3. Establish a policy that prohibits judges or counsel from using potential racial, ethnic, or gender bias of jurors as a means of influencing settlement negotiations.
4. Direct that a standard jury instruction be drafted and implemented in all types of cases, which prohibits jurors from considering race, gender or ethnic identity when evaluating the credibility of witnesses, experts or litigation parties.
5. Increase diversity on juries throughout the Commonwealth.[72]
6. Direct that model jury instructions be drafted to address specifically the undervaluation of homemaker services.
7. Commission an empirical study of decided cases in Pennsylvania to determine whether a racial, ethnic or gender disparity in damage awards exists, and to determine the specific factors (e.g., future earnings, evaluation of pain and suffering) that likely account for the disparity, if any.
8. Include programs on the need for fair and equal treatment of litigants in employment discrimination cases at training sessions for judges and court personnel.

TO THE LEGISLATURE

The Committee recommends that the Legislature:

1. Amend the Pennsylvania Human Relations Act to include a right to a jury trial for all discrimination plaintiffs, as is provided to virtually all other plaintiffs in the civil litigation system.
2. Amend the Pennsylvania Human Relations Act to include a right to reasonable attorney's fees to plaintiffs who are prevailing parties.
3. Appropriate funding for the Pennsylvania Human Relations Commission at a level to permit substantive investigation of all claims.

ENDNOTES

[1] The Effects of Gender in the Federal Courts, The Final Report of the Ninth Circuit Gender Bias Task Force, Southern CA. L. Rev., Vol. 67, No. 4, p. 884 (May 1994) [hereinafter Ninth Circuit Study].

[2] Judith Resnik, *Gender in the Court: The Task Force Reports*, The Woman Advocate, (1996); Judith Resnik, *Naturally Without Gender: Woman, Jurisdiction, and the Federal Courts,* 66 N.Y.U. L. Rev. 1682 (1991); Kathryn Skoug, *The Intersection of Gender and Race in the Federal Courts: Doubly Disadvantaged;* unpublished on file at Georgetown Law Journal (January 26, 1994).

[3] Ninth Circuit Study, *supra* at 885.

[4] Sources consulted for this included: Final Report of the Colorado Supreme Court Task Force on Gender Bias in the Courts (1990) [hereinafter Colorado Report]; Illinois Task Force on Gender Bias in the Courts, the 1990 Report [hereinafter Illinois Report]; Iowa Equality in the Courts Task Force, Final Report (1993) [hereinafter Iowa Report]; Kentucky Task Force on Gender Fairness in the Courts, Equal Justice for Women and Men (1992); Report of the Gender Bias Study of the Supreme Judicial Court, Commonwealth of Massachusetts (1989) [hereinafter Massachusetts Report]; Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report (1989) [hereinafter Minnesota Report]; New Jersey Supreme Court Task Force on Women in the Courts, First Year Report (1984) [hereinafter New Jersey Report]; New York Task Force on Women in the Courts, Report (1986); Rhode Island Committee on Women in the Courts, The Final Report (1987); Washington State Task Force on Gender and Justice in the Courts, Report (1989); Wisconsin Equal Justice Task Force Final Report (1991).

[5] Colorado Report, *supra* at 104.

[6] *Id.* at 105.

[7] Id.

[8] The Gender Bias Task Force of Texas, Final Report, p. 41 (1994).

[9] Id.

[10] Achieving Equal Justice for Men and Women in the California Courts, Final Report of the Judicial Council of California Advisory Committee on Gender Bias in the Courts, p. 88 (1996).

[11] Id.

[12] Report of the Oregon Supreme Court/Oregon State Bar Task Force on Gender Fairness, p. 87 (1998).

[13] Goodman, Loftus, Miller & Greene, *Money, Sex and Death: Gender Bias in Wrongful Death Damage Awards*, 25 L. & Soc'y Rev. 270, 282–82 (1991); Iowa Report, *supra* at 115.

[14] Massachusetts Report, *supra*, at 211–212.

[15] Final Report, Nebraska Supreme Court Task Force on Gender Fairness in the Courts, p. 23 (1994) [hereinafter Nebraska Report].

[16] Iowa Report, *supra* at 119.

[17] Minnesota Report, *supra* at 78–79; Illinois Report, *supra* at 186.

[18] Colorado Report, *supra* at 104.

[19] Iowa Report, *supra* at 119.

[20] Nebraska Report, *supra* at 24.

[21] *Id.* at 23.

[22] Iowa Report, *supra* at 199, citing Illinois Report, *supra* at 186.

[23] Washington State Minority and Justice Task Force, Final Report, p. 131 (1990).

[24] Report of the New York State Judicial Commission on Minorities, Vol. 2—The Public and the Courts, p. 184 (1991).

[25] Frank M. McClellan, *The Dark Side of Tort Reform, Searching for Racial Justice*, 48 Rutgers L. Rev. 774 (1996) [hereinafter McClellan].

[26] *Id.* at 776.

[27] Iowa Report, *supra* at 118.

[28] Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. Pa. L. Rev. 463, 465 (1998).

[29] Martha Chamallas, *A Woman's Worth: Gender Bias in Damage Awards*, Trial Magazine, August 1995 pp. 38–43 [hereinafter Chamallas, *A Woman's Worth*].

[30] Testimony of Dr. James Kenkel, Pittsburgh Public Hearing Transcript, pp.157–158.

[31] Gender and Justice: Report of the Vermont Task Force on Gender Bias in the Legal System (1991), p. 151 [hereinafter Vermont Report].

[32] *Id*. at 152.

[33] Id.

[34] James Ciecka, Thomas Donley and Jerry Goldman, A Markov Process Model of Work-Life Expectancies Based on Labor Market Activity in 1997–1998, Journal of Legal Economics, Winter 1999–2000.

[35] Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 Fordham L. Rev. 74, 115 (1994) [hereainafter Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*].

[36] *Id*. at 95–96.

[37] *Id*. at 97.

[38] *Id* at 117.

[39] *Id*. at 115.

[40] Chamallas, *A Woman's Worth*, *supra* at 40.

[41] *City of Los Angeles v. Manhart*, 435 U.S. 702, 709 (1978).

[42] Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, supra at 105.

[43] Id.

[44] *Id*. at 105–107.

[45] *Id*. at 99.

[46] New Jersey Report, *supra*.

[47] Minnesota Report, *supra* at 76.

[48] *Id*. at 77.

[49] Colorado Report, *supra* at 105.

[50] Vermont Report, *supra* at 148.

[51] *Id*. at 150.

[52] *Id*. at 149, 150.

[53] Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 Northwestern University L. Rev. 1 (1996).

[54] *Id*. at 10.

[55] *Id*. at 9–10.

[56] *Id*. at 10.

[57] Sources of racial underrepresentation in the jury pool include judicial district boundaries, qualifications to serve, source lists, questionnaire and summons, random selection, excuses and exemptions. *See* Kurt M. Saunders, *Race and Representation in Jury Service Selection,* 36 Duq. L. Rev. 49 (1997). For a more extensive discussion of racial underrepresentation in the jury selection process, see Chapter 2 of this report on Racial and Ethnic Bias in Jury Selection.

[58] Testimony of Timothy O'Brien, Pittsburgh Public Hearing Transcript, pp. 162–163.

[59] Honorable Frederica A. Massiah-Jackson, *Justice and Fairness: A Judge's Perspective*, *Race & Gender in the Courtroom*, Pennsylvania Bar Institute, p. 109 (2000).

[60] Id.

[61] *Id* at 110.

[62] *Stanton v. Astra Pharm. Prods. Inc.*, 718 F. 2d 553, 578–579 (3d Cir. 1983).

[63] *Id*. at 579.

[64] *Hill v. Maryland*, 339 Md. 275, 661 A.2d 1164 (1995).

[65] *Illinois v. Diggs*, 612 N.E. 2d 83, 85 (Ill. App. Ct. 1993); *Commonwealth v. Gray*, 608 A.2d 534, 540–41 (Pa. Super. Ct. 1992).

[66] McClellan, *supra at* 768.

[67] Id. at 766.

[68] Lynn Hecht Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, Trial Magazine, February 1990, p. 30–32.

[69] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S. Ct. 964 (1968).

[70] For example, in *Haynes v. Rhone-Poulenc, Inc.*, 206 W.Va. 18, 521 S.E. 2d 33 (1999), the Supreme Court of Appeals of West Virginia interpreted identical language in that state's statutory counterpart to the PHRA, the West Virginia Human Rights Act, W.Va. Code, 5-11-13(c), as permitting an award of punitive damages to a successful plaintiff under that Act. Similarly, in *Perilli v. The Board of Education Monongalia County*, 182 W. Va. 261, 387 S.E. 2d 315 (1989), the Supreme Court of Appeals of West Virginia construed the same act, the West Virginia Human Rights Act, W. Va. Code, 5-11-13 as providing a right to a jury trial, reasoning that the language of the statute did not prohibit a jury trial and that the plaintiff's sexual discrimination claim was "a species of personal injury akin to tort."

[71] *See* Chapter 2 of this report on Racial and Ethnic Bias in Jury Selection for a more extensive discussion of jury diversity.

[72] *Id.*

8 EMPLOYMENT AND APPOINTMENT PRACTICES OF THE COURTS

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INTRODUCTION

By virtue of its mission to dispense justice, the entire court system must reflect fairness and sensitivity in all respects, including the complexion, demeanor, and diversity of its work force.

Courts differ from other governmental institutions in that their goal is to uncover truth and dispense justice and, in that process, to apply the law equally to all people. Their strength rests on the public's perception that they are fair, impartial, and independent. When citizens believe that the courts are unfair or biased, confidence in the judicial system erodes.

By virtue of its mission to dispense justice, the entire court system must reflect fairness and sensitivity in all respects, including the complexion, demeanor, and diversity of its work force. Similarly, the process by which courts hire employees and make appointments must be open and inclusive. An employment and appointment process that considers a broad spectrum of qualified candidates will not only appear to be fair, but will serve to generate a diverse pool of applicants from whom the best candidates may be selected.

Appellate and trial courts in Pennsylvania have the authority to hire and appoint individuals to a variety of positions within the legal system. As employers, the courts hire clerical, technical, legal, and support staff. In addition, judges appoint attorneys to serve the court as counsel to indigent criminal defendants and as masters, arbitrators, guardians, and other positions. Appellate courts can also appoint attorneys, as well as trial judges, to advisory committees and disciplinary boards. Court staff positions and judicial appointments confer a certain level of prestige and can enhance the recipient's exposure and career.

In an effort to determine whether racial, ethnic, or gender bias plays a role in the Pennsylvania legal system, two separate Work Groups, the Court as Employer and the Court as Appointer, were formed to review the court system's employment and appointment practices.

Focus of Inquiry

The objective of the Committee's examination of employment practices in the Pennsylvania court system was to develop a personnel profile, by race, ethnicity, and gender of the employees in the system. The Committee initially planned to conduct an analysis of the courts' hiring, promotional, and training practices, but that project was tabled because of difficulties in obtaining data to produce the profile.

The focus of the Committee's study of the court appointment system was to determine whether there is actual or perceived discrimination based on race, ethnicity, or gender in the process by which courts make their appointments. The Committee sought to determine whether the process was sufficiently inclusive to provide all interested and competent candidates with the opportunity to serve the courts. The inquiry began with an effort to identify the circumstances in which the court functioned as appointer. The Committee then gathered data about the process by which appointments are made, and finally examined the data in order to determine if any patterns of bias emerged.

THE COURT AS EMPLOYER

THE PENNSYLVANIA COURT SYSTEM

The current Pennsylvania judiciary is composed of the Supreme Court of Pennsylvania, the Superior Court, the Commonwealth Court, the Courts of Common Pleas in each county, and the various specialty and minor courts. Most Pennsylvania justices and judges are elected to 10-year terms; the policy has been in place since a 1968 referendum amended the 1853 state constitution. The only exceptions to the 10-year term are district justices, and judges in Philadelphia Municipal Court and Philadelphia Traffic Court, all of whom are elected to six-year terms; and judges in Pittsburgh's Magistrates Court, who are appointed by the mayor to four-year terms.

Pennsylvania's court personnel are employed by either the county or by the Commonwealth. All judges are employed by the Commonwealth, including justices of the Supreme Court of Pennsylvania; judges on the Superior Court and Commonwealth Court; trial judges in the Courts of Common Pleas; and district justices. Appellate court personnel and chief court administrators are also Commonwealth employees. Employment records for Commonwealth employees are retained by the Administrative Office of the Pennsylvania Courts (AOPC). Local county governments employ all other court employees at the Common Pleas Court and district justice level, including judicial staff, assistant court administrators, and managers. Their employment records are maintained by the individual county governments.

SUMMARY OF METHODOLOGY

To gather information about the court as an employer, the Committee contacted each of the three appellate courts, each county court administrator, and the AOPC to request data on the race, ethnicity, and gender of court personnel. Statisticians working for the Committee provided census data to the Committee for use in comparing the race, ethnicity, and gender profiles of court personnel with each county's general population statistics. A discussion of the specific methodology used in obtaining that data and the findings is set forth below.

The Committee also contracted with The Melior Group and V. Kramer & Associates, Philadelphia-based research and consulting firms, to organize and conduct focus groups and interviews with court employees, attorneys, judges, and litigants in several locations around the Commonwealth.

In addition, the Committee reviewed testimony from the six public hearings held throughout the Commonwealth. Witnesses included experts on topics being studied by the Committee; advocates for litigants seeking assistance from the courts; and citizens willing to relate their experiences within the justice system. Racial, ethnic, and gender bias reports prepared by other state task forces were also consulted by the Committee.

PROFILES

PENNSYLVANIA JUDICIARY

> *As of June 2002, there were 431 justices and judges in the Commonwealth, of whom 73 (17 percent) were white women, 19 (4 percent) were non-white women and 16 (4 percent) were non-white men.*
>
> —Administrative Office of Pennsylvania Courts and Pennsylvania Bar Association Commission on Women in the Profession

As of June 2002, there were 431 justices and judges in the Commonwealth, of whom 73 (17 percent) were white women, 19 (4 percent) were non-white women and 16 (4 percent) were non-white men. These figures, and the additional ones below, were obtained from the AOPC and the Pennsylvania Bar Association, Commission on Women in the Profession, 2002 Report Card.

TABLE 1
Race, Ethnic and Gender Profile of Pennsylvania Judiciary [1] [2]

Court or County	Judges					District Justices				
	Total	Male		Female		Total	Male		Female	
		W	NW	W	NW		W	NW	W	NW
Supreme Court	7	6	0	1	0					
Superior Court	15	9	1	5	0					
Commonwealth Ct	9	4	0	4	1					
Adams	3	3	0	0	0	4	4	0	0	0
Allegheny	40	31	1	5	3	55	38	3	13	1
Armstrong	2	2	0	0	0	4	4	0	0	0
Beaver	6	5	1	0	0	9	8	0	1	0
Bedford	2	2	0	0	0	4	2	0	2	0
Berks	12	9	0	3	0	17	13	1	3	0
Blair	4	3	0	1	0	7	6	0	1	0
Bradford	2	2	0	0	0	3	3	0	0	0
Bucks	10	8	0	2	0	18	12	0	6	0
Butler	5	4	0	1	0	4	2	0	2	0
Cambria	5	5	0	0	0	10	9	0	1	0
Carbon	2	2	0	0	0	4	4	0	0	0
Centre	3	3	0	0	0	5	5	0	0	0
Chester	11	6	1	4	0	18	16	1	1	0
Clarion	1	1	0	0	0	4	4	0	0	0
Clearfield	2	2	0	0	0	4	4	0	0	0
Clinton	2	2	0	0	0	3	3	0	0	0
Columbia-Montour	2	2	0	0	0	5	3	0	2	0
Crawford	2	2	0	0	0	6	5	0	1	0
Cumberland	5	5	0	0	0	8	4	0	4	0
Dauphin	8	7	0	1	0	14	12	0	1	1
Delaware	18	13	1	4	0	32	23	3	6	0
Elk-Cameron	0	0	0	0	0	3	3	0	0	0
Erie	9	7	0	2	0	14	10	0	4	0
Fayette	6	6	0	0	0	13	10	0	3	0
Franklin-Fulton	4	3	0	1	0	9	6	0	3	0
Greene	2	2	0	0	0	3	3	0	0	0
Huntingdon	1	1	0	0	0	4	3	0	1	0
Indiana	2	2	0	0	0	4	3	0	1	0
Jefferson	1	1	0	0	0	3	3	0	0	0

Court or County	Judges					District Justices				
	Total	Male		Female		Total	Male		Female	
		W	NW	W	NW		W	NW	W	NW
Lancaster	12	11	0	1	0	20	15	0	5	0
Lawrence	4	4	0	0	0	5	4	0	1	0
Lebanon	4	4	0	0	0	7	5	0	2	0
Lehigh	9	8	0	1	0	14	10	0	4	0
Luzerne	9	8	0	1	0	17	16	0	1	0
Lycoming	5	4	0	1	0	6	6	0	0	0
McKean	1	1	0	0	0	4	3	0	1	0
Mercer	3	3	0	0	0	5	4	0	1	0
Mifflin	1	1	0	0	0	2	1	0	1	0
Monroe	5	3	0	2	0	10	8	0	2	0
Montgomery	20	18	0	2	0	30	21	0	9	0
Northampton	6	5	0	1	0	15	7	0	8	0
Northumberland	3	3	0	0	0	5	5	0	0	0
Perry-Juniata	2	2	0	0	0	5	2	0	3	0
Philadelphia	90	43	11	21	15					
Philadelphia Municipal Ct						25	13	2	6	4
Philadelphia Traffic Ct						6	4	0	0	2
Pike	1	1	0	0	0	4	4	0	0	0
Potter	1	1	0	0	0	4	0	0	4	0
Schuylkill	6	5	0	1	0	8	6	0	2	0
Snyder-Union	2	1	0	1	0	4	4	0	0	0
Somerset	3	3	0	0	0	5	4	0	1	0
Susquehanna	1	1	0	0	0	3	3	0	0	0
Tioga	1	1	0	0	0	3	3	0	0	0
Venango	2	2	0	0	0	4	4	0	0	0
Warren-Forest	2	2	0	0	0	6	4	0	2	0
Washington	5	3	0	2	0	12	10	0	2	0
Wayne	1	1	0	0	0	4	1	0	3	0
Westmoreland	10	8	0	2	0	19	14	0	5	0
Wyoming-Sullivan	1	1	0	0	0	4	2	0	2	0
York	11	9	0	2	0	18	14	0	4	0
Totals	**431**	**323**	**16**	**73**	**19**	**576**	**432**	**10**	**126**	**8**

APPELLATE COURT PERSONNEL

Data were also obtained from two of the three Pennsylvania appellate courts on the racial, ethnic, and gender composition of their work forces. The findings showed that in the Pennsylvania Superior Court, 29 percent of the personnel were male; 71 percent were female; 91 percent were white; and 9 percent were non-white. Similarly, in the Pennsylvania Commonwealth Court, 30 percent of the personnel were male; 70 percent were female; 92 percent were white and 8 percent were non-white. The data are presented in the following tables:

TABLE 2
Race, Ethnic, and Gender Profile of Pennsylvania Superior Court Personnel

October 2001

Office	Total	Male		Female	
		W	NW	W	NW
Judges Chambers	137	33	3	97	4
Central Legal	25	8	0	15	2
Legal Systems	5	3	0	2	0
Executive Administrator	5	3	0	2	0
Fiscal Department	5		0	4	1
Prothonotary Philadelphia	21	5	3	8	5
Prothonotary Harrisburg	10	2	0	7	1
Prothonotary Pittsburgh	11	4	0	6	1
Reporting Office	4	0	0	4	0
Totals	**223**	**58**	**6**	**145**	**14**

TABLE 3
Race, Ethnic, and Gender Profile of Pennsylvania Commonwealth Court Personnel

March 2002

Employees	Male		Female	
	W	NW	W	NW
Total: 136	38	3	87	8

The Committee also requested that each of the three Pennsylvania appellate courts provide data on the race, ethnicity, and gender of law clerks employed by those courts. None of the three appellate courts routinely gathers that data, but the Superior Court made a special effort to do so for the Committee. The data from Superior Court is presented in the following table:

TABLE 4
Race, Ethnic, and Gender Profile of Pennsylvania Superior Court Law Clerks

September 2002

Law Clerks	Male		Female	
	W	NW	W	NW
Total: 101	35	4	61	1

COUNTY COURT PERSONNEL

Determining the racial, ethnic, and gender composition of county court personnel was considerably more difficult than determining the racial, ethnic, and gender composition of the three appellate courts. The appellate courts are staffed by AOPC employees with common job classifications. The 67 county courts[3] throughout the Commonwealth, however, maintain separate personnel systems, and each county has both county and Commonwealth employees. Further, each of the court systems has its own unique job classification system in place. Some counties' classification systems are identical; others are not, making comparisons between counties virtually impossible.

Although the lack of uniformity of the job classification systems in the counties was a challenge, the Committee nevertheless felt that it was desirable to obtain some baseline data. Consequently, county court administrators were surveyed in an attempt to determine if racial, ethnic, and gender data are collected and to discover the nature of job classifications in county courts.

SURVEY

The survey of court administrators was designed by consultant Alan Rosin, of AR Associates, who designed a similar study for the state of California. The Committee made some minor modifications to Rosin's survey design. A copy of the survey instrument is found at Appendix Vol. II. Each of the

61 county court administrators[4] received the survey and 54 (86 percent) returned it. The findings indicated a wide disparity in the nature of job classifications and in the ways that racial, ethnic, and gender information is collected and maintained.

FINDINGS

Number of personnel in county justice system

Court administrators were asked to indicate the number of personnel in their justice system. Not surprisingly, the number of personnel varied widely, given the range of county populations in Pennsylvania. The average number of personnel was 214 persons per county, ranging from a low of five persons in the joint system in Perry and Juniata counties to a high of 2,609 persons in Philadelphia County. Only two counties, Philadelphia and Allegheny, had more than 550 persons working in the court system.

Availability and type of racial, ethnic, and gender data maintained

Court administrators were asked about the availability of racial, ethnic, and gender information for all county justice system employees. The definition of "county court employee" was left to each court system. Overall, slightly more counties had collected gender information than had collected racial/ethnic information. In only 31 percent of the counties, however, was the gender information in a format that could be linked to racial/ethnic information. Four court administrators who said they did not collect racial, ethnic, or gender information also indicated that they knew this information through their own observations. Counties with more than 50 employees were more likely than the smaller counties to have racial, ethnic, and gender data available.

Job classifications for which racial, ethnic, and gender data is available

Court administrators were also asked to identify each job classification for which racial, ethnic, or gender information was available. The court personnel were divided into two categories: judicial officers (judges, hearing officers, masters) and non-judicial employees (all other court personnel). In general, racial, ethnic, and gender information was more readily available for non-judicial employees than for judicial officers. The responses also showed that only half of the responding counties with non-judicial employees maintained any such information.

Other job classifications

Counties were asked to list any job classifications that they use but that were not listed on the survey. One-third reported that they did have other job classifications including: probation officers (13 counties) and tipstaves (six counties), and court reporters, law clerks, law librarians, and lawyers (five counties each). There were also many other jobs mentioned by a single county, including first-level supervisors, caseworkers, enforcement officers, jury attendants, district justice clerks, district justice secretaries, court administrative-clerical, and domestic relations director. Philadelphia County attached a list of 170 additional job titles.

It was not possible within the Committee's pressing time constraints, however, to determine how the counties retrieved and recorded racial, ethnic, and gender data: by self-reporting, by observation, or by some other method. Therefore, there is no guarantee of consistent or complete data even in the counties that do keep such data.

Contract personnel

In addition, 80 percent of the reporting counties contracted for personnel who were not justice system employees. These personnel included interpreters, court reporters, arbitrators, masters, conflict counsel, and mediators. One county also contracted for clerical staff, a mental health review officer, secretaries, tipstaves, and hearing officers. Only two of the 42 counties with contract personnel kept information on race, ethnicity, or gender.

Racial/ethnic classifications

In compliance with federal Equal Employment Opportunity Act guidelines, 96 percent of the responding counties that collected racial/ethnic data did so in broad classifications, such as "white, not of Hispanic origin," "African American," "Hispanic," "Asian or Pacific Islander," and "American Indian."

Format for retained data

There is no consistency in the manner or method of data compiled by those counties that keep racial, ethnic, and gender data. Sixteen of the 31 responding counties maintained computerized records and the remaining 15 counties used hard copies. Some counties used more than one data

format, and three counties used both computerized records and hard copies.

There was likewise no consistency in the storage software used to maintain the data. Some counties reported using AS400, while others used Microsoft Visual FoxPro and two counties used the ADP system. The rest of the 16 counties used other systems and software, including SQL, Access, Excel, MUNIS, ADMINS system, and Pentamation. Administrators in two counties said they did not know how their records were kept.

The data are acquired in a myriad of ways. Eleven counties used the federal EEO-4 form, while 18 others used miscellaneous forms that included employment applications or files (nine counties), information sheets or data sheets (two counties), EEO Internal-report (one county), and STD-21-B (one county). One court administrator also reported using first-hand knowledge.

SNAPSHOT OF COUNTY COURT WORKFORCES

A direct comparison of county court employment by job categories is virtually impossible because even when counties have set up and maintained employee databases, they are unique to the particular county. Nevertheless, the Committee compiled the basic racial, ethnic, and gender data provided by the county courts that kept the data. As was earlier noted, while differences in compiling and reporting data make precise figures impossible, it is still evident that Pennsylvania's county courts employ few non-whites in any capacity. In an effort to place these numbers in context, the Committee compared survey data with census figures of the non-white and female populations in each county.[5] The data are depicted in Table 5.

TABLE 5
Race, Ethnic, and Gender Profile of Selected County Court Personnel [6]

County	Total employees	Male		Female		2000 Census		
		W	NW	W	NW	Population	Percent non-white	Percent female
Adams	47	17	0	30	0	91,292	4.6	50.9
Allegheny	1099	305	89	544	161	1,281,666	15.7	52.6
Armstrong						72,392	1.7	51.4
Beaver						181,412	7.5	52.1
Bedford	28					49,984	1.5	50.7
Berks						373,638	11.8	51.
Blair						129,144	2.4	52.1
Bradford						62,761	2.1	51.3
Bucks						597,635	7.5	50.9
Butler	116	39	0	77	1	174,083	2.2	51.2
Cambria						152,598	4.2	51.5
Carbon						58,802	2.2	51.3
Centre	84	24	0	60	0	135,758	8.6	48.9
Chester	493	110	8	319	56	433,501	10.8	50.9
Clarion						41,765	1.8	51.7
Clearfield						83,382	2.6	50.1
Clinton						37,914	1.7	51.5
Columbia- Montour						64,152/ 18,236	2.4 3.3	52.4/ 52.5
Crawford						90,366	3.0	51.3
Cumberland	58	23	1	34	0	213,674	5.6	51.2
Dauphin						251,798	22.9	52.
Delaware						550,864	19.7	52.3
Elk- Cameron						35,112/ 5,974	1.0/ 1.2	50.5/ 50.9
Erie						280,843	9.1	51.2
Fayette						148,644	4.7	52.1
Franklin- Fulton						129,313/ 14,261	4.7/ 1.7	51.3/ 50.0
Greene						40,672	4.9	48.5
Huntingdon						45,586	6.6	47.7
Indiana	65	16	0	49	0	89,605	3.1	51.5
Jefferson						45,712	1.0	51.1
Lackawanna						213,295	3.3	52.8

County	Total employees	Male		Female		2000 Census		
		W	NW	W	NW	Population	Percent non-white	Percent female
Lancaster	458	118	8	283	49	474,658	8.5	52.8
Lawrence						94,143	5.0	52.5
Lebanon						120,327	5.5	51.3
Lehigh						312,090	13.0	51.8
Luzerne						319,250	3.4	51.8
Lycoming						120,044	6.1	51.1
McKean						45,936	3.5	49.9
Mercer						120,293	6.9	51.3
Mifflin	27	12	0	15	0	46,486	1.5	51.8
Monroe						138,687	11.8	50.6
Montgomery	234	79	3	133	18	750,097	13.5	51.7
Northampton	326	103	13	197	13	267,066	8.8	51.3
Northumberland						94,556	2.9	51.0
Perry- Juniata						43,602/ 22,821	1.5/ 1.9	50.4/ 50.3
Philadelphia	2460	789	270	794	606	1,517,550	55.0	53.5
Pike						46,302	6.9	50.2
Potter						18,080	1.9	50.7
Schuylkill	134	43	0	91	0	150,336	3.4	50.2
Snyder- Union						37,546/ 41,624	2.1/ 9.9	51.1/ 44.7
Somerset						80.023	2.6	50.1
Susquehanna						42,238	1.5	50.3
Tioga						41,373	1.9	51.0
Venango						57,565	2.4	51.2
Warren- Forest						43,863/ 4,946	1.3/ 4.1	51.0/ 47.4
Washington	199	61	6	124	8	202,897	4.7	52.0
Wayne						47,722	3.3	49.8
Westmoreland						369,993	3.4	51.8
Wyoming- Sullivan						28,080/ 6,556	1.7/ 4.4	50.4 49.5
York						381,751	7.2	50.8
Totals						**12,281,054**	**14.6**	**51.7**

DETAILED INFORMATION ON SEVEN COUNTIES

Seven counties provided detailed data on the racial, ethnic, and gender composition of their county court personnel. Unfortunately, as described above, the employment categories are markedly different. The following tables are presented to illustrate the type of information collected in the survey.

TABLE 6
Allegheny County Personnel Profile[7]

August 29, 2000

Job Category	Total Within Job Category	Male		Female	
		W 28%	NW 8%	W 49%	NW 15%
Judicial-related	19	8	0	7	4
Management	124	52	9	47	16
Professional	291	132	41	88	30
Confidential	210	50	2	139	19
Clerical	446	61	34	260	91
Part-time temporary	9	2	3	3	1
Grand Total	**1099**	**305**	**89**	**544**	**161**

TABLE 7
Chester County Personnel Profile

June/2002

Job Category	Total Within Job Category	Male		Female	
		W 22%	NW 2%	W 65%	NW 11%
Officials and Administration	19	9	1	7	2
Professional	194	73	5	104	12
Paraprofessionals	1	0	0	0	1
Clerical	246	10	1	193	37
Protective Service	32	15	1	12	4
Service/Maintenance	1	1	0	0	0
Technicians	3	2	0	1	0
Elected Officials	2	0	0	2	0
Grand Total	**493**	**110**	**8**	**319**	**56**

TABLE 8
Cumberland County Personnel Profile

June/2002

Job Category	Total Within Job Category	Male		Female	
		W 39%	NW 2%	W 59%	NW 0%
Casa Program Coordinator	2	0	0	2	0
Clerk, JR Law-Part Time	5	2	0	3	0
Clerk, SR Law-Part Time	4	3	1	0	0
Court Reporter	9	0	0	9	0
Jury Commissioner	2	1	0	1	0
Secretary to Judge	5	0	0	5	0
Staff Assistant	4	0	0	4	0
Tipstaff	18	11	0	7	0
Chief Tipstaff	1	1	0	0	0
Juvenile Master	1	1	0	0	0
Law Library Clerk	1	1	0	0	0
Law Clerk	1	1	0	0	0
Court Administrator	1	1	0	0	0
Asst. to Court Administrator	2	0	0	2	0
Special Court Administrator	1	1	0	0	0
Divorce Master	1	1	0	0	0
Grand Total	**58**	**23**	**1**	**34**	**0**

TABLE 9
Indiana County Personnel Profile

June/2002

Job Category	Total Within Job Category	Male		Female	
		W 25%	NW 0%	W 75%	NW 0%
Probation	21	10	0	11	0
Domestic Relations	17	4	0	13	0
Court Staff	27	2	0	25	0
Grand Total	**65**	**16**	**0**	**49**	**0**

TABLE 10
Lehigh County Personnel Profile

June/2002

Job Category	Total Within Job Category	Male		Female	
		W 25%	NW 1%	W 67%	NW 7%
Court Administration	94	25	0	63	6
Adult Probation	55	21	0	29	5
Juvenile Probation	72	31	4	34	3
Orphans Court	9	0	0	7	2
Domestic Relations	63	10	0	48	5
Master in Divorce	2	1	0	1	0
District Justices	65	0	0	59	6
Law Library	13	3	0	10	0
Grand Total	**373**	**91**	**4**	**251**	**27**

TABLE 11
Philadelphia County Personnel Profile

April/2002

Job Category	Total Within Job Category	Male		Female	
		W 32%	NW 11%	W 32%	NW 25%
Officials and Administration	128	78	16	19	15
Professional	873	302	137	224	210
Paraprofessionals	184	44	1	89	49
Clerical	699	78	30	352	239
Protective Service	378	208	74	48	48
Service/Maintenance	14	8	1	4	1
Technicians	132	27	5	56	44
Skilled Crafts	50	44	6	2	0
Grand Total	**2459**	**789**	**270**	**794**	**606**

TABLE 12
Schuylkill County Personnel Profile

June/2002

Job Category	Total Within Job Category	Male		Female	
		W 32%	NW 0%	W 68%	NW 0%
Officials and Administration	10	5	0	5	0
Professional	48	33	0	15	0
Paraprofessionals	0	0	0	0	0
Administrative support	71	3	0	68	0
Protective Service	0	0	0	0	0
Service/Maintenance	0	0	0	0	0
Technicians	5	2	0	3	0
Skilled Crafts	0	0	0	0	0
Grand Total	**134**	**43**	**0**	**91**	**0**

ANALYSIS OF COURT PERSONNEL PROFILES

The data tables presented in the previous sections indicate the following:

1. Minorities are represented on the bench or in the court personnel system only in those counties in which there is a significant minority population—primarily Pittsburgh and Philadelphia, and Philadelphia's surrounding suburban counties. With the exception of court personnel in Chester County, however, in no counties are minorities represented on the bench or among court personnel in numbers proportionate to their population.
2. There are few or no minority employees in six of the 14 counties that acknowledged collecting racial and ethnic data on court employees.
3. The tables from the counties with more detailed data illustrate the disparities in current job classification categories, as well as the difficulties in compiling data. The definition of "professional" in one county, for example, may be different from that used in another county. Absent that type of information, it is impossible to evaluate the data submitted. It is also not feasible, given the state of the present database, to accurately assess whether the hiring and promotional practices in some counties are fair or if there are equal opportunities for promotion in each system. Further research will be required by expert consultants to answer these questions.

4. The data do show, however, that women, both white and non-white, are generally clustered in the clerical and secretarial jobs, while men tend to hold the managerial and professional positions. The notable exception is Chester County.
5. There are far more men than women in protective services positions.
6. There is a need for a centralized system to compile detailed data in a format mandated by the Supreme Court. There is also a need for more extensive study of the hiring, training, and promotion practices at all levels of the Pennsylvania court system.

THE MELIOR GROUP/V. KRAMER & ASSOCIATES FOCUS GROUP FINDINGS

As stated previously, the Committee contracted with The Melior Group and V. Kramer & Associates to conduct a series of focus group sessions and interviews with attorneys, judges, court personnel, and litigants to discuss whether the Pennsylvania justice system operates fairly. Copies of the consultants' final reports are found in Appendix Vol. II.

Relevant key observations in the sessions included the following:

1. There was a perception that female court personnel are clustered in certain lower-level job categories and are often absent from supervisory categories that remain mostly male. (This perception is affirmed by the county data discussed earlier in this chapter.) Moreover, participants also reported large salary gaps between male and female court employees.[8]
2. In some counties, court personnel reported that certain jobs are considered "men's jobs."
    a. In Erie County, court personnel said that men alone are interviewed for certain jobs, which pay more than other comparable jobs that are "open" to women.[9] The Erie group also commented on the almost total absence of African American court staff.[10]
    b. In Philadelphia, employee participants said that certain jobs, such as court crier, are patronage jobs and tend to go to men, while other jobs, such as clerks, are standard county jobs and tend to be filled by women.[11]
    c. Some judges also noted that certain courtrooms almost seem racially segregated and that certain job categories seem to break down by race and gender.[12]

3. Generally, female employees did not perceive that there was a viable, realistic way for them to complain about bias. If they complained to their supervisors, they worried about being perceived as troublemakers; this was particularly problematic if the immediate supervisor was a judge.[13]
4. African American court personnel across the Commonwealth reported a pervasive condition of disrespect and unequal treatment in the workplace. They were concerned that if they complained about such treatment, they could lose their jobs. Consequently, they reported adopting a "grin and bear it" attitude.[14]
5. African American litigants also noted the paucity of African American employees in the courtroom. Some litigants commented that as a result, the courtroom felt "unfriendly" and "uncomfortable."[15]
6. Participants noted that African American personnel principally work in the courtrooms of minority judges. One effect of the pattern is that minority employees find advancement unlikely, unless they have a patron with "clout."[16]
7. African American attorneys and court personnel said they were very concerned about the latitude and tolerance that courts afforded to people who used race-based negative innuendo to their advantage.[17]
8. Minority employees felt that employment of more minorities would help moderate disparate treatment.[18] The feeling was that the dynamics of the courtroom are complex, and a minority presence in the courtroom would help reduce racially-biased behavior.[19]
9. The racial and gender composition of court personnel in various courtrooms was seen by participants in the focus groups as a reflection of bias in hiring and job assignments.[20]
10. Almost all participants—judges, employees, and attorneys—agreed that racial, ethnic, and/or gender bias could be subtle, and was often a matter of perception and interpretation.[21] Participants said instances of overt bias due to race, ethnicity, or gender were more common in areas of the Commonwealth where minority and female lawyers and judges rarely, if ever, have been seen in courtrooms.[22]

11. Judges had different views about the roles they had played—or could play—in changing the racial, ethnic, and gender profile of court employees. The degree to which a judge controls hiring and promotion is a matter of local custom. Different geographical areas have their own hiring procedures that may or may not leave room for political appointments.[23]
12. A number of judges reported hearing court employees use patronizing language about system participants who are different from them.[24]
13. Attorneys and court personnel alike felt largely powerless to challenge biased behavior.[25] African American court personnel expressed little hope for system-wide remedies that would overcome society's racism. Participants said they looked toward the judge as the one authoritative voice that could rectify disparate treatment. Participants believed that a meaningful response to unequal treatment must start with the Supreme Court of Pennsylvania setting the tone and descend through the administrative hierarchy of the justice system.[26]
14. There was universal agreement that judges set the tone for how things run in the courtroom and in their chambers, and that they have the power and responsibility to rectify racial, ethnic, and gender bias in the courtroom and the courthouse.[27]

Focus group participants and interviewees had numerous suggestions for improving the system, including the following:

1. From judges:
    a. Prevent bias through training and education of lawyers and judges, starting in law school.[28] A number of judges in Philadelphia were enthusiastic about relatively new "sensitivity" training for court personnel.[29]
    b. Create methods to identify and deal with instances of attorney and judicial bias when they occur.[30]
    c. Urge the Supreme Court to "find the line between common sense and political correctness"—particularly with regard to training and the need to get participants to take it seriously.[31]
2. From employees:
    a. Participants were frustrated both by the "blind eye" they said was often turned towards racial and ethnic problems in the courtroom, and by perfunctory remedial efforts, including sensitivity training, which they said were sporadic and ineffective. As an alternative, participants suggested independent courtroom observers who could verify complaints while allowing the complainants to remain

anonymous.[32] The consultants noted that this recommendation was another way of saying that the Supreme Court should set a tone and dictate compliance.[33]

b. Participants called for creation of an independent panel[34] outside the employees' chain of command, to which employees could report instances of bias.[35]

c. Participants favored creation of a disciplinary board that would hold judges accountable, but to which they could report anonymously.[36]

PUBLIC HEARINGS

Beata Peck Little, executive director of the Women's Resources of Monroe County, testified that she and her staff had been unable to identify a person of color in the judiciary or court administration, despite the county's 348 percent increase in Latino population since 1990 and 383 percent increase in African American population in the same period.

At the Committee's public hearings, the most common concerns regarding the role of the court as employer raised by experts and laypersons included the following:

- Minimal minority representation in the judiciary, in court administration, and among court staff reinforces the perception that the court does not serve members of the minority communities except as defendants.

Many speakers at public hearings across the Commonwealth touched on issues related to employment by the court. In Erie County, Gary Horton, executive director of the Urban Erie Commission, said minorities appeared to be underrepresented in the court system, compared to the general population.[37] Judge Stephanie Domitrovich of Erie County said that, of about 500 lawyers in the county, approximately 40 to 50 were women and five or six were African American.[38]

Beata Peck Little, executive director of the Women's Resources of Monroe County, testified that she and her staff had been unable to identify a person of color in the judiciary or court administration, despite the county's 348 percent increase in Latino population since 1990 and 383 percent increase in African American population in the same period.[39]

Little suggested that the court should actively recruit and train people of color if employment in the system is to reflect local communities. Lawyers and court administrators should be recruited, she said, and people of color should be encouraged to run for elected positions such as magistrate, district justice, and judge.[40]

The same issues were raised in Philadelphia. Iraida Afanador, associate executive director of the Lighthouse, posed a question to the legal community: "Are you hiring from the communities that you serve?"[41]

Jerome Mondesire, president of the Philadelphia branch of the NAACP, noted that the lack of diversity in the numbers of minority judges, prosecutors, court administrators, and chosen jurors reinforces the perception among African Americans that, "If you are black, you are more likely to be stopped, arrested, prosecuted and imprisoned than if you are white."[42] Mondesire ventured that the electoral process does not adequately provide for diversity on the bench. Too much emphasis is placed on those who can afford "to buy their way onto the ballot," he said, endorsing appointment of appellate judges.[43]

Judith Ariola-Rivera, bilingual and bicultural domestic violence counselor for Women's Resources of Monroe County, pointed out that many judges do not understand "the differences in religion and culture and ethnicity" and why differences in cultures might lead a woman to act or dress in a certain manner.[44]

Witnesses at various hearings noted that there is no institutionalized forum where judges can discuss questions of possible race, gender, and ethnic bias within the system.[45] In addition, Afanador pointed out that there had been testimony about African Americans, minorities or people of color at the Philadelphia hearing, but no specific mention of Latinos. She also noted the absence of Latinos in administrative and judicial positions.[46]

- Suggestions for improvements

Many suggestions were made for improvements in employment within county courthouses. In Allegheny County, it was suggested that the court maintain a statistical analysis of people on the court system payroll.[47] In Philadelphia County, a speaker recommended scrutiny of the courts' employment practices, coupled with hiring from the communities served. For outreach to job candidates, the courts could advertise in community newspapers and contact community organizations.[48] Another participant suggested instituting regular education sessions to address problems of racial, ethnic, and gender bias.

The Honorable John Younge, of the Court of Common Pleas in Philadelphia, suggested that the court adopt a goal of zero tolerance of racial discrimination and gender bias in the courthouse, whether in the courtroom or the workplace. He also suggested community outreach programs to address the perception that the courthouse is an inhospitable place. Judge Younge said he meets monthly with a group in the court to discuss issues relating to gender and racial bias. Recently, the group participated in a seminar on racial hate crimes.[49]

One attorney recommended the creation of a permanent mechanism for addressing bias issues, involving leaders of the bench and bar in the process.[50]

THE COURT AS APPOINTER

The appointers…may not fully appreciate that the racial, ethnic, and gender distribution in these positions conveys a strong message about the status of men and women and racial and ethnic minorities in the court system.

In Pennsylvania, the appellate and trial courts draw upon the extensive talents and knowledge of the private, public, and academic legal communities. The courts appoint lawyers to a variety of positions. Individual judges may appoint staff, criminal defense counsel, experts, guardians, and the like. The president judge of a county court may appoint administrative staff, permanent masters, and lawyers to court-related advisory committees.

These appointments are highly valued. They reflect the court's recognition of the lawyer's reputation and standing in the legal community. In addition, some appointments involve remuneration.

The appointers, on the other hand, may not fully appreciate that the racial, ethnic, and gender distribution in these positions conveys a strong message about the status of men and women and racial and ethnic minorities in the court system. Similarly, the manner by which appointers select appointees conveys a strong message about the fairness of the system. The participation of a diverse group of attorneys in appointed roles also increases the comfort level of litigants, jurors, and criminal defendants, and goes a long way to demonstrate that fairness is a reality in the justice system, not just a lofty ideal.

It is important, therefore, to ensure that all lawyers, to the extent possible, have the opportunity to receive court appointments periodically without regard to race, ethnicity, or gender. The courts should always bear in mind the value and necessity of diversity.

CIRCUMSTANCES IN WHICH COURTS MAKE APPOINTMENTS

SUPREME COURT OF PENNSYLVANIA

There are seven justices of the Supreme Court. The Court makes many appointments, ranging from court system administrator to members of court committees, the Disciplinary Board, and some members of the Judicial Conduct Board and Court of Judicial Discipline.

SUPERIOR COURT

The Superior Court currently has 22 judges, 14 of whom are commissioned and eight of whom are senior judges. Each judge employs/appoints four judicial law clerks, one summer law student intern, and, depending on available funding, a support staff of two secretaries. Superior Court does not make appointments as a court. The president judge has the power to appoint staff positions, such as directors of administration and central legal staff.

A report submitted to the Committee by the Superior Court indicated that, in 2000, each of the 19 judges who made appointments hired six staff persons; the remaining three judges each hired seven staff persons, some of whom hold part-time positions. Of the 135 total appointed positions in the Superior Court, seven, or 5 percent, were filled by non-white applicants.

COMMONWEALTH COURT

The Commonwealth Court currently has 16 judges, nine of whom are commissioned, and seven of whom are senior judges. One senior judge ended service at the end of 2002. Commonwealth Court, as a court, does not make appointments. The president judge has the power to appoint all personal and administrative staff. Each judge appoints his or her staff, including four law clerks and two secretaries per chambers.

COMMON PLEAS COURTS

As of 2002, there were 399 Common Pleas Court judges in Pennsylvania. They have appointment authority in a wide range of circumstances that are staff-related, case-related, or court-related. Staff-related appointments are those appointments the judge makes to

his or her staff, including tipstaves, law clerks, secretaries, and sometimes court reporters. Case-related appointments pertain to a particular case before the judge. They include special masters, arbitrators, mediators (in some cases), guardians, special trustees, and experts. Individual judges often appoint counsel in criminal cases and approve class action lead counsel in complex cases. Court-related appointments are made on behalf of the full court. These appointments include the court's administrative staff, permanent hearing officers, interpreters, stenographers, and small claims arbitrators. The president judge in each Court of Common Pleas makes many of the court-related appointments. Permanent hearing officers or interim district attorneys are appointed by a majority vote of the court's membership. Appointment practices vary by county; in some counties, administrative arms of the court are responsible for appointments.

METHODOLOGY

The Committee's data gathering efforts were broad-based. Through a survey of court administrators, the Committee sought information about the hiring and appointment process for private attorneys and court personnel in the Common Pleas courts. The Committee also received valuable information from individual attorneys, judges, and court personnel who testified at the public hearings throughout the Commonwealth.[51] In addition, site visits were made to Pittsburgh and Philadelphia where interviews were conducted with judges and administrators.[52] The Committee also reviewed racial and gender bias reports prepared by task forces in other states.

SURVEY

The Committee developed a survey with the assistance of court administrators throughout the Commonwealth.[53] *See,* Survey, attached in Appendix Vol. II. The survey was formulated to establish the criteria—such as experience, years of practice, and education—used to fill certain appointed positions. The Committee was particularly interested in the following positions: arbitrators, conflict counsel, court-appointed counsel, hearing officers, judicial law clerks, masters, judicial staff, and appointed committees.[54] The Committee also sought information about advertising vacancies, assessment of applicants' qualifications, and efforts to recruit women and minorities. Another purpose of the survey was to determine whether there was consistency among the various county appointment practices.

Responses to the survey were made by 51 of the counties surveyed, or 76 percent. *See*, the Statistical Report attached in Appendix Vol. II. While not every survey was completely answered, certain patterns emerged from the responses to each question.

FINDINGS

Most Common Appointed Positions

The position of arbitrator is the most common appointment made by county courts. Seventy-five percent of the counties appoint arbitrators, and the appointments are usually the exclusive province of president judges. Conflict counsel, appointed to represent indigent criminal defendants when the local public defender's office has a conflict in representing the defendant, are most likely to be "employed," or hired as employees, by counties. Judicial clerks are most likely among the appointees to be hired "under contract." The salaries and methods of payment for each position vary considerably among counties. Payment may be made on an hourly, daily, monthly, yearly, or case-by-case basis. Individual judges also retain responsibility for employing their own staff. Some court administrators appoint conflict attorneys in criminal court.

Selection Standards

The survey identified selection standards for each position. The following table summarizes these findings.

TABLE 13
Selection Standards

Position	Experience	Years of Practice	Education and Training	Application	Interview	Observed Performance	References
Arbitrators	X	X	X				
Conflict Counsel	X	X	X	X		X	
Court-Appointed Counsel	X	X	X	X		X	
Hearing Officers	X	X	X	X	X	X	X
Judicial Clerks	X		X	X	X		X
Masters	X	X	X	X	X	X	
Mediators	X	X	X	X		X	
Judicial Staff	X	X	X	X	X	X	X

Recruitment

While applicants for law clerk and other judicial staff positions are generally recruited by courts through a formal application process, an informal process is used for appointments and for applications to most other positions, including conflict counsel, court-appointed counsel, master, and mediator. ("Informal" in this context means without any standard procedure.) Applications for all positions are mainly screened by court administrators or president judges.

Applicant Lists

Only one-quarter of the responding counties created a list of applicants and most did not maintain it. Of those counties that maintained a list, only one-third updated it on an annual or "as needed" basis.

Selection Procedure

For those counties that do create and maintain a list of applicants, selections are made either by rotation or at the judge's discretion. The following table summarizes the selection procedure by position.

TABLE 14
Selection Procedures

Position	Rotation	Discretion of Judge
Arbitrators	X	
Court-Appointed Counsel	X	
Hearing Officers	X	
Masters	X	
Conflict Counsel	X	
Judicial Clerks		X
Judicial Staff		X

Recruitment Efforts

Most counties make no effort to recruit minorities or women for the positions studied by the Committee. Of the counties responding to the survey, 70 percent reported filling the positions without recruiting for minorities and 77 reported not recruiting for females. The majority of the counties with at least 10 percent minority employment in those positions did, however, recruit for minorities. In contrast, the counties with at least 25 percent women employed in these positions noted that there was no targeted recruitment for women.

TABLE 15
Recruitment Efforts for Minority Employees

All Counties

		Effort to recruit?			>= 10% employees				
		n	%	% Valid	n	%	% Valid	% Effort	% of all counties
Valid	Yes	11	22	30	5	50	55	46	10
	No	26	51	70	4	40	45	15	8
	Total	37	73	100	9	90	100		18
Invalid	No Answer	14	27		1	10			2
Total		**51**	**100**		**10**	**100**			**20**

TABLE 16
Recruitment Efforts for Female Employees

All Counties

		Effort to recruit?			>= 25% employees				
		n	%	% Valid	n	%	% Valid	% Effort	% of all counties
Valid	Yes	9	17.6	23.07692	6	35	40	67	12
	No	30	58.8	76.92308	9	53	60	30	18
	Total	39	76.5	100	15	88	100		30
Invalid	No Answer	12	23.5		2	12			4
Total		**51**	**100**		**17**	**100**			**34**

Positions for Which Recruitment Efforts Are Made by County Courts

Counties that recruit minorities and women make an effort to find qualified candidates for almost all positions. Appointments of arbitrators and mediators are a notable exception. See the following tables.

TABLE 17
Counties That Make An Effort To Recruit Minorities By Position

	Yes	No	N/A	Total	10%+
Arbitrators	5 or 50%	3 or 30%	2 or 20%	10 or 100%	4 or 40%
Conflict Counsel	7 or 70%	0 or 0%	3 or 30%	10 or 100%	3 or 40%
Court Appointed Counsel	8 or 80%	1 or 1%	1 or 10%	10 or 100%	4 or 40%
Hearing Officers	7 or 70%	2 or 20%	1 or 10%	10 or 100%	1 or 10%
Judicial Law Clerks	3 or 100%	0 or 0%	0 or 0%	3 or 100%	1 or 33%
Masters	8 or 80%	1 or 10%	1 or 10%	10 or 100%	4 or 40%
Mediators	3 or 33%	0 or 0%	6 or 67%	9 or 100%	1 or 11%
Judicial Staff	8 or 89%	1 or 11%	0 or 0%	9 or 100%	2 or 22%
Other	5 or 71%	0 or 0%	2 or 29%	7 or 100%	2 or 29%

TABLE 18
Counties That Make an Effort to Recruit Women By Position

	Yes	No	N/A	Total	25%+
Arbitrators	4 or 57%	2 or 29%	1 or 14%	7 or 100%	7 or 100%
Conflict Counsel	6 or 86%	0 or 0%	2 or 14%	7 or 100%	2 or 14%
Court Appointed Counsel	7 or 100%	0 or 0%	0 or 0%	7 or 100%	2 or 14%
Hearing Officers	6 or 100%	0 or 0%	0 or 0%	6 or 100%	3 or 50%
Judicial Law Clerks	3 or 100%	0 or 0%	0 or 0%	3 or 100%	1 or 33%
Masters	7 or 100%	0 or 0%	0 or 0%	7 or 100%	3 or 43%
Mediators	3 or 60%	0 or 0%	2 or 40%	5 or 100%	3 or 60%
Judicial Staff	8 or 100%	0 or 0%	0 or 0%	8 or 100%	5 or 63%
Other	3 or 60%	0 or 0%	2 or 40%	5 or 100%	1 or 20%

REVIEW OF COURT RECORDS

Experts and others recommend establishing a panel of well-qualified attorneys, listed alphabetically, from which a central court administrator makes selections on a rotating basis.

The Committee sought information and records from a sampling of county court administrators to determine how courts appoint attorneys to represent indigent criminal defendants when taxpayer-funded public defender's offices cannot do so.

The eight-county sample revealed the following methods of selection:

1. PHILADELPHIA COUNTY BAR ASSOCIATION—An attorney must first be pre-qualified by the Philadelphia County Bar Association and then must be endorsed by a judge. The judge then has the discretion to decide whether or not the attorney should be included on the rotation "wheel." Attorneys are randomly selected from the "wheel" and assigned to cases.
2. WESTMORELAND COUNTY—Each judge maintains his or her own list and assigns attorneys based on the subject matter of the case and the amount of work involved.
3. BUTLER COUNTY—The court administrator maintains an alphabetical list of attorneys, from which he or she makes selections on a rotating basis.
4. ERIE COUNTY—The trial division administrative judge appoints attorneys with the approval of the president judge. The court enters into contracts with the appointed attorneys.
5. DAUPHIN COUNTY—The president judge appoints attorneys, based upon letters of interest received by the court. Contracts are established with the interested attorneys for as long as the attorneys desire. The court rotates through a list of contracted attorneys when openings arise.
6. WASHINGTON COUNTY—Three attorneys are employed full-time by the court on a contract basis. The attorneys are assigned by rotation, based upon subject matter or caseload.
7. FAYETTE COUNTY—Two conflict attorneys are appointed by the court. If the two conflict attorneys are unavailable, individual judges make appointments from a list of interested attorneys.
8. ALLEGHENY COUNTY—Judges are permitted unlimited discretion in making court appointments on an individual basis.

The Committee concluded that while there is no common method of appointing counsel in these types of cases, the practice of giving judges unlimited discretion to make their own appointments can be problematic. Experts say that having individual trial judges choose defense attorneys can result in favoritism, which undermines public confidence in the system.[55] Another possible consequence is that the attorney can feel beholden to the judge for income, which can result in a perfunctory defense of an indigent client.

An equally significant problem with full judicial discretion in appointments is that women and minorities may be underrepresented on a judge's private list. That concern was clearly borne out in the data supplied to the Committee by one county which uses that type of court appointment system. For the years 2000–2001, only one woman and no minorities made the list of the top 11 fee generators for court appointments in that county. Moreover, the one woman had far fewer appointments than all but one of the top eight appointees. The list of the top 25 fee generators included only four women and no minority attorneys.[56]

Experts and others recommend establishing a panel of well-qualified attorneys, listed alphabetically, from which a central court administrator makes selections on a rotating basis.

PUBLIC HEARINGS

While only a few witnesses at the public hearings discussed the court appointment process in the state justice system, they echoed comments made by female and minority attorneys during other meetings and surveys conducted by the Committee. Three primary concerns were raised by the hearing testimony:

THE MINIMAL PRESENCE OF MINORITIES IN THE STATE JUDICIARY AND IN COURT ADMINISTRATION LEADS TO THE PERCEPTION OF LIMITED APPOINTMENT OPPORTUNITIES FOR MINORITIES.

During the testimony of Honorable Kathryn Lewis at the Philadelphia public hearing, Committee member Honorable Nelson A. Diaz noted that during his service as administrative judge in the Civil Division of the Philadelphia Court of Common Pleas, "There had only been three African Americans…in the history of this Commonwealth that [had] ever served on the office court side."[57] He emphasized that people in such administrative

positions can select recipients of contracts for court business and can influence other court appointments. Judge Diaz also described an instance in which he encountered resistance from a colleague when he recommended the appointment of a Latino attorney to serve as a guardian in a matter before the Orphan's Court Division.[58] He reported that his colleague did not know the Latino attorney, but assumed that the man lacked the competence to fill the position, even though he was a partner in a large and respected Philadelphia law firm.

Similarly, attorney Felipe Restrepo, of the Hispanic Bar Association of Pennsylvania, testified at the public hearing held in Harrisburg that there are no Latino judges serving in the appellate judiciary in Pennsylvania. Restrepo expressed concern that the lack of diversity on the bench has had a negative impact on minority litigants and attorneys.[59]

MINORITIES AND WOMEN ARE SIGNIFICANTLY UNDERREPRESENTED ON COURT APPOINTMENT LISTS.

Attorney Shelley Pagac of Allegheny County testified at the Pittsburgh public hearing in her role as co-chair of the Women's Bar Association of Allegheny County. She reported that she had canvassed approximately 45 female attorneys in Allegheny County in preparing her remarks. She testified that women and minorities are underrepresented on court appointment lists and that this underrepresentation prevents some attorneys, particularly those who practice criminal law, from obtaining the experience necessary to further their careers.[60]

MEMBERSHIP ON SUPREME COURT OF PENNSYLVANIA RULES COMMITTEES SHOULD BE BALANCED BY RACE AND GENDER TO ENSURE THAT THE IMPACT OF RULES ON WOMEN AND MINORITIES IS CONSIDERED IN FORMULATING THE COURT RULES.

Attorney Larry Frankel, director of the Pennsylvania American Civil Liberties Union, testified at the Philadelphia public hearing about his concern about diversity in membership on the rules committees appointed by the Supreme Court of Pennsylvania, so that "consideration of race and gender will consistently be taken as new rules are developed."[61] More specifically, Frankel urged the Committee to recommend that the Court's rules committees not only be diverse in membership, but be directed to consider the impact of changes in rules and procedures that may disproportionately disadvantage women and minorities coming into the

court system. Frankel also pointed out that women and minorities are among the people most likely to appear *pro se* without the assistance of an attorney to guide them through the litigation process.

BEST PRACTICES

During the course of its research, the Committee identified one system of appointment that is notable for its effort to provide equal opportunity for all attorneys in the selection process: Allegheny County's system for the appointment of arbitrators. The key to its functioning is an eight-member advisory committee, which is racially diverse and composed of males and females. Plaintiff's attorneys, defense attorneys and attorneys specializing in landlord/tenant law are all represented on the advisory committee.

The advisory committee develops three lists of arbitrators to which an attorney may be assigned. The first list comprises persons who will be assigned as "chair" of the panel. To be considered for this list, an attorney must have practiced for a minimum of five years. "Special arbitrators" make up the second list of arbitrators; attorneys apply for this list if they have expertise in a particular area of law. If an attorney is placed on either of the first two lists, he or she will sit on a panel approximately 15 times per year and will remain on the list for 10 years. The attorney must then reapply to be considered for another 10-year appointment.

The third arbitrator on each panel is selected from a third list that contains the names of any attorney licensed in Pennsylvania who has requested to be on the list. Attorneys on the third list will be called for a panel approximately once every two years.

SUMMARY OF FINDINGS

Despite a significant amount of variation in data across the Commonwealth, the Committee was able to make the following observations about court appointment systems.

1. There are no statewide standardized policies and procedures in place that are used by county court systems to select individuals for court appointments. Systems for selecting attorneys for court appointments vary widely. Some counties use centralized alphabetical lists from which court administrators select attorneys on a rotating basis. In other counties, potential appointees serve at the discretion of individual

judges before whom they may have to appear, and whose approval is needed for payment of fees.

2. President judges in each county make the majority of appointments, with the exception of criminal court appointments.
3. The majority of counties do not create or maintain lists of attorney candidates for court appointments from which selections are made.
4. Most courts do not use a formal recruitment system to fill appointed positions such as conflict counsel, court-appointed criminal counsel, masters, and mediators.
5. Most counties make no effort to recruit women or minorities for the positions examined by the Committee.
6. The limited presence of minorities in the state judiciary, and court administrative positions in particular, leads to the perception that there are few court appointment opportunities for minorities. That perception is affirmed by the fact that there are few minority appointments in at least one large county in Pennsylvania.
7. The underrepresentation of female attorneys and minority attorneys in court appointments reduces their opportunities to gain the experiences necessary to further their careers.
8. Minority attorneys perceive that they are excluded from receiving court appointments because they are not members of the "old boys' network" of white male attorneys and judges.

CONCLUSIONS

In its review of the racial, ethnic, and gender composition of the Pennsylvania judiciary, the Committee concluded that progress has been made in the diversification of the bench, but it remains disproportionately white and male. As of 2002, women represent only 21 percent of the Commonwealth judiciary, and minorities only 8 percent. One notable exception among the courts is the Pennsylvania Commonwealth Court, where women represent 55.5 percent of the court members.

The analysis of the racial, ethnic, and gender diversity of the Commonwealth's court personnel is complicated by the lack of data and the variation of the personnel systems throughout the Commonwealth. A review of the data collected by the Commonwealth's appellate courts reveals that females are well-represented among these courts' personnel (70–71 percent), but minorities comprise only 9 percent of the Superior Court's workforce and 8 percent of the Commonwealth Court's staff.

With regard to judicial clerkships, only the Superior Court provided data for the the Committee. The results indicated that women are well-represented among the court's law clerks but minorities are even less prevalent in these positions than in other jobs. Women comprise 61 percent of Superior Court law clerks but minorities, only 5 percent.

Among the county courts, few collect racial, ethnic, and gender data on their personnel. Moreover, job classification systems in each county were so diverse that it was not possible to perform a meaningful comparison. However, a review of the seven counties that did provide data on their court personnel (including Philadelphia and Allegheny) revealed that minorities are underrepresented in all of those court systems, and, with the exception of Chester County, women are clustered in the non-supervisory positions. Clearly, a standardized system of collecting and maintaining racial, ethnic, and gender data on all court personnel in the Commonwealth is needed in order to determine whether the courts are functioning as employers in a fair and unbiased manner.

Similarly, in its study of the court appointment process the Committee found many different methods of making appointments throughout the Commonwealth. Appointees in some counties were selected by a court administrator from a centralized alphabetical list of candidates, which

regularly rotated; others were appointed by individual judges who retain full discretion in selecting from personal lists of candidates, or from no list at all. Some complaints were registered by minorities during roundtable discussions about being excluded from the court appointment process by the "old boys' network" of white attorneys and judges, and a review of one county's data on criminal court appointments for one year supported this perception.

While recognizing the interest of the judiciary in retaining the discretion to make their own appointments, the Committee concluded that this interest must be balanced with the need to overcome the perception (and perhaps the reality) that the system is not accessible to all races, ethnicities, and genders. Seeking a diverse set of candidates for court appointments is completely compatible with obtaining qualified and competent individuals for the appointed tasks.

RECOMMENDATIONS

TO THE SUPREME COURT OF PENNSYLVANIA

The Committee recommends that the Court:

1. Direct court administrators to devise a statewide method of collecting data on the racial, ethnic, and gender composition of the court workforce.
2. Direct each court administrator to analyze the data collected pursuant to Recommendation Number 1 and submit to the Court a standardized written annual report of findings. [62]
3. Establish as a goal increased opportunities for women and minorities to receive judicial appointments and employment with the courts.[63]
4. Create a training session for judges and court administrators on the responsibilities of the court in personnel matters.
5. Implement the resolution drafted by the Pennsylvania Bar Association in 1994 for a voluntary check-off identifying the gender of lawyers admitted to practice in Pennsylvania, and expand it to include race and ethnicity so as to ensure adequate data collection.
6. Increase opportunities for promotion of minority and female judges and lawyers into more responsible positions and policymaking assignments.

TO BAR ASSOCIATIONS

The Committee recommends that county bar associations:

1. Ensure adequate female and minority representation on judicial evaluation committees.

TO THE AOPC AND COUNTY COURT PERSONNEL OFFICES

The Committee recommends that the AOPC and county court personnel offices:

1. Review all job descriptions to ensure that they are gender-neutral.
2. Make specific efforts to increase the number of women and minorities holding highly paid, high-status jobs within the court system.
3. Develop written policies for promotion; discipline; training; annual, sick and disability leaves; part-time and flex-time arrangements; and job sharing. Seek ways to ensure the objective, consistent application of such policies.

ENDNOTES

1 The labels, "white" (W) and "non-white" (NW), were used to present this data because they were the categories used by the AOPC in collecting this data. For purposes of this report only, "white" is defined as Caucasian, and "non-white" includes all other racial and ethnic groups.

2 Calculations from information provided by AOPC. A district justice was not counted if it was noted that the term expired or that he or she died, retired, or was not retained. The figures do not include senior district justices.

3 While there are 67 counties within the Commonwealth, there are only 61 court administrators. Six of the court administrators are responsible for administering the court systems in two counties each.

4 *Id.*

5 Census figures for non-white population are divided into several categories, making computation of non-white population figures difficult. The Committee decided to compute the total non-white population by subtracting the white population from the total population figure.

6 We are unable to determine whether comparisons between counties are valid since some counties may have included certain employees, e.g., probation officers and/or law clerks, while others did not. No judges or district justices are included here.

7 Judicial-related jobs include quasi-judicial positions such as hearing officer and master.

8 The Melior Group/V. Kramer & Associates, Final Report on Perceptions and Occurrences of Gender Bias in the Courtroom, Court Personnel, p.1 (2002), attached in Appendix Vol. II [hereinafter Melior Group Gender Bias Court Personnel Report].

9 *Id.*

10 *Id.*

11 *Id.*

12 The Melior Group/V. Kramer & Associates, Final Report on Perceptions and Occurrences of Racial Bias in the Courtroom, Judges Report, p.7 (2002), attached in Appendix Vol. II [hereinafter Melior Group Racial Bias Judges Report].

13 Melior Group Gender Bias Court Personnel Report, *supra* at 6.

14 The Melior Group/V. Kramer & Associates, Final Report on Perceptions and Occurrences of Racial Bias in the Courtroom, Court Personnel, p.1 (2002), attached in Appendix Vol. II [hereinafter Melior Group Racial Bias Court Personnel Report].

15 The Melior Group/V. Kramer & Associates, Final Report on Perceptions and Occurrences of Racial Bias in the Courtroom, Litigants Report, p.1 (2002), attached in Appendix Vol. II [hereinafter Melior Group Racial Bias Litigants Report].

16 The Melior Group/V. Kramer & Associates, Final Report on Perceptions and Occurrences of Racial Bias in the Courtroom, p.12 (2002), attached in Appendix Vol. II [hereinafter Melior Group Racial Bias Report].

17 *Id.* at 10.

18 *Id.* at 12.

19 The Melior Group/V. Kramer & Associates, Final Report on Perceptions and Occurrences of Racial Bias in the Courtroom, Attorneys Report, p.3 (2002), attached in Appendix Vol. II [hereinafter Melior Group Racial Bias Attorneys Report].

20 *Id.* at p. 16.

21 Melior Group Racial Bias Judges Report, *supra* at 1.

[22] The Melior Group/V. Kramer & Associates, Final Report on Perceptions and Occurrences of Gender Bias in the Courtroom, Attorneys Report, p. 1 (2002), attached in Appendix Vol. II [hereinafter Melior Group Gender Bias Attorneys Report].

[23] The Melior Group/V. Kramer & Associates, Final Report on Perceptions and Occurrences of Gender Bias in the Courtroom, Judges Report, p. 8 (2002) [hereinafter Melior Group Gender Bias Judges Report].

[24] *Id.* at 3.

[25] Melior Group Racial Bias Attorneys Report, *supra* at 5; Melior Group Racial Bias Court Personnel Report, *supra* at 4.

[26] Melior Group Racial Bias Court Personnel Report, *supra* at 4.

[27] *Id.* at 13.

[28] Melior Group Gender Bias Judges Report, *supra* at 9.

[29] *Id.* at 9.

[30] *Id.* at 14.

[31] *Id.* at 11.

[32] *Id.* at 14; Melior Group Racial Bias Litigants Report, *supra* at 2.

[33] Melior Group Racial Bias Court Personnel Report, *supra* at 4.

[34] A recommendation for a similar grievance procedure is set forth in the Report of the Third Circuit Task Force on Equal Treatment in the Courts, 42 Vill. L. Rev. 1355, 1672 (1997).

[35] Melior Group Gender Bias Court Personnel Report, *supra* at 7.

[36] *Id.* at 7.

[37] Testimony of Gary Horton, Erie Public Hearing Transcript, p. 11.

[38] Testimony of Hon. Stephanie Domitrovich, Erie Public Hearing Transcript, p. 80.

[39] Testimony of Beata Peck Little, Wilkes-Barre Public Hearing Transcript, pp. 12–13 [hereinafter Peck Little Testimony]; According to the U.S. Census Bureau, there were 2,052 Latinos living in Monroe County in 1990, compared with 9,195 in 2000, and the population of the African American community of the county increased from 1,727 African American residents in 1990 to 8,343 African American residents in 2000. *See* Monroe County Needs Assessment, p.11; http://www.unitedwaymonroe.org/needs/.

[40] Peck Little Testimony, *supra* at 20.

[41] Testimony of Iraida Afanador, Philadelphia Public Hearing Transcript, p. 96 [hereinafter Afanador Testimony].

[42] Testimony of Jerome Mondesire, Philadelphia Public Hearing Transcript, p. 48.

[43] *Id.* at 53.

[44] Testimony of Judith Ariola-Rivera, Wilkes-Barre Public Hearing Transcript, p. 39.

[45] *Id.*

[46] Afanador Testimony, *supra* at 96.

[47] Testimony of Leroy Hodge, Pittsburgh Public Hearing Transcript, p. 142.

[48] Afanador Testimony, *supra* at 96.

[49] Testimony of Hon. John Younge, Philadelphia Public Hearing Transcript, pp. 160–162.

[50] Testimony of Judy Berkman, Philadelphia Public Hearing Transcript, p. 223.

[51] Testimony at the various hearings conducted throughout the state also identified other appointed positions: guardians, trustees, interpreters, experts, and court reporters.

[52] The Honorable Stanton Wettick of the Allegheny County Court of Common Pleas, the Honorable Joseph Del Sole of the Pennsylvania Superior Court, Commonwealth Court Executive Administrator Ronald Darlington, and Superior Court Executive Administrator Mitchell Gruner were among those interviewed by Work Group members.

[53] The Committee extends its gratitude to Paul Kuntz, court administrator of Westmoreland County, who not only provided assistance in the development of the survey, but also worked closely with the other court administrators to assure that it was properly completed and returned.

[54] When the Committee sent the survey to the court administrator or president judge of each county, the respondents expanded the categories by identifying other court appointed positions: education counselors, juvenile masters, and per diem clerks.

[55] John Carroll, dean of Cumberland Law School at Stamford University in Birmingham, AL.

[56] Data sheet, Allegheny County Court Administrator's office, *Court Appointed Counsel, January–December 2000*, attached in Appendix Vol. II.

[57] Testimony of Honorable Nelson A. Diaz, Philadelphia Public Hearing Transcript, pp. 34–36.

[58] *Id.* at 44–45.

[59] Testimony of Felipe Restrepo, Harrisburg Public Hearing Transcript, pp. 84–85.

[60] Testimony of Shelley Pagac, Pittsburgh Public Hearing Transcript, p.187.

[61] Testimony of Larry Frankel, Philadelphia Public Hearing Transcript, p. 250.

[62] A standardized listing of job classifications and method of collecting data is critical to the system. The format of such reporting should be created by the AOPC. The purpose of this reporting should be to create a profile of the racial, ethnic, and gender composition of the workforce and any trends that have emerged. In particular, an analysis of this data, when received, should include promotion patterns for higher level positions, career development, training, discipline, tracking of employee complaints, performance evaluations, applicant pool tracking (applicants, interviewees, and final hires), and salary comparisons. The establishment of a unified personnel tracking database will be invaluable for forecasting purposes, budgetary preparation, employee deployment, measuring attrition, determining the workforce profile in each of the counties, and tracking staff training hours and expenditures. The analysis should also indicate the degree to which men and women are hired into these positions from both internal and external applicant pools.

[63] Specifically, the Committee recommends the following process for handling court employment and appointments:

a. The courts should publicly solicit applications for court appointments and permanent jobs from all groups including females and minorities, and should specifically identify the necessary criteria. The administrative office of the New Jersey court system has an excellent program for seeking minority candidates for judicial clerkships that could be replicated by the AOPC;

b. Those applicants who meet the criteria for appointments and permanent employment should be placed on a list maintained either by the entire court or by the individual judges. The list should be used to make court appointments and fill permanent job openings within the system; and

c. Care should be taken that appointments and permanent hiring from this list should be made or offered equitably, such as on a rotating basis.

9 PERCEPTIONS AND OCCURRENCES OF RACIAL, ETHNIC, AND GENDER BIAS IN THE COURTROOM

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INTRODUCTION

While other chapters of this report discuss instances of bias in specific types of legal cases and settings, this chapter discusses instances and perceptions of racial, ethnic, and gender bias that cut across all aspects of the judicial system. Specifically, the Committee reviewed instances of racial, ethnic, and gender bias as perceived, reported and reflected by actual participants in the judicial process—judges, attorneys, litigants, witnesses, and court employees throughout Pennsylvania, in both the civil and criminal justice systems.

RACIAL AND ETHNIC BIAS

Many people who come into contact with the Pennsylvania justice system report that there is racial and ethnic bias within the system. While most agree that intentionally offensive behavior has declined in recent decades, many people of color still detect evidence of bias lingering in judicial hallways, in the workplace, and in courtrooms. Bias may be evident when, for instance, an African American attorney is called a derogatory, racially inspired name. The signs of bias may also take a more subtle form when, for example, counsel refers to an African American witness as "Johnny" and a white witness as "Mr. Smith," or when a court employee raises an eyebrow as an African American man stands to answer the question "Who represents the plaintiff?"

Through public hearings, interviews, focus group sessions, and other research tools during the past two years, the Committee has grappled with fundamental questions concerning courtroom speech or conduct that calls attention to a person's race or ethnic identity. When are comments improper and demeaning? How does the court respond when a litigant has been insulted, demeaned, or disrespected on the basis of race or ethnicity? And when do disrespectful comments and behaviors materially undermine the ability of a person to perform professionally in the courtroom?

Statements made to the Committee in public hearings and focus groups suggest that, at a minimum, race- or ethnic-based comments and conduct tip the courtroom's level playing field, whether the persons being singled out are attorneys, litigants, or witnesses. Expressions of bias impose upon people of color a barrier to effective performance that does not exist for white courtroom participants. Displays of respect and disrespect are bound to register on judges and jurors as they make the myriad decisions associated with a trial. Therefore, any conduct warrants scrutiny and correction when it singles out one participant and places him or her in an unfavorable light.

The Melior Group and V. Kramer & Associates conducted focus groups and interviews on the topics of racial, ethnic, and gender bias in the courtroom. During these sessions, they gathered "numerous accounts" of apparent offhand comments that injected condescension or hostility into courtroom proceedings. An assistant district attorney in Philadelphia, for instance, used the term "boy" in reference to a 50-year-old African American defendant.[1] Elsewhere, court personnel were overheard using stereotypical code-speak ("What can you expect from them?")[2] to characterize litigants.

There can be no doubt that such statements are made. There is no need here, however, to determine their frequency or precise location because, as the attached final report of The Melior Group and V. Kramer & Associates notes, arguments about the depth and breadth of racial or ethnic bias are "largely extraneous," or beside the point. "We think that the Committee should direct its considerations to the central issue that is commonly expressed by the study's participants," the report says. "That is, racial bias, whether emanating from insensitivity, indifference, ignorance, or negative prejudice, compromises and injures the parties affected. It fosters unequal treatment and unequal outcomes in the one area where justice is sought."[3]

Sources of Information

The Committee conducted an extensive literature review, examining more than 20 recent task force reports on racial and ethnic bias from other states and federal judicial circuits. Many of the reports regard perceptions of bias as a critical element to be examined. As a judge said in the Second Circuit's 1997 report on gender, racial, and ethnic fairness in federal court, "After all, even if the courts are fair, unless those appearing in them think so, we have a problem."[4] One consistent finding in most studies is that a large percentage of women and people of color regard bias as common within the courts, while men—and particularly white men—believe it occurs only in rare instances. This finding appears to hold true for groups of judges, litigators, witnesses, and litigants. A summary of key findings from other state and federal task force reports, including the 1997 report of the Third Circuit Task Force on Equal Treatment in the Court, is included later in this chapter.

The Committee found the same dichotomy in perceptions of biased conduct in Pennsylvania that were noted in other state and federal task force reports. The Committee reviewed prior relevant studies conducted in Pennsylvania, notably the Philadelphia Bar Association's 1988 Report of the Special Committee on Employment of Minorities in the Legal Profession. The Committee also generated current data through its own study conducted by The Melior Group and V. Kramer & Associates and through public hearings held throughout the Commonwealth. The consultants conducted interviews with judges and litigants and held focus groups with attorneys and court employees in Philadelphia, Erie, Harrisburg, and Pittsburgh.

Early in the study, the Committee developed a qualitative approach to gathering data on this topic. The Committee chose this approach after recognizing the limitations inherent in quantitative methods of data gathering, such as the use of survey instruments. The Committee's intent was to explore how and under what circumstances bias is experienced and what its effects are, both perceived and actual. Quantitative analysis is ineffective as a method of gathering data that accurately and fully reflects the participants' experiences.

After completion of its study, the Committee reached the general conclusion that racial and ethnic bias within the judicial system still exists throughout the Commonwealth, and that these perceptions of bias are, in some instances, based on overtly discriminatory practices. This chapter will document the evidence supporting the general conclusion.

SUMMARY OF THE MELIOR GROUP/ V. KRAMER & ASSOCIATES STUDY

The Melior Group and V. Kramer & Associates, referenced previously, were engaged by the Committee to conduct focus groups and interviews throughout the Commonwealth on the topics of racial, ethnic, and gender bias in the courtroom. A total of 10 focus group sessions were conducted among attorneys and court personnel throughout the Commonwealth. Personal interviews were held with 18 judges and 10 litigants. The participants in the interviews and in the focus groups were primarily African American and white, with some representation from the Latino and Asian American communities, and included both men and women. Based upon the focus groups and interviews, the consultants' final report cites several major themes that were repeated by judges, attorneys and court personnel:[5]

- Racial and ethnic bias in the courtroom is described by all participants as rarely being overt. Rather, when it occurs, it is oblique; it has a "cover."
- Racially- and ethnically-biased actions in court compromise minority attorneys and minority court personnel in the performance of their responsibilities.
- Minority litigants complained of unequal dispositions of cases (in comparison to whites of similar status with similar cases) in criminal, family and civil courts, based upon their racial and ethnic identity.
- Some members of the judiciary were reported to be defensive when the issue of racial or ethnic bias is brought to their attention. This attitude discourages minority courtroom participants from seeking redress for race- or ethnic-based inequities.
- Power and responsibility to set the tone in the courtroom and effect change rest with the judiciary.
- Respondents from all focus groups called for strong standards to clarify and rectify racial or ethnic bias in the justice system.
- Most participants recommended some form of objective third-party monitoring of courtroom procedures to corroborate the existence of racial or ethnic bias or even mitigate its emergence in the courtroom.
- Ongoing, meaningful training, supported by the Supreme Court of Pennsylvania, can serve to inform, educate, and promulgate norms across the Commonwealth's system.

PENNSYLVANIA FINDINGS

MINORITIES ARE UNDERREPRESENTED WITHIN THE PENNSYLVANIA JUDICIAL SYSTEM

> "Minorities are educated by people that don't look like them, arrested by people that don't look like them, represented by people that don't look like them, appear before judges that don't look like them, and are handed down verdicts from juries that don't look like them. The only time this changes is when they are incarcerated…the only place minorities are overrepresented…in Pennsylvania is the jails and prisons."[6]

The statistical and anecdotal evidence demonstrates that minorities are employed in disproportionately low numbers in the Pennsylvania bar, the Pennsylvania judiciary, and the Pennsylvania court personnel system. The statistics show periods of rapid improvement at certain times and in certain areas; between 1976 and 1985, for example, the size of the minority bar in Philadephia County nearly quadrupled, from 2.1 percent of the attorneys to 7.8 percent.[7] Much of the increase, however, stemmed from a surge in the numbers of minority attorneys in government agencies at a time when the numbers of minority attorneys increased less dramatically at private firms and actually declined in corporate jobs.[8] Those numbers must be weighed against an increase in the pool of minority graduates from law schools since the 1970s, when many schools began attracting more women, African American, Asian American, and Latino students. In the 2000–2001 school year, minority enrollment was 20.6 percent of total Juris Doctor enrollment at all American Bar Association (ABA)-approved law schools. During the year 2000, the percentage of all Juris Doctor degrees awarded to minority students was 19 percent. It increased to 20 percent in 2001.[9]

"The only place minorities are overrepresented… in Pennsylvania is the jails and prisons."

—Ronald Felton, NAACP

A sampling of recent statistics presents a grim picture of minority hiring in the court system, indicating that perceptions of racial and ethnic bias are borne out by statistical evidence. Presently, there are no minority assistant federal public defenders in the Middle District of Pennsylvania, and only two minority assistant federal public defenders in the Western District, although many of the clients served by those offices are minority group members. As of 2001, there were two minority attorneys in all of Beaver County, an area northwest of Pittsburgh with a 7.5 percent minority

population; both attorneys worked for Neighborhood Legal Services Association, a publicly funded non-profit corporation. At the same time, Beaver County had two minority deputy sheriffs; one minority court employee working in the Recorder of Deeds offices; and no minority law clerks.[10] In Philadelphia, court employees voiced the common impression that minority personnel often held positions of minimal authority with little chance for advancement. [11] In Allegheny County, one attorney speaking at a focus group acknowledged that there were African American females working in the court, but "Black males, you don't even see them working in the courthouse. I mean I don't even see them pushing the broom."[12] In the offices of the Pennsylvania Superior and Commonwealth Courts, only 8 percent of the staff is non-white.[13]

Allegheny County currently has four full-time African American judges, although the county's minority population is more than 11 percent.[14] Erie County, with a minority population of 9 percent, has no African American judges.[15] Similarly, there are no African American judges in Lancaster County, although the minority population is 8.5 percent.[16] Monroe County in Northeastern Pennsylvania has no African American or Latino judges, district justices, or court administrators, despite a population that in 2000 was 6 percent African American and 6.6 percent Latino.[17] Notably, Monroe County's African American population grew 383 percent between 1990 and 2000, while its Latino population grew 348 percent in the same period.[18]

The Committee found no record of a Latino judge ever serving on any appellate court in Pennsylvania. When the question of Latino judges was raised at public hearings in Harrisburg, one speaker responded that the high cost of running for election made it prohibitive for Latino candidates to run for office, much less for an appellate position.[19]

Chapter 2 of this report examines the jury selection process and documents the absence of minorities from most juries throughout the Commonwealth.[20] The perception is that minorities are generally underrepresented in jury panels, and this underrepresentation is amplified later in the jury selection process as prosecutors use peremptory challenges that further reduce the numbers.[21] In this regard, one attorney speaking at a Harrisburg focus group said ruefully that conditions had improved in Dauphin County. "In the last five years you get one black on your jury as a token."[22]

MINORITIES WITHIN THE JUDICIAL SYSTEM ARE EXCLUDED FROM FULL AND EQUAL PARTICIPATION IN THAT SYSTEM.

Several judges interviewed during the study observed that certain courtrooms seem racially segregated, and that certain job categories seem to be classified by race and gender.

Minorities who are employed within the judicial system often believe that their assignments are made at least partly on the basis of their race. Several judges interviewed during the study observed that certain courtrooms seem racially segregated, and that certain job categories seem to be classified by race and gender.[23] In Philadelphia, for example, the court system employed six African American criers, five of whom were assigned to African American judges. The sixth was assigned to a white judge, but was nevertheless paired with one of the 12 African American court officers. At a focus group in 2001, Philadelphia court employees agreed that all African American court officers were currently paired with either African American criers or African American judges.[24]

Minority attorneys reported similar experiences in the private bar, raising the specter of the "old boys' network," composed of white men, from which many perceived themselves to be excluded. The 1988 Philadelphia Bar Association study on minorities in the legal profession found that private law firms that employed minority attorneys were more likely to hire additional minority staff than were firms without a minority attorney. The report described the "old boys' network" as the firm's reliance upon its contacts—judges, colleagues and non-legal acquaintances—to recommend potential applicants. Noting that a firm's contacts are likely to have a racial composition similar to the firm itself, the report said, "Smaller firms which have minority partners appear to have access to a network of minority lawyers who are available for lateral hiring."[25] The same report found that when the "old boys' network" does recommend a minority attorney for hire, it tends to recommend that candidate either to a minority law firm or to a fully integrated law firm.[26]

Once minorities obtain positions within the judicial system, they often believe they are excluded from further advancement because of their race. At the focus group of Philadelphia court employees, one person ventured that African American employees remain "interspersed at the lowest levels

of the court system. They're not tiered up in middle management...there's not one black in higher management."[27] Similarly, the Third Circuit study in 1997 found that minority employees held few supervisory positions throughout the circuit and, consequently, earned relatively lower salaries than white court employees.[28]

The effects of the "old boys' network" are perceived to extend beyond the hiring process and continue to be felt once a minority attorney begins to practice. The Third Circuit report noted a perception by minority attorneys that judges provided more informal access and deference to attorneys of their own race or ethnicity."[29] And initial access to the system does not guarantee advancement. One Allegheny County attorney noted that, despite an extensive effort by some judges to hire minority law clerks, "Once those clerks do their time with the judge…they're not offered a job…They're just not taken seriously, they're considered to have that job just because they're minorities."[30]

Minority attorneys speaking at the focus group discussions also believed the network served to exclude them from court appointments because of their race. In Pittsburgh, an attorney said, "I did do some work with a judge and I did see that…theirs is a small group of people that they would select from. And if you weren't in that group…"[31] Other attorneys believed that they were treated differently from white attorneys who were "buddies" with a judge. "They'll be communicating—acting like they're friends—they'll be talking about those things they're doing…[You] feel uncomfortable, like they've already got the stuff made out before you get in there."[32] A judge corroborated this perception in a separate interview, noting that a personal relationship with an attorney might make a judge more tolerant of the attorney's behavior than perhaps he should be.[33]

CONSEQUENCES OF MINORITY UNDERREPRESENTATION IN THE JUDICIAL SYSTEM

The Pennsylvania judicial system lacks a meaningful representation of minorities,[34] and this affects the system in myriad ways. The Third Circuit concluded in its 1997 report that the small number of minority jurors, judges, attorneys, and publicly visible court employees within the Circuit's judicial system is reason enough to fuel a perception of racial bias within the system.[35] Speakers at the public hearings and focus groups voiced similar perceptions. Ted Darcus, of the Governor's Commission on African American Affairs, said, "Many individuals with whom I speak are afraid of the justice system because they do not understand it…What further

compounds their fears and sense of disenfranchisement is a lack of positive role models within the justice system. They see few black judges, attorneys, and other employees in the justice system, and even fewer black females."[36]

"I'm the only black D.A.," an attorney said at one focus group. "There's not even a black person working in the office. And a lot of times I feel alone…Is this really racial bias or is this—something else going on?"

Since so few minorities work in the judicial system,[37] many feel that they are not welcomed by the system. One attorney at the Pittsburgh focus group summed up the situation: "If the courthouse is not representative of minorities, if it's a place where it's uncomfortable to practice or you feel like even if you are representing a client that you are immediately disadvantaging yourself or your client, then it does impact you in the sense that maybe you're going to stay away from courthouse practice…or law firms, even if they do hire you, will pigeonhole you in areas where you can do no harm."[38]

Some minority attorneys feel isolated and say they are perceived differently because of their skin color. "I'm the only black D.A.," an attorney said at one focus group. "There's not even a black person working in the office. And a lot of times I feel alone…Is this really racial bias or is this—something else going on?"[39] Other minority attorneys said they were cautious about associating with other minority persons in the courtroom, fearing that any association, no matter how casual, would be perceived as their "being in cahoots" with the other person.[40]

Attorneys at the Pittsburgh focus group also said the consistent lack of African American jurors forced them to employ alternate strategies in trying their cases. They said the situation affected their presentation, their composure, and their aggressiveness in order to overcome an all-white jury's or judge's stereotypes about their own role and competence, as well as stereotypes about their minority client's behavior and conduct.

"For many white jurors who don't interact much with blacks, their perception of black people [is] just what they draw from the evening news," one Pittsburgh focus group participant observed. "So when they get into a courtroom and they are determining the fate of an African American litigant…they have to overcome what they've seen already on television, what they grew up understanding how black people are and how black

people live. And at the same time, there's nobody in the courtroom, other than maybe the attorney for that litigant or that defendant, who is black. There's no black staff there to help them overcome that perception. There's no black judge to help them…So they're left just with their perceptions in determining the fate of that black person. And the outcome is often grim."[41]

Attorneys discussed the need for minority jurors who can bring their varying cultural and life experiences to bear on the decision-making process. The attorneys said the presence of minority jurors would give the appearance of a system where all had equal access to justice. The attorneys also believed that the presence of African American jurors would inhibit actual discriminatory or biased decision-making, whether done innocently or with malicious intent.[42]

THE PERCEPTION THAT MINORITIES ARE VIEWED AS INCOMPETENT

Many minorities expressed the view that there is an underlying but widespread erroneous assumption throughout the Pennsylvania judicial system that they are not competent to perform their jobs. This bias is manifested in several ways, but most obviously by comments from other court participants that belittle their abilities, and by lowered expectations of their performance. Such comments may be well-intended—in instances, for example, when someone expresses surprise and delight that the minority employee is in fact performing in a competent manner. Bias may also be couched within the related presumption that people of color cannot be objective because of their minority status.

The Melior Group and V. Kramer & Associates quote in their final report a white female judge's opinion that "There is an undercurrent of belief among judges and the bar that African American judges are not as smart as Caucasian judges."[43]

"We're questioned more," a minority Philadelphia attorney stated. "If I come in and make a comment about the history of the case, the judge will say, 'Well, let me hear from the Commonwealth first. As if I'm a member of the bar, but [the judge] doesn't trust what [I] say."[44] A Harrisburg attorney told about the presentation of an African American engineer as an expert witness. Upon determining that the witness was, in fact, an engineer, the judge asked to see the engineer's credentials. "They don't ask that of the white professional engineers," the attorney said.[45]

A related issue is the perception by whites that minorities cannot be objective about matters involving either white or African American litigants. The underlying assumption is that minorities are less competent than their white counterparts who can put aside their biases and render fair, impartial decisions concerning all races at all times.

Elizabeth Shuster, of the Pennsylvania Human Relations Commission, illustrated the point in her comments at the Committee's public hearing in Harrisburg. She related an incident in which the late Judge A. Leon Higginbotham Jr., of the Third Circuit Court of Appeals, was presiding over a school discrimination case in which there were allegations of preferential treatment for white students and substandard provisions for minority students. The white respondents challenged Judge Higginbotham's impartiality because the case involved African American students. As Shuster observed: "The racist implication—that a white judge would be able to deal with a situation impartially, where white students were benefited, whereas a black judge might not be able to or would not be able to be impartial to the black students—was not lost on Judge Higginbotham."[46] The judge did not recuse himself from the case.

As previously discussed, minorities are often struck from juries because of a presumption that they will render biased verdicts. But, "We go to places where you have black people in the juries in the majority all the time," noted an attorney at a Pittsburgh focus group. "Go to Birmingham, Alabama…the juries are full of black people and they are putting black people in jail every day. And they are denying black plaintiffs verdicts every day."[47]

PERCEPTIONS THAT DIMINISHED STANDARDS AND EXPECTATIONS ARE APPLIED TO MINORITIES

Minorities often perceive themselves as subject to a convoluted standard that erroneously regards them as less than competent. Consequently, they perceive that expectations concerning their performance are lower than expectations for whites. One persistent problem is that supervisors may not bother to critique or even review the work of minority attorneys, who feel stung by the assumption that they are unable to do their jobs.[48] A gap in perceptions was also evident in the Third Circuit in its 1997 survey, which found that 92 percent of all court employees felt women were encouraged to attend professional seminars at the same rate as other employees, but only 41 percent of female African American court employees believed women were equally encouraged.[49]

"Minorities are not given the opportunity to fail," a Philadelphia attorney said in an earlier survey. "The same opportunity might allow them to succeed if they have the ability and desire to deal with all the ramifications of a successful career."[50] Current information suggests that many minority attorneys and court personnel continue to perceive that their careers are hampered by their supervisors' low expectations.

Another problem may arise when minorities do, in fact, succeed at their jobs. Sometimes their colleagues register surprise. An attorney at a focus group in Harrisburg commented on the "presumption of incompetence that white people have about black lawyers." The attorney went on, "For the first year or two of my career, I wasn't the shining star but people said good things about me…because I was black and the expectations were very low."[51] At the corresponding focus group in Philadelphia, another attorney said: "What irks me is when white attorneys will come up to me and they will have the audacity…to say, 'My, you're good at this.'" She observed, "It's because I'm black and I'm female. And they assume that we know nothing—that they know everything. And I've been practicing law for 20 years. And I still get it."[52]

DISRESPECTFUL CONDUCT DIRECTED TOWARDS MINORITIES UNDERMINES THE FAIRNESS OF THE JUSTICE SYSTEM

Names do hurt, and disrespectful comments can have a lasting harmful effect, not only on the person to whom they are directed, but on others within earshot. This is a widely held principle that applies inside and outside the legal system. "To be effective as an attorney, your clients have to see you as in a position of authority, power and respect," a Harrisburg attorney said during a focus group. "And if you walk in and you're immediately demeaned as soon as you come in—that's going to impact the client's impression about you."[53]

In a most egregious incident of racially offensive conduct by the court, an African American attorney was admonished by a white judge in a suburban Philadelphia county to, "stop being Stepin Fetchit" because, in the judge's opinion, the attorney was taking too much time to conduct cross-examination in the case.

Memories of name-calling and biased remarks stretch across many lifetimes. Although the injured parties often choose to keep the memories to themselves, many shared their stories during the public hearings and focus groups. Minority attorneys spoke about being addressed by their first names or in other patronizing ways. An African American judge from Philadelphia remembered being politely introduced at a bar association committee meeting by her appropriate title and name. Then, however: "The person who was presiding stood up and said, 'And now we will welcome one of our own,' and then referred to the white judge who was in the room." She drew a clear conclusion from the statement. "I had been to many of the committee meetings and I had participated in activities, so it wasn't that I was a stranger to the group. But apparently, for whatever reason yet to me to be disclosed, I was not one of their own."[54]

In a most egregious incident of racially offensive conduct by the court, an African American attorney was admonished by a white judge in a suburban Philadelphia county to, "stop being Stepin Fetchit" because, in the judge's opinion, the attorney was taking too much time to conduct cross-examination in the case.[55]

As stated earlier, differences in perceptions are clear in the Third Circuit's 1997 survey, in which few of the white attorneys believed their race had an impact on the treatment they received from the court, while significant numbers of Asian American, Latino, and African American attorneys in that same survey believed that race or ethnicity "always" or "sometimes" had an impact. [56]

The issue of disrespect poses a subtle but persistent problem that in some cases may be more troublesome than overt expressions of bias. One extenuating factor is that people of color are attuned to the nuances of disrespect, while many white people are not. A Philadelphia court employee reported, for example, that a white person entering a courtroom would typically ignore African American employees and would seek assistance from white employees, even if it meant walking past several people.[57]

Speaking at the focus group for Philadelphia court employees, a minority court reporter related an incident in which she was wearing a suit while training a much younger white woman in jeans. "The attorneys came over and addressed her like *she* was the reporter…and I was just the trainee."[58] Another person in the same focus group observed, "When you first go into the courtroom there is an 'air.' If you are not white when you walk into the courtroom, most of the time you're made to wait before anyone asks you…They think you're the defendant."[59]

Attorneys are caught in the same set of assumptions. A minority attorney from Harrisburg remembered, "I came in with a suit, briefcase, and all of that and the judge—it was a criminal case—the judge asked me if I was the defendant's wife."[60] Another minority attorney in the same focus group recalled walking with a white attorney toward a metal detector at the York County courthouse. Both men were wearing suits and carrying briefcases. The guard not only waved the white attorney through security, but addressed him directly to say his African American "client" would have to pass through the detector.

> *"If these things happen to you in the courtroom and people see it or they think that blacks aren't competent, or minorities aren't competent, the clients think the same thing. And so if the clients think the same thing—blacks can't survive in business."*
>
> —Harrisburg Attorney

"In some of my cases there will be an attorney who's black on the other side," a female attorney told a Philadelphia focus group. In such cases she has heard judges ask, "'Oh, are you the attorney?' They don't ask that of a white man in a suit."[61]

Demeaning remarks and conduct produce an overall negative effect for people of color within the court system. In the final report on the focus group study, an attorney is quoted as saying, "How do you think our clients feel when they come in with you and the judge and the staff are talking down to you, while respectfully addressing the other lawyer? If the judge is talking down to you, the client may think you're not as good a lawyer or the judge thinks you don't have a very good case. The negative effect of such treatment is tangible."[62]

Demeaning conduct and disrespectful speech are affronts to a person's pride and confidence, whether that person is a defendant, a witness, a court worker, or a judge. Richard Garland, executive director of Youth Works, noted in the Pittsburgh public hearing that, "Even if…[criminal defendants] take a deal for a lighter sentence, the manner in which the judge talks to them often times strips them of their pride even further…"[63] Even judges of color are reported to be treated disrespectfully. An attorney told the Philadelphia focus group, "I've seen the black judges, where the white attorneys would…be speaking down to them. You know, they aren't getting the same respect."[64]

To counter a lack of respect, minority attorneys and court workers say they must work hard and use different strategies to prove themselves, often to no avail. "We come in defensive," a Philadelphia attorney said, "because, one, we anticipate and we assume…they're going to disbelieve our clients. And two, we adjust our strategies, our attitudes towards our clients."[65]

Minority attorneys believe that clients and potential clients who witness disrespectful actions will lose confidence in the attorneys' ability to represent them effectively in court. An attorney at the Harrisburg focus group stated, "If these things happen to you in the courtroom and people see it or they think that blacks aren't competent, or minorities aren't competent, the clients think the same thing. And so if the clients think the same thing—blacks can't survive in business."[66]

SPECIAL PROBLEMS IN EQUITABLE TREATMENT OF MINORITY LITIGANTS AND DEFENDANTS

Testimony presented to the Committee demonstrates that many people in minority communities are distrustful of the Pennsylvania judicial system because of factors that include a lack of minority hiring, disrespectful treatment of those who do hold jobs, and the system's tendency to empanel juries on which minorities are underrepresented.

Other factors also breed distrust. There are often wide cultural and economic gaps between those who dispense justice and those who appear in court to seek justice. Many people also report that police and prosecutors focus too much attention upon members of minority communities, who, in turn, believe that their own lack of resources will lead to inequities in outcomes in both civil and criminal cases.

It is apparent that the vast majority of Pennsylvania's judges, attorneys, court employees, and jurors are white.[67] In small rural counties, court personnel may have little or no sustained personal contact with persons of color; even in larger counties, day-to-day experiences with minorities may be limited. Despite this gap in real-life knowledge and experience, the courts presume to make unbiased decisions that affect the life of a minority litigant or defendant. Even with the best of intentions, this simple lack of knowledge may impair the decision-maker's ability to act in a fair manner.

Several judges acknowledged in interviews that there is a "gap in experience and understanding between middle-class Caucasian judges and poor minority litigants." One judge characterized the problem as an "ivory tower" of upper-middle class biases on the part of judges with little understanding of current family dynamics and economic struggles.

"I am not trying to indicate that there is any one individual who is purposefully racist…within the Luzerne County court system," Carl Romanelli, a former employee for the Luzerne County Child Support Unit, said at the public hearing in Wilkes-Barre. "I will say, however, that a lack of understanding, a lack of [sensitivity] causes many good-intentioned people to be the unwitting tools of racism…"[68]

A similar point was raised in a Pittsburgh attorney focus group. "There are things that black people in their culture do that white people have no understanding about. I have to then try to educate a population—at the same time as trying the case on a whole separate issue. That's a daunting task."[69]

Several judges acknowledged in interviews that there is a "gap in experience and understanding between middle-class Caucasian judges and poor minority litigants." One judge characterized the problem as an "ivory tower" of upper-middle class biases on the part of judges with little understanding of current family dynamics and economic struggles.[70] In this regard, the complications of poverty may prevent a person from arriving on time for court, or from dressing in a manner the judge deems appropriate. One point made in several focus groups is that the judicial system does not necessarily understand today's litigants and defendants.

Judy Ariola-Rivera, bilingual and bicultural domestic violence counselor for Women's Resources of Monroe County, said at the Wilkes-Barre public hearing that white judges, "try to do the best they can," but that some "have no clue about diversity and differences in religion and culture and ethnicity and why one would choose to leave [an abusive relationship] and another one would not, or why one would feel intimidated and wear maybe a very short skirt and…look a certain way while others don't."[71]

Attorneys are sometimes caught in the reflection of their clients' behavior. When women are chastised by the court for dressing inappropriately, their lawyers may simultaneously be warned that the court will no longer hear them or see them if they cannot control their clients. Beata Peck Little, of Women's Resources of Monroe County, raised the point at the Wilkes-Barre hearing, saying the attorneys therefore become fearful, "that it will affect other kinds of cases they do. For them to put their practice in such jeopardy is not something that they can do."[72]

There is another perception that poor people are further disadvantaged because they cannot afford lawyers who can devote the requisite amount of time and attention to their cases. Though court-appointed attorneys are regarded as a pillar of the system and a primary safeguard of liberty, minority defendants instantly recognize that the system is stacked against them when, just as the trial is about to begin, they see a public defender opening the case file for the first time. Richard Garland, referenced previously, voiced a common dilemma at the Pittsburgh public hearing when he said, "Most at-risk males as well as females don't have the money to hire a good attorney. When left with a public defender, who, most of the time is overworked…he or she cannot give the necessary time needed to…providing the best defense."[73]

With minimal representation, minorities recognize that the outcomes of their cases are adversely affected. With no case investigation and no effective representation in sight, a defendant may accept a plea bargain as the only way out of a no-win situation. "The client is threatened with the maximum penalty and then forced into taking a deal so they don't have to sit in jail any longer," Garland said. "Guilt and innocence frequently play no part in the decision to accept a plea bargain. Even if they are innocent they take a deal because of the cloud over this system: If you are black and male you are going to get it. The phrase 'innocent until proved guilty' is not something most black males believe."[74]

UNEQUAL OUTCOMES IN FACTUALLY SIMILAR CASES

Many minority defendants believe they have been treated differently from white defendants, and that the outcomes of their cases have differed from the outcomes of similar cases against white defendants. A Philadelphia attorney reported his experience with a white male client who had been charged with burglary. The man had a long record, yet the white judge permitted him to go home. "I had a black male client the next day in front of the same judge," the attorney recalled. This client had a burglary and no record. "He did not go home. He got a sentence of 11 months. I couldn't say anything, because they were both my clients."[75] In the Harrisburg focus group, an attorney reported a case where the judge appeared to "take a more fatherly role" towards a Greek defendant while structuring a sentence "more strictly geared towards punishment" with his black co-defendant.[76]

These and other similar experiences have the overall effect of solidifying or supporting the belief held by minorities that they receive unequal and unfair treatment in the courts. "There is a clear perception in the African American community that the system of justice does not work for us," said Jerome Mondesire, president of the Philadelphia NAACP at the Committee's public hearing in Philadelphia. "It is a widely held perception among African Americans—irrespective of income and education—that if you are black, you are more likely to be stopped, arrested, prosecuted and imprisoned than if you are white. Similarly, the civil justice system places a lesser value on the loss of your health and, in fact, the loss of our lives…because of our skin color."[77] This perception is corroborated by Pennsylvania's statistics on racial and ethnic disparities in sentencing,[78] and by the Third Circuit study, which concluded "even minority attorneys who [said they had] never experienced racist treatment believed that there is a strong perception within minority communities that racism does exist within the judicial system of this Circuit."[79]

As a result, minorities are often fearful of the judicial system, and the fear has tangible implications. Fear, for example, can prevent minority victims of domestic violence from obtaining legal protection when they have been abused. Peck Little said at the Wilkes-Barre hearing, "Almost everyone you have to share your story with is Caucasian and knows little about the cultural aspects of your life, how you interact and communicate with others, or the social mores which govern your behavior…you can begin to see the difficulties faced by people of color who need assistance. For many, these facts translate into not seeking assistance at all."[80]

SEARCHING FOR VIABLE REMEDIES

Aside from filing lawsuits in state or federal court, or making a formal complaint to the Judicial Conduct Board, Pennsylvanians presently have no statewide mechanism for making informal complaints about racial or ethnic bias within the judicial system.[81] Moreover, there are few viable reporting or complaint procedures within the legal profession, and those that exist are "form only," with no meaningful remedies attached. Additionally, the Committee heard from many people who said affronted persons were reluctant to voice their complaints because they were afraid of reprisals or of being perceived as whiners and troublemakers.

The issue of reporting complaints was raised at each focus group discussion. Participants were asked to describe available remedies following racially- or ethnically-biased incidents, but there were few examples. Several Philadelphia attorneys were able to cite a formal disciplinary procedure, although they acknowledged they did not often use it.[82]

If offensive conduct occurs during a trial, attorneys noted that they could put their objections on record. Some Philadelphia attorneys, however, said they believed an objection would "disappear" from the transcript in certain courtrooms, and so would any record of the statement or conduct upon which the objection was based.[83] The topic of available remedies was also discussed in interviews with judges, who acknowledged the practice of going "off the record" but disagreed about whether a judge could or would edit the record to remove potentially biased remarks. Some said they knew of judges who did this, while others said the practice was a relic of the past.[84]

The judges did not report receiving any specific training in identifying or resolving racial or ethnic bias issues.[85] They said that racial or ethnic bias typically was not a topic at judges' meetings. "A number of judges stressed the isolation of judges, one even calling the existence, 'monastic,'" the consultants reported. "One said no one wants to admit they might have a bias and they don't want to feel attacked. 'If you bring up this subject, you are either the attacker or the attacked.'"[86]

In general, respondents to the question about reporting bias overwhelmingly said complaints were, at best, futile and, at worst, harmful. Persons who had made formal complaints said that they were not believed and their perceptions were "rationalized" away. A Pittsburgh attorney explained, "As a black person…you feel that it's racism, but at the same time coming from someone else who is not like you, they're not going to get it." The typical response, he said, is, "You're complaining, you're sensitive."[87]

Another attorney underlined the point: "It's a very easy out and a comfortable out for a white person to say, 'Oh no, you're just being paranoid,' or, 'You're just complaining or whining.'"[88]

Even worse is the fear that a person making a bias complaint will be labeled a troublemaker. "If you get on the wrong side of one judge," a Pittsburgh attorney told the focus group: "there's a very good opportunity that you'll get on the wrong side of a bunch of other judges." The attorney continued: "What you try to do is you try to appease them and…look the other way and hope it doesn't happen again."[89]

Attorneys were concerned not only about their relations with judges, but about the impact upon their clients. "No one can just say, 'Hey, judge, you were racist on Monday—why did you do that?'" a Philadelphia attorney observed in the focus group. "The judge takes true offense to the fact that you recognized that or questioned that he was racist—even though he knows he was and you know he was. But for you to say that in open court, on the record, puts you in a very bad light. And you have to work your way back up that scale with him. And then you have to think, 'What if he damaged this client?' Then [you] think the damage is going to be far worse the next time [you] come in here with another client. So you have to constantly think of what are the repercussions."[90]

With no uniform grievance system in place—and no official acknowledgment that racial or ethnic bias does surface within the judicial system—attorneys are forced to weigh on their own the consequences of making a complaint about racial or ethnic bias. The system itself currently offers no guidance and no assistance. So some attorneys complain and some do not. But without such complaints, and without remedies, the problems will persist.

OTHER TASK FORCE FINDINGS

Nearly 25 other states have examined how perceptions of racial or ethnic bias influence courtroom participants within their respective court systems. At the federal level, the First, Second, Third, Ninth, and District of Columbia (D.C.) Circuit Courts of Appeal have published the findings of their task forces on racial or ethnic bias in the courts. This cumulative body of knowledge is of particular importance today because of the rapidly changing racial and ethnic composition of our country's population. A discussion of some representative reports, both state and federal, follows.

STATE TASK FORCES

New Jersey

The New Jersey Supreme Court began its effort in 1983 with an Ad Hoc Working Group on Minority Concerns. The working group reported to the New Jersey Supreme Court in 1984 and was succeeded in September 1985 by a 16-member Supreme Court Task Force. The task force was expanded to 48 members in January 1986 and produced its final report in 1992. One year after the submission of the final report, the task force published a special report on the differential use of the court by minorities and non-minorities. Its mission was to focus "primarily on access issues that surface in the civil courts," in order to "develop methods for the identification of 1) real and perceived barriers to racial, ethnic and cultural minorities who elect to use the courts, and 2) the reasons why minorities with a need to use the court do not."[91]

In its report, the New Jersey task force looked at racial and ethnic perceptions of the court system through a socioeconomic lens. As noted in the report, one of the primary reasons why minorities do not use the courts, even when they need to, is that they lack confidence in the court system. This mistrust is partly due to insufficient knowledge of the system, but it also comes from the widespread perception that: "There is a direct correlation between how much money one has and the probability of prevailing in the courts."[92] Much of the public hearing testimony gathered by the task force showed that because most minorities are acted upon in the judicial system, rather than initiating an action, "they view economics or their lack of wealth as making them victims in a system that presupposes financial resources."[93] Thus, this task force found that minority access to the court system was impeded by lack of knowledge as well as by socioeconomic status, and that perceptions of fairness and access were intertwined with these conditions.

Michigan

In 1987, the Michigan Supreme Court created the Task Force on Racial/Ethnic Issues in the Courts in response to a call for action from the Michigan Supreme Court Citizen's Commission to Improve Michigan Courts. The task force considered perceptions of bias to be of particular importance because of the damage racial bias causes to the lives of parties, court professionals, and the court system itself.[94] It found that racial and ethnic minorities, as well as many non-minorities, perceive that the Michigan justice system, and court personnel in particular, engage in discriminatory behavior.[95]

Florida

Florida published its initial report in 1990, and prepared a Ten-Year Retrospect of the Report in December 2000. The 2000 retrospect notes that while much work has been done, "racial and ethnic bias in the justice system continues at an unacceptable rate."[96] For example, in the 10 years from 1990 to 2000, the number of minority judges in Florida increased from 5.8 percent to 11.4 percent at the trial court level, from 3.5 percent to 14.7 percent at the district court level and from 14.2 percent to 28.5 percent at the supreme court level, but the judiciary as a whole still failed to reflect the "rich cultural diversity" of the state.[97] Similar levels of improvement were noted in court staffing, although with notably less significant improvement in leadership positions and higher-level job classifications.[98] Less progress was made in increasing the number of minorities in the Florida bar, which still trails the national average, although not all attorneys respond to the call for such information and the Florida bar collects racial information on a voluntary basis.[99]

Washington

The initial findings of the Minority and Justice Task Force of Washington State were also published in 1990. Not surprisingly, the report noted themes common to those found in other states. More recently, however, the 2001 Annual Report of the Washington State Minority and Justice Commission highlighted the findings of a 1999 telephone survey conducted by the Washington State Office of the Administrator for the Courts that was similar to the National Center for State Courts survey of the same year. The results of the 2001 Washington survey showed a remarkable disparity in the general perceptions of minorities regarding the justice system.

The Washington state survey was comparable to the national survey in showing that 70 percent or more of the public had either a great deal of confidence or some confidence in the courts. However, as also seen in the national survey, confidence among African Americans was far less—only 14 percent in Washington said they had a great deal of confidence, 42 percent said they had some confidence, and 15 percent said they had no confidence. Among Latinos, 29 percent said they had little or no confidence in the local courts. Those polled were also questioned about their perceptions of the state of equality for various groups in the court system. When the groups were broken down by racial and ethnic composition, each group felt it was treated worse than the population as a whole—56 percent of African Americans felt that way, along with 56 percent of Latinos, and 59 percent of non-English speaking people.

Survey respondents also felt in large numbers that most juries are not representative of the community. Very significantly, the responses demonstrated that people were not looking for special treatment when they went to court, but wanted the judge to follow the law fairly and impartially. Instead, in response to questions about fairness and objectivity, 81 percent felt that judges' decisions were influenced by political considerations; that elected judges were influenced by having to raise campaign funds; that cases were not resolved in a timely manner; that information needed to proceed with a case was not readily available to the public; and that court rules and procedures were not easy to understand.[100]

New York

In 1991, the New York State Judicial Commission examined the perceptions of the treatment of minorities in the judicial system. The commission concluded that, among minority litigants, there was a perception that they were not treated fairly by the various court systems.[101] It also found that nearly half of all litigators in the survey reported personal experiences of unfair or biased treatment of minority attorneys, litigants, jurors, or witnesses in New York courtrooms.[102] In addition, surveys of litigators demonstrated the existence of a perception gap regarding hiring and promotion opportunities between minority and white attorneys. A majority of African American litigators perceived that they needed extraordinary qualifications if they were to be hired or promoted, while, in contrast, white litigators perceived that standards were lower for minority attorneys.[103]

Massachusetts

In 1993, the Massachusetts Supreme Judicial Court Commission to Study Racial and Ethnic Bias in the Courts also found widespread perceptions of racial and ethnic bias pervading the Massachusetts court system. The chairperson of the commission, in a preface to the report, wrote: "I regret to report that it is the perception of many lawyers, community members, judges, and focus groups that disparate treatment toward racial and ethnic minorities exists within courts of the Commonwealth. Our research corroborates this perception."[104] The commission found a negative perception of minority attorneys in Massachusetts by their white counterparts and white judges, with large percentages of minority attorneys reporting that they "sometimes" or "usually" heard jokes or demeaning comments based on race.[105] Furthermore, the commission reported the perception that jurors in Massachusetts, most of whom were white, tended to favor litigants and attorneys of their own race.[106]

Oregon

In 1994, the Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System explicitly stated in the introduction that, "Non-minorities (sic) have brought about many of the problems that minorities encounter…Addressing these problems, and ultimately solving them, is the joint responsibility of minorities and non-minorities."[107] By framing the problem this way at the very beginning of the report, the Oregon task force attempted to address, head-on, the belief held by non-minorities that they do not cause such problems. The Oregon task force concluded that this attitude, coupled with the fact that many minorities were raised in a culture where discrimination was common or even accepted, meant that, "Minorities and non-minorities alike must work together to solve these problems."[108]

Connecticut

The State of Connecticut Judicial Branch Task Force on Minority Fairness published its full report in April 1996. The discussion of perceptions in this report focused mostly on the recruitment and retention of minority attorneys in the legal workplace. Some of the key factors concerning retention were related to perceptions of the judicial system or to the practice of law in the workplace. The findings of the Connecticut task force in this area revealed the same split in perceptions that had been evident in other states and in other areas of the system. For example, one judge said, "Hiring is not a source of bias; the problem is to get minority people to take the positions."[109] One reason for any such reluctance, however, is the perception of minorities that the system is "too white." This creates "a great sense of loneliness" for the minority lawyer who is not included in the "old boys' network" of "invitations for lunch, after-work drinks, or weekend social events, but who is still subject to the expectation that he or she should assimilate into "mainstream 'blue-blood' culture."[110] Similarly, the report observed: "There is a perception that minority attorneys in Connecticut enter the public sector and focus on small firms," perhaps because they believe they have a "greater opportunity of being hired" or feel that hiring practices are more open in the public sector and in the smaller private firms.[111] This belief goes hand-in-hand with the perception that minority attorneys do not have comparable opportunities for being assigned cases or promotions. The Connecticut task force found that: "Minority attorneys are much more likely than Caucasian attorneys to perceive that minority attorneys are often or very often assigned more limited, less complex and less remunerative cases than non-minority attorneys."[112] Eighty-seven percent of minorities participating in the task

force survey felt that a minority attorney was less likely to receive a supervisory or partner position than was a non-minority of comparable experience, and, significantly, 43 percent of the responding judges agreed that the statement was true more than a quarter of the time.[113]

Ohio

Most recently, the Ohio Commission on Racial Fairness, which was commissioned by the Supreme Court of Ohio, published its final report in 1999. Most of the judges surveyed by the Ohio commission, "regardless of their ethnic background, perceived little racial bias in judicial processes such as jury selection, setting bail, and professional etiquette."[114] The attorneys in the survey, however, reported significant differences in how whites and minorities, especially African Americans, perceived the degrees and effects of racial and ethnic bias. The effects included perceptions that had been noted in other states, such as: reduced opportunities for minority attorneys and more problems for minority attorneys who do operate within the system; fewer mentoring opportunities for minorities; the view that hiring preferences are granted to whites; and the general beliefs that minority defendants do not receive equal treatment and that the judicial system treats all minorities "unfairly."[115]

FEDERAL TASK FORCES

D.C. Circuit

When the Gender, Race and Ethnic Bias Task Force Project in the D.C. Circuit was created in 1990, its Special Committee on Race and Ethnicity was the first in the country to address the ways in which race and ethnicity might affect federal courts by examining the "work and worklife of the courts of the D.C. Circuit."[116] The Committee's research tools included surveys, interviews, focus groups, and public hearings. The D.C. Circuit is unique because the majority of its population is African American and, at the same time, it is, "geographically small and entirely urban, and all of the courts of the Circuit are housed in one building."[117]

Despite a widely varied research agenda, the special committee noted one consistent theme: That one's view of the effect of race and ethnicity on the work of the courts depends largely on the racial and ethnic perspective of the viewer.[118] In relation to this finding, one of the most significant problems found by the D.C. task force was the lack of effective discrimination complaint procedures and practices. The most common complaints about these procedures

included the following: 1) the process was not perceived to be impartial or neutral; 2) discrimination procedures were perceived to lack confidentiality; 3) employees at all levels within the courthouse workforce, including managers, reported that employees who had used the discrimination complaint process had routinely had negative experiences; and 4) discrimination complaints were perceived to be handled too slowly.[119]

Ninth Circuit

Formed in 1993, the Ninth Circuit Task Force on Racial, Religious & Ethnic Fairness published its final report in 1997. As a result of financial and logistical constraints, the Ninth Circuit Task Force did not survey the perceptions of litigants and members of the public regarding the effects of racial or ethnic bias on the litigation process. It did, however, review the perceptions of court employees about the effects of race, religion, or ethnicity on various aspects of their employment with the courts. The task force also surveyed judges and attorneys to ascertain if and how these issues affected the litigation process. All Ninth Circuit employees, both white and minority, reported that the courts of the Ninth Circuit were generally fair employers, although about 33 percent of court employees "reported having heard demeaning or disparaging comments based upon gender, race or ethnicity," with the two most frequent sources of such statements reported as "court staff or members of the public."[120] In general, most judges agreed that there was a sense of collegiality among the judges of their court, but fewer minority judges felt that this was the case, or that all judges communicated openly about non-case specific issues or problems.[121] Few lawyers in the Ninth Circuit reported observing bias among the judiciary, but criminal defense attorneys and assistant federal public defenders reported many more instances of bias than other attorneys, and bias based on language or accent was reported as often as bias based on race, ethnicity, or perceived immigration status.[122]

Second Circuit

The report of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, published in 1997, sought to determine, "whether, among persons or groups who use or work in the courts, any bias or unfairness is, for whatever reasons, subjectively believed or perceived to exist."[123] The task force found a perception among minority attorneys in the Second Circuit that members of their own groups are more disadvantaged than those of other groups.[124] Minority attorneys who practice in the Second Circuit also reported that they observed or

personally experienced forms of racial or ethnic bias in their professional interactions on a very regular basis.[125] These reports of bias by minority attorneys were not shared by their white counterparts, nor were their perceptions shared by judges in the Second Circuit. Judges and white male attorneys in the survey perceived that the Second Circuit was colorblind to those who practiced in it, and that race and gender did not affect the operation of the courts.[126]

Third Circuit

The Third Circuit Task Force on Equal Treatment in the Courts also published its final report in 1997, even though the task force was formed in 1994, a year later than the Ninth and Second Circuit task forces. The Third Circuit found that "Even minority attorneys who had never directly experienced racist treatment believed that there is a strong perception within minority communities that racism does exist within the judicial system of this circuit."[127] Such perceptions were evident in the response of minority court employees when asked how they believed they were treated in comparison with their co-workers, "[F]or example, only 4.2 percent of white court employees felt that they were treated with less respect based upon their race or ethnicity, while about 25 percent of all minority [court employee] respondents perceived less respectful treatment."[128] The task force also circulated a survey to attorneys that "specifically inquired of attorneys as to the extent they believed their race or ethnicity affected their treatment in the Third Circuit."[129] The survey found that just 2.5 percent of white attorneys practicing in the Third Circuit believed their race had an impact on the treatment they received, while 22 percent of Asian American attorneys, 26 percent of Latino attorneys, and 40 percent of African American attorneys reported that race or ethnicity "always" or "sometimes" had an impact.[130] It is also important to note that the Third Circuit Task Force found that minority employees held few supervisory positions throughout the circuit and, consequently, that they earned relatively lower salaries than white court employees.[131] The task force concluded that the very fact that there were such small numbers of minority jurors, judges, attorneys, and publicly visible court employees within the circuit's judicial system was reason enough to fuel the perception of racial bias within that system.[132]

CONCLUSION

The manifestations of racial or ethnic bias within Pennsylvania's judicial system may be overt or subtle, inadvertent or intentional. People may have their private reasons for engaging in objectionable conduct, but in any case there are no acceptable excuses. Explanations do not transform objectionable conduct into benign behavior. In this regard, outcomes trump intentions and the offending party's excuse, "I meant no harm," is generally beside the point. If a person perceives that biased speech or conduct is interfering with the discharge of his or her duties, then that behavior must, in fact, be regarded as biased, regardless of the speaker's intent.[133]

In this context, however, one could argue that there is still an important difference between perceived and actual bias. "Perceived" implies that conduct can be adjudged as biased only in the mind of the perceiver, regardless of the actor's intentions or beliefs. When a judge, for example, questions a minority attorney about the legal sources for his motion, must the judge also ask similar questions of the other attorney in the case?[134] And if the judge does not, is this an example of racially- or ethnically-biased conduct? The answer is debatable because there are plausible non-racial or non-ethnic explanations for the judge's engaging in the line of questioning.

The conduct in this example appears different from conduct that is universally considered an expression of bias, such as calling an African American a derogatory, racially-inspired name. The two examples, however, may not be different at all. The judge may be questioning the attorney's competence and knowledge because he or she believes the attorney to be inexperienced and incompetent, or the judge may be asking the questions simply because of the color of the attorney's skin. Conduct that appears unobjectionable may also be cloaking actual bias. For example, arguments that the striking of all potential African American jurors is based on sound *voir dire* principles can, "fail or refuse to acknowledge that the outcome of those policies can engender inequitable circumstances when [all] minorities are excluded."[135] When a Philadelphia court employee was challenged in a focus group about his belief that eliminating minorities from juries was an example of racial bias, the employee responded, "That's the new racism. When they wouldn't serve you at the lunch counter, everybody could believe that was racism. But now where it's institutionalized…it's hard…to come to a definition of what it is and if it is there but you know it because you're black and you feel it."[136]

The lack of overtly biased language or behavior should not allow us to feel complacent. Attorney Susan Yohe, former chairperson of the Allegheny County Bar Association's Women and the Law Committee who has represented clients in employment discrimination cases, said at the Pittsburgh public hearing that, over the years, such cases have become more difficult to prove. "Few of us believe that this is because employment discrimination has been eradicated throughout the land…Rather, it is at least in part because what has been almost entirely eradicated is careless talk about discrimination…and this is good…But we should never equate the absence of discriminatory language with the absence of discrimination."[137]

Another attorney at a Pittsburgh focus group told of an all-white jury verdict in favor of his three African American clients but with very low monetary damage awards. Afterward, one juror complained that her colleagues had spent two-and-a-half days in the jury room telling racial jokes. "And they finally decided—there's no question of liability—we just can't give these people that much money because they'll quit their jobs and stay home and drink malt liquor." The judge subsequently granted counsel's motion for a new trial, a bench trial, on the issue of damages.[138]

The Committee concludes that it is a mistake to concentrate on the supposed differences between perceived and actual manifestations of bias. To do so would be to deflect attention away from the fact that racial and ethnic bias continues to exist within the Pennsylvania judicial system, just as it exists throughout American society. As the Third Circuit concluded, "Regardless of whether perceptions are rooted in social factors beyond the court's control, or stem from specific conduct that has been interpreted as reflecting unequal treatment by a member of the court community, the courts…should consider, on an ongoing basis, how best to reduce these perceptions."[139]

"I urge you not to exhaust your energy and your scarce resources of time and money on just identifying problems. Equal justice for all will only be guaranteed, or at least furthered, by the development and implementation of an action plan to eradicate racial and gender bias wherever it is."

—Honorable Kathryn S. Lewis

It would be erroneous, in other words, to conclude from this report that racial and ethnic bias has been eradicated from the system. The experiences and grievances of those who spoke directly and indirectly to the Committee must not only be acknowledged, but acted upon. Minorities want the reality of bias to be eradicated, not simply the perceptions of those who are victimized by it.

As Dr. Stan Hamilton said at the public hearing in Wilkes-Barre: "There's been lots of commissions and studies, throughout the nation, on racial bias. It's been repeated year after year, decade after decade. The question is what are you going to do? You and I both know you've heard everything I'm going to say before. It's all been documented. It's no secret. The only thing you need to hear now is a human cry from the American people: Do something. Do something and do it now. Take an action. After today, you will all be found guilty, every one of you, guilty of procrastination, manipulation, and even fraud, unless, of course, you do something."[140]

If these perceptions are ignored by the system, they will not simply disappear. They will persist and will continue to undermine confidence in our judicial system. If this system does not respond with a proactive approach, it will be criticized rightly for tolerating racial or ethnic bias or, at worst, condoning the behavior that gives rise to perceptions of bias.

This Committee urges the Pennsylvania Supreme Court to heed the words of Honorable Kathryn S. Lewis, of the Philadelphia Court of Common Pleas, who spoke during the Philadelphia public hearing: "I urge you not to exhaust your energy and your scarce resources of time and money on just identifying problems. Equal justice for all will only be guaranteed, or at least furthered, by the development and implementation of an action plan to eradicate racial and gender bias wherever it is."

She continued: "When actions premised upon racial or gender bias enter our courts and we fail to question or, more specifically, to denounce such actions, by our inactions, conscious or unconscious, we are guilty of condoning such bias. The consequence of our failures and dangers in some cases destroys the promise of equal justice for all."[141]

GENDER BIAS

During the past 30 years, Americans have altered their perceptions of women's roles in society. One sign of this change is the increased participation of women in the justice system. Women are employed as judges, attorneys, and court personnel, and they appear before the court as witnesses and litigants. The growing presence of women makes it tempting to conclude that gender bias[142] within the judicial system has waned since the 1970s.

Research by the Committee shows, however, that gender inequality persists even as more women have filled a greater variety of positions and have increased their participation in the system. Expressions of bias still resound through the system, making it difficult at best for women to appear before the court on an equal footing with men.

Many people working within the justice system believe that persistent gender bias prevents women, regardless of their roles in the system, from receiving the courtesy and respect they deserve. Speaking at public hearings, interviews, and focus groups held throughout Pennsylvania, female lawyers spoke of encountering gender bias through comments and behaviors that call into question their credibility and competence to perform their jobs, subjecting them to what many regard as a more rigid application of rules than their male counterparts' experience.

Female attorneys reported that they commonly hear derogatory, gender-specific language, including comments about their bodies. Many female lawyers find that their work is scrutinized and judged more harshly than the work of men, and that shortcomings in their work are attributed to their gender. They say they are frustrated by their inability to engage in the easy camaraderie enjoyed among many male lawyers and judges. Female lawyers and court personnel also agreed that gender bias affects the credibility of female litigants and witnesses.

Likewise, female judges—who sit in only 26 of the Commonwealth's 67 counties[143]—expressed in private interviews a sense of simply not being "heard" by their male colleagues; that is, their male colleagues fail to respond to their comments or validate their expressions of opinion.

Most female participants in the justice system, whether court personnel, litigants, lawyers, or judges, were reluctant to complain formally about their treatment. They noted emphatically that there can be significant risks to their careers and clients' cases can be jeopardized if they pursue remedies when bias occurs.

Despite their reluctance to report instances of bias, many women do not believe the situation is without hope. They perceive the judiciary as being in a unique position to set the appropriate standard of conduct so that all people are treated fairly throughout the justice system.

Scope of Inquiry

The Committee reviewed instances of gender bias throughout the judicial system, paralleling its study of racial and ethnic bias in the courtroom. The Committee collected data from relevant studies, public hearings, and a series of focus groups[144] and personal interviews. Reports from other state task forces were also reviewed. The findings from all sources are set forth below.

PENNSYLVANIA SOURCES

MELIOR GROUP/V. KRAMER & ASSOCIATES STUDY

The Melior Group and V. Kramer & Associates, referenced previously, conduced focus groups and interviews on the topic of gender bias in the courtroom as well. The focus groups were composed only of women, but men were also included in the interviews with judges and litigants. Drawing upon the focus groups and interviews, the consultants' final report cites several major themes repeated by judges, attorneys, court personnel, and litigants:

- Respondents described a system in which judges, lawyers, and court personnel experience and display gender bias in the courtroom.
- Everyone, regardless of position, brings assumptions and prior experiences into the courtroom. Some people are more conscious of this than others; education and training should deal with this fact and redress any consequent problems.
- Gender bias is manifested in spoken words, in the demeanor of male judges and attorneys, and in the application of different standards and requirements for male and female attorneys.

- Gender bias is more evident in criminal and family courts than in other courts.
- Bias appears to be involved in the clustering of female court personnel in certain lower-level jobs.
- Gender bias is both overt and subtle. When subtle, it is often difficult to link to outcomes. As a result, it can be difficult to demonstrate the effects of gender bias in an individual case.
- Bias has real effects on outcomes. Bias affects determinations of innocence or guilt, severity of sentences, size of damage awards, custody and support awards, and issuance of protection from abuse orders in situations that can result in injury or even death.
- Economic status and class intersects with gender and race, has a significant effect on a litigant's courtroom experience and can affect the outcome of a case.
- Under current procedures for making complaints of bias, many attorneys and court personnel believe the risks—to their own careers and, if attorneys, to their clients—prevent them from coming forward.
- The judiciary has the power and responsibility to set the tone in the courtroom and effect change.

PENNSYLVANIA BAR ASSOCIATION JOINT TASK FORCE TO ENSURE GENDER FAIRNESS IN THE COURTS INTERIM REPORTS

In 1993, the Pennsylvania Conference of State Trial Judges and the Pennsylvania Bar Association (PBA) established the Joint Task Force to Ensure Gender Fairness in the Courts. Its mission was, first, to determine and evaluate the extent to which gender bias exists, and, second, to formulate and disseminate solutions and recommendations to promote gender fairness. The Task Force contracted with a social scientist, Professor Phyllis Coontz, Ph.D., of the University of Pittsburgh, to design surveys, analyze the results, and report on the findings.

The Joint Task Force issued its First Interim Report in 1995 to present its findings from a statewide survey of attorneys practicing in Pennsylvania. A copy of the First Interim Report is attached in Appendix Vol. II. The attorney survey revealed the following:

- A wage gap: female attorneys earned on the average of $30,000 less than male attorneys in all earnings categories.
- A glass ceiling: both male and female respondents indicated a conspicuous absence of women in senior positions.
  - Twenty-nine percent of the female attorneys responded that they worked in organizations or firms where there were no women in senior level positions;
  - A majority, 53 percent, of the men responded that they worked where there were no women in senior level positions.

The report also presented findings regarding different experiences of male and female attorneys in the workplace and in court. The attorney survey asked men and women about their experiences with other legal professionals, including lawyers, judges, co-workers, and court employees. The results showed overwhelmingly that men and women reported differences in their professional experiences. The differences revealed in the survey regarding professional interactions between men and women included the following:

- Women were more likely than men to be called by their first names;
- Women were more likely than men to be exposed to comments about their physical appearance;
- Women were more likely than men to be exposed to jokes or comments about race;
- Women were more likely than men to be exposed to jokes or comments about their own gender and the gender of other women attorneys; and
- Women were more likely than men to be excluded from professional conversations with other lawyers, judges, and court personnel.

Two years later, in 1997, the Joint Task Force issued its Second Interim Report to present its findings from a statewide survey of trial court judges. A copy of the Second Interim Report is attached in Appendix Vol. II. The survey asked judges to render decisions in four typical case scenarios: self-defense/homicide, personal injury, alimony, and simple assault.

There were two survey versions, which varied only by the gender or the race/ethnicity of the civil litigants or the criminal defendant and victim. The factual information relevant to each of the cases was otherwise identical. The two versions of the survey were distributed randomly to all trial judges sitting in Pennsylvania. The judges were asked to render a decision, and then, if appropriate, award damages or alimony, or enter a criminal sentence.

Although the judges' responses to the surveys were generally the same, regardless of the litigants' gender or race/ethnicity, as well as the judge's gender, there were some instances where there were statistically significant differences. The differences in these responses were determined by the social scientist to be related to the "non-legal factors," i.e., the gender or the race/ethnicity of the civil litigants or the criminal defendant and victim, or the gender of the judge.

The survey revealed that, under the same factual circumstances:

- Judges were more likely to find white female defendants claiming self-defense guilty of homicide than African American female defendants, under the same factual circumstances;
- Judges awarded twice the amount of damages for assault when the defendant was a male and the victim was a female, than when the defendant was a female and the victim was a male;
- Judges imposed longer sentences on white female defendants than African American defendants; and
- Judges awarded higher damages to female victims of male assailants than male victims of female assailants.

Another important component of the Joint Task Force's Second Interim report was the role played by the gender of the judge. Insufficient data prevented an analysis of the responses by race/ethnicity of the responding judges. The survey results showed that, under the same factual circumstances:

- Female judges were more likely than male judges to find the male defendant guilty of assault than the female defendant;
- Male judges were half as likely as female judges to find the female defendant claiming self-defense guilty of homicide; and
- Male judges imposed shorter sentences for simple assault than female judges.

ALLEGHENY COUNTY BAR ASSOCIATION WOMEN IN THE LAW COMMITTEE

In 1991, the Allegheny County Bar Association (ACBA) published the results of its attorney survey, which was designed to determine whether gender bias existed in the Allegheny County courts and, if so, in what ways it might differentially affect the career tracks of male and female attorneys. The survey was sent to the entire ACBA membership; 29 percent of those responding were women, which accurately reflected the percentage of women practicing law in Allegheny County in 1990.

The survey results indicated that the average annual salary range for males practicing law was $60,000–$79,900, while the average annual salary range for females was $35,00–$45,900. Years of practice, area of practice, number of hours worked as a lawyer, number of children under eight years old, and marital status did not explain the differences in the income of male and female lawyers. A significant percentage of women believed they earned less than males with comparable education and levels of responsibility, with almost 20 percent believing that gender was a factor in their decreased earnings. While the same percentage of licensed female and male attorneys were engaged in the practice of law, a larger percentage of the women were working only part-time. Even when the information was analyzed by number of years of experience, the survey results also indicated that, on a percentage basis, far more men than women were receiving fee-generating appointments from the courts. It also appeared that women were promoted in proportionally far fewer numbers than their male colleagues.

The ACBA survey also looked at social factors affecting attorneys' careers, such as identifying within an attorney's household who predominantly performs household chores, and who would be expected to relocate should the attorney's spouse receive an out-of-town job offer, to discover the impact, if any, these factors could have on employment practices. The Committee discovered that females continue to be responsible for the bulk of their families' childcare and household duties, such that if an emergency arises at home, it is far more likely that the female, rather than the working husband, will leave her job to attend to the problem. Twenty percent of the female respondents indicated they had made long-term career accommodations in order to care for their children, while only 6 percent of the male respondents reported similar shifts.

Lastly, the survey asked men and women about their perceptions of gender bias, as evidenced by such behaviors as commenting on women's appearance, addressing women by their first names, and other similar indicators of bias. As is the case with all other survey results referred to in this chapter, women reported being the recipients of these forms of biased conduct far more often than did men.

FINDINGS

UNDERREPRESENTATION OF WOMEN THROUGHOUT THE JUDICIAL SYSTEM

The number of women in the legal profession has been steadily increasing since the 1970's. ABA data on law school graduates show that, over the past 11 years, women have accounted for between 43 percent and 47 percent of law school graduates.[145] Many believe, however, that women still disproportionately occupy the lowest echelons of the legal system. They report that they are the secretaries but not the managers; the law associates but not the partners; the junior-level judges but not the upper echelon administrators.

Women's relative disadvantage in hiring and promotions is reflected in gender-related policies that affect support staff throughout the justice system. Philadelphia court employees report, for example, that the "crier" jobs are virtually all male while the clerical staff is predominantly female.[146] In Cumberland County, where there are no female judges,[147] a female public defender noted, "Sometimes I can look around the whole courtroom and can see that everybody in the courtroom who's running the courtroom is female except the judge. And the judge is always male and—the stenographer, the court clerk…they are all…like little minions, and there's…the judge, he's running the whole thing. And all these women in service to this guy. That's the way it looks to me sometimes."[148]

At the local level, however, only 20 percent of Pennsylvania judges were female. When Philadelphia County and its 39 female judges (42 percent) were excluded, the percentage of female judges dropped to 14 percent in the remainder of the Commonwealth… in 41 of the 67 Pennsylvania counties, there were none at all.

—Pennsylvania Bar Association Commission on Women in the Profession

While progress has been made, the perception of a male-dominated judiciary is borne out by the most recent breakdown by gender of Pennsylvania judges. As of 2002, women held one of seven seats on the Supreme Court, five of 15 seats on Superior Court and five of nine seats on Commonwealth Court.[149] At the local level, however, only 20 percent of Pennsylvania judges were female. When Philadelphia County and its 39 female judges (42 percent) were excluded, the percentage of female judges dropped to 14 percent in the remainder of the Commonwealth. Philadelphia was the only county with more than eight female judges, and in 41 of the 67 Pennsylvania counties, there were none at all.[150] Female judges also tend to be clustered. In certain jurisdictions, judges believe there is a tendency to assign female judges to family court rather than criminal or civil court.[151]

Many female attorneys believe that, as they grow older, their careers often lose momentum at the same time that male attorneys' careers are thriving and advancing. The PBA, in a 2002 survey of the Commonwealth's 100 largest law firms, found that 32 percent of the attorneys in those firms were women. Among those women, 47 percent were associates, 17 percent department heads, 16 percent partners, and 8 percent managing partners. However, women were "an overwhelming majority" of the part-time employees in those firms.[152] Salary studies within Pennsylvania from both 1991 and 1995 indicated that female attorneys were earning significantly lower pay than male attorneys, even after taking into account age, experience, and hours-worked differentials.[153]

Anecdotal evidence gathered by the Committee reflects and reinforces the impression that the glass ceiling is firmly in place for female attorneys in Pennsylvania. The anecdotes also demonstrate the effect these restraints have had upon career directions for female attorneys. "The numbers every year, they don't change," a member of the PBA Report Card Committee said at the Philadelphia focus group for attorneys. "The women, they're just leaving," two to five years after law school. "They're staying at home and raising their children," she said. "They're going into just completely different professions…they're all just jumping [ship]."[154]

A recent study, Women in Law: Making the Case, conducted by Catalyst, and sponsored by Columbia Law School, Harvard Law School, University of California-Berkeley Law School, University of Michigan Law School, and Yale Law School, produced findings somewhat contradictory to the

statements by the preceding attorneys. The study found that while the career paths of men and women lawyers diverge over time, and fewer women than men remain employed in law firms, many of those female attorneys do not leave the profession entirely but simply relocate to the education and corporate sectors.[155]

Many women see the specter of gender behind the lower pay and slower rate of promotion. A Philadelphia attorney shared her experience at a focus group. "I was at a smaller firm and I got paid less than the male attorney who had five years less experience…They said, you're female and generally females make less. I said, 'Wait a minute…he just got his license.' I was out [of law school] maybe five, six years. I said, 'He's coming to me for help.'" The response, she said, was "Well, we expect him to be a rainmaker."[156]

DISPARATE STANDARDS AND BIASES DIRECTED TOWARD WOMEN

Many women find they are regarded as junior partners and denied the respect and authority received by male attorneys. In their eyes, gender makes women less than equal to their male counterparts.

Susan Yohe, referenced previously, began her public hearing testimony in Pittsburgh by saying, "I do not come today with stories of blatant mistreatment of women in the courts…It has been years since I was asked by a court employee, as I was routinely throughout my first 10 years in practice, despite my suit and briefcase and the company I kept, 'Are you a lawyer?'"

She continued, "It is no longer an obvious leap in logic to anyone that if it is a woman, it must be a secretary or paralegal or other support person."[157] She concluded her remarks by noting, "Good people discriminate without even knowing it, without recognizing it…A man who believes his female colleague is just a little too emotional or aggressive or meek, too masculine or too feminine or more committed to her family than to her career…He would not admit to prejudice, but would say he is only making an objective evaluation of her job skills. When he does this, he is…subjecting the woman…to a level of scrutiny not common to all lawyers."[158] Many people expressed a similar sentiment to the Committee, cautioning that although women have come a long way, they still have a long way to go.

The "old boys' network" excludes women, denying them full and equal participation in the system.

Women have joined the team, yet they generally do not see themselves as full and equal partners—and the team itself has yet to offer them full membership. One common complaint is that many men claim commitment to equality, yet question whether gender bias actually exists. Caren Bloom, a Centre County attorney, has heard criticism of the Women's Bar Committee in Centre County by male attorneys who called it reverse discrimination because there is no men's bar committee.[159] Male members of the Erie County Bar made a similar complaint because female attorneys were holding formal women-only lunches a few times per year.[160]

The irony of these male perceptions is not lost upon their female colleagues, who have long noted the "old boys' network" maintaining its grip in judicial circles as it resists the inclusion of women. In 1997, the Third Circuit Court of Appeals Task Force on Racial and Gender Fairness reported that, "The notion that an 'old boys' club' operated among long-practicing male attorneys and male judges, to the detriment…of women attorneys…was voiced frequently in attorneys' comments to the survey and at the public hearings. A female attorney commented: "The old boys' club is alive and well…Women and minority judges and attorneys just aren't included, and they are expected to be inferior in some respects."[161]

At a Philadelphia focus group, a female attorney described an incident that exemplified the problem. Her law firm scheduled a weekend golf outing at Myrtle Beach for partners—who were all male—and clients. The women in the firm also played golf and had represented several of these clients, yet the women were pointedly not invited, even after the guest list was expanded to include several of the firm's associates. The women raised the issue of their exclusion with their male colleagues, whose reactions ranged from puzzlement to sympathy. The excursion went on as planned, without the female associates. The following year, a memo circulated that invited all associates, male and female, to attend the outing. The women signed up. But the excursion was canceled, and has never again occurred.[162]

An attorney from a more rural county told a Harrisburg focus group about an incident in which a local legal organization (the Inns of Court) issued a membership invitation to the two full-time male attorneys in her office, but ignored the two full-time female attorneys.[163]

It would be a mistake to minimize the effect of this type of exclusionary conduct. Women believe it affects their ability to retain clients. The woman excluded from the Inns of Court believed it was important to be able to, "convince your clients…that you have access to the court system and you have access to the judges." Another attorney at the same Harrisburg focus group said that, when a client sees an attorney, "chumming up with the judge or the D.A., they're thinking, 'Wow, this person is well-connected—I'm OK.'"[164]

Disparate treatment of male and female attorneys may cause a woman to question her ability to work effectively on a tilted playing field. "We do not understand why the judge seems to have a short fuse when it is a woman arguing her case,"[165] Susan Yohe said at the public hearing in Pittsburgh. Similarly, an Erie County attorney told her focus group about, "the hostility and the discrimination and the being treated differently." Male attorneys, she said, were able to give motions without the proper notice while women in the same courtroom were, "forced to go through every hoop and every word in the rule."[166]

"We long for the easy camaraderie with judges and court personnel enjoyed by men…because it…means a more ready acceptance, a more open ear to a novel or difficult position, a more forgiving attitude toward a mistake—things all litigators need from time to time."

—Attorney Susan Yohe

In her role as an officer of a local chapter of the National Organization of Women, Joanne Tosti-Vasey has received complaints from female attorneys in central Pennsylvania about their treatment in the local courthouses. One of the concerns she has heard on a number of occasions is the sense that female attorneys have that they are not privy to the friendly discussions and relationships shared by judges and male attorneys. Their concern is that those relationships can have an important bearing on a case and they have no access to them: "The discussions with the male attorneys are different than with the female attorneys. For example, the judicial official might discuss the Penn State football game for 15 or 20 minutes with a male attorney. The discussions with a female attorney would more likely deal with a court case and/or are very short in nature. This type of informal conversation gives the perception that the female attorney is not the judicial officer's pal." Tosti-Vasey went on, "Clients with female attorneys have said, 'If my attorney was his…pal or buddy, then I would have fared better.' This is an appearance of bias issue, even if there is no actual biased behavior."[167]

Many women also believe their male counterparts are more likely to receive support and concrete advice from senior attorneys. As attorney Shelley Pagac noted at the Pittsburgh public hearing: "Older male attorneys in law firms often focus their mentoring efforts on young male associates, and exclude young female associates from certain opportunities within the firm. This type of conduct may be unintentional, but can have a profound effect on the professional development of women attorneys."[168]

Exclusion from the network also affects women's ability to represent their clients in the most effective manner. A Harrisburg public defender put it succinctly: "A lot of Dauphin County D.A.'s are old school members, and if you're not in their little clique, you are not going to get as good a deal as the older men that are in that little clique."[169] Yohe noted at the Pittsburgh hearing, "We long for the easy camaraderie with judges and court personnel enjoyed by men…because it…means a more ready acceptance, a more open ear to a novel or difficult position, a more forgiving attitude toward a mistake—things all litigators need from time to time."[170]

Women perceive that they are accorded less credibility because of their gender.

Because of their overwhelming presence in the justice system, men established the standards and norms of behavior expected within the system. As women enter the system, many find that its standards favor and reinforce typical male behavior patterns. Thus, some women believe that they are discriminated against simply because they are not men.

When the court addresses women as "Mister" or initiates a court session with, "Good Afternoon, Gentlemen"—a frequent point of contention in Pennsylvania—the clear meaning is that men expect to see other men serving as attorneys and judges. The assumption, consciously or unconsciously, translates into an inappropriate form of address. After all, said one female attorney who was consistently addressed as "Mister" by a particular judge, "I know darn well I look like a female."[171]

Other women believe the courts discriminate against women who do not speak, sound, or react emotionally in the same manner as men. The women believe, for example, that judges sometimes look with disfavor upon female litigants who cry on the witness stand. "There are times when the judges are very what we would call abusive with a crying female witness," attorney Caren Bloom said at the State College public hearing, calling the judges, "sometimes abusive and impatient at the woman crying on the stand and being emotional about her life falling apart."[172]

Women's speech patterns, inflections, tones of voice, and use of language may also be called into question. An attorney at the Philadelphia focus group related a discussion with a male colleague who thought he was praising her legal skills when he said, "You've mastered the fine art of being a persuasive advocate without whining…I'm telling my female associates all the time, 'Stop whining.'"[173] The man, in effect, was implicitly criticizing anyone who sounded like a woman, which was the wrong way to sound. He sounded like a man, which in his mind was the right way to sound.

A similar bias spills over into expressions of moral values that influence professional behavior. If a woman does not prioritize her work and family life according to male expectations, she risks violating expected norms of behavior. A witness at the State College public hearing testified to receiving several reports from female attorneys in the area who complained of being denied continuances for family and childcare emergencies, while men were granted continuances for trifling reasons.[174] A Philadelphia attorney told a focus group about an occasion when, with an important trial looming, she took three days' bereavement leave because of her mother-in-law's death. When the attorney subsequently won the trial, a male attorney in the office told her, "You really shouldn't be a partner at a law firm. You should go in-house, because you love your husband too much…"[175]

Women are perceived to be less competent than men.

Women continue to believe that perceptions of their competency are distorted and that their professional credibility is hard won. "We have a tougher battle convincing the court that we really are as good as we are," Yohe said at the Pittsburgh public hearing. "We come into a courtroom having to prove ourselves, to overcome an assumption that we are not quite first-rate, but still learning, still needing to be patronized. We are treated as new in the profession, still wet behind the ears, still young, even after we have acquired years of experience and gray hairs. We are forever girls."[176] For attorneys, this can result in greater, stricter scrutiny by the court, especially in rural areas where fewer female attorneys practice. Civil litigators in Wilkes-Barre noted that female trial attorneys are held to higher standards, as though the court was wary of their abilities.[177]

The Third Circuit Task Force survey drew a similar conclusion, citing the common impression that judges singled out female counsel and made disparaging or demeaning remarks about their performance and professional competence.[178]

Clients can act in biased ways, too. As an attorney observed at the Harrisburg focus group, "I always feel like I have to start out trying to prove myself, that I know what I'm doing, and I'll have them say to me—before I have a chance to say anything—'do you know what you're doing?' Or, 'How long have you been doing this?' They call me 'Hon.' I've been called 'Kiddo'…They might say, 'My husband now has so-and-so on the other side. Do you think you can handle him?'"[179]

Some women also connect with competence issues the frequent misidentifications of female attorneys as nonprofessionals. An attorney from Wilkes-Barre noted that she was often mistaken for the court reporter when she arrived at an office for a discovery deposition, although she carried no reporting equipment.[180] Similarly, a young female attorney in Erie related that in domestic cases, "If I'm representing a male…they tend to think that I am the paramour of the male. Even if the male is 65 years old."[181]

In response to similar findings by the District of Columbia Task Force on Gender and Racial Bias, The Honorable Patricia Wald of the D.C. Circuit Court said, "No one infers conscious bias from [this data], but on the other hand, how can one discount the effect non-recognition has on the woman lawyer? Honest mistake, of course. Non-prejudicial error? I don't think so. It says to the misidentified player, you are not in friendly territory. This is not your game, yet."[182]

Women believe they must exhibit either aggressive or passive behavior.

A unique problem arises from expectations that a woman will act or speak in a certain way. However, these stereotypes about women do not always jibe with expectations about the way a legal advocate or judge should act. This often puts a female attorney in the paradoxical position of either behaving in an outspoken manner and being perceived as too aggressive or "bitchy," or conforming to more passive behavior that will cause her to be labeled as an ineffective advocate. Either way, a woman's competence is once again challenged.

An Erie attorney, who said she is generally unaware of any gender bias directed toward her, nevertheless reflected that, "To the extent that things have been unfavorable to me as a woman it is because I feel that I have to work…twice as hard to get the same result as a man, because when I make a good argument I'm seen as going crazy or 'Isn't she a bitch.'"[183]

The dilemma is related to the issue of disparate treatment. Although attorneys acknowledge the existence of civility codes that are applicable to both genders, they assert that, "The men can say 'I can be as aggressive as…or I'm going to raise my voice. I'm going to bang my fist on the table. I'm going to be loud and in the witness's face,'" an attorney said at the Philadelphia focus group. "But the women, if the women do that, you have to worry about the judge reacting adversely to you."[184] Caren Bloom, referenced previously, underlined a similar point at the State College public hearing: "When a female lawyer is assertive, she is considered bitchy. And when a male lawyer is assertive, he's considered a good advocate…"[185]

At the Pittsburgh public hearing, Yohe worried about how the contradictory expectations affected the judge's reaction to her arguments: "We fear that strong, powerful advocacy on behalf of our clients turns off judges and juries. We constantly worry that we appear either not strong enough, too much like a woman, or too strong, too much like a man. This is a conversation we have with ourselves that I cannot imagine has a counterpart among men. And if we are too aggressive, we risk making a judge or jury angry at us."[186] An attorney at the Erie focus group, noting the progress made in the area of gender parity, nevertheless testified, "Women are historically, the stereotype has been, you're not aggressive, you're going to be more passive…and those things feed into the judges' perceptions. So that when you are aggressive, they don't know what to do."[187]

Women's spoken words are often discounted.

Attorneys have long reported that some judges actively interrupt and discourage or derail a female attorney's or female litigant's presentation. The Third Circuit Task Force, among others, found that courtroom interruptions by judges were noted far more frequently by women than by men.[188]

"Judges interrupt female witnesses and litigants more often when they are on the stand," noted Joanne Tosti-Vasey at the State College public hearing, "And female lawyers have reported that if they're doing what appears to be a very good interrogation, the judge will more likely interrupt the flow and ask his own questions."[189]

Another attorney said, "I actually had an experience last year where I…made a particular kind of objection and the judge kind of dismissed it out of hand. And literally came back about a half-hour later and apologized." She remembered the judge saying, 'I went back and I thought about what you said and you're right…but…I just don't think you're being heard.'"[190]

Many women perceive certain types of behavior as inherently disrespectful. Interruptions, for example, and the inability to "hear" a woman's argument are regarded as examples of conduct that is disrespectful and discourteous towards women. Such conduct bespeaks a value system in which women are not afforded the same respect as men, and a system in which women are singled out and treated differently from men.

Women are subjected to sexual remarks and conduct.

Women often report being subjected to remarks and conduct that portray them as sexual objects. An attorney in the Erie focus group related an incident in which deputy sheriffs were at one end of a courthouse hallway and a drinking fountain was at the other. Just as the woman approached the fountain, the deputies called her to come down the hallway to where they were standing. "So I walked down there. One of the men said, 'I just wanted you to come down here so I could watch you walk back.' I was horrified."[191]

The speaker's reaction is understandable. An attorney's job is to prepare and present her client's case, to effectively and ably represent her client in court. Being perceived as something other than an advocate can be both distracting and humiliating.

The speaker also raised a concern about possible retaliatory action by the sheriff's office if she were to object to such offensive conduct. She stated, "The next time someone flips out in court then that sheriff's deputy is not going to be standing between you and that person."[192] In addition to complaints about sheriff's office employees, participants in the Erie focus group of female attorneys also complained of offensive conduct by district justices. One attorney reported that she was invited by a district justice in her community to, "come back to my office with the state police and we'll all tell dirty jokes and laugh."[193] Another attorney stated in reference to district justices, "I think that's one of the most rampant places for sexism to rear its nasty long neck."[194]

Women are addressed differently than their male colleagues.

Many women are perplexed by unnecessary and inappropriate comments about their age and appearance. Every survey and task force report reviewed contains reports of women at least occasionally being addressed in a disrespectful manner. Some report the use of "Dear" or "Hon," or being called by their first names while their male counterparts are called "Mister."[195]

Some women dismiss such words as benign, saying they should be overlooked as long as the case has a satisfactory result in court. In this light, one attorney at the Erie focus group spoke of a retired judge, "the sweetest person in the universe. And every time I see him, I'm 'honey.' And you know what? I don't care…It doesn't bother me from him because I know from being in front of him, he doesn't think I'm stupid because I'm a female. He's never treated me inappropriately in the courtroom…You could not possibly get mad at this guy."[196]

Yet the words are often loaded with hostile inferences: "One judge, every time we'd go into chambers, he'd stand up and go, 'Hello, Mr._____, hello Mr._____,' every single time, for two years. And it drove me completely out of my mind…he didn't think I was someone's paralegal. He knew exactly…who I was. And nonetheless, he never referred to me as Ms._____. He referred to me as [first name]."[197] She also had to contend with male colleagues who "thought it was hilarious. They all noticed it."[198] She felt the judge had tacitly but effectively told the men that they, unlike her, were worthy of respect. Respect, which implies equal treatment with their male counterparts, is what women are seeking.

Female judges also reported problems in this area. One judge noted in an interview that she has difficulty being "heard" in judges' meetings, even though she believes her peers generally respect her. The judge remembered making suggestions in meetings that were ignored until a male colleague made the same suggestions.[199]

Women are subjected to comments concerning their appearance and age.

Women in the justice system hear remarks about their age and appearance more frequently than do men.[200] One Philadelphia attorney told her focus group, "I know when I go before…men I have to dress in gray or have to dress in blue and be very conservative. Whereas with a woman judge, and this is in Philadelphia, too…I can put a dress on. I can feel a little bit more comfortable."[201] Another Philadelphia attorney observed, "You have to dress down," explaining that she is expected to look masculine. "I don't want to say you really can't be a woman, but you really have to almost fit yourself into a mold so that they'll accept you."[202]

In addition to feeling pressured to "dress down" and/or fit a mold, women complain of being subjected to comments about other women's physiques. Women view such comments as examples of the same objectionable behavior exemplified by subjecting women to sexual remarks. "Judges, court personnel and attorneys…have been heard to make comments about a woman's size…Examples include, 'She's a tiny woman attorney.' 'She's a hunk of a woman.' 'She needs to lose weight.' All of these statements objectify the woman. They are all putdowns."[203]

Women also question why their age, or the age of female litigants, seems to be an issue while this subject rarely arises about men. "When women…take the stand," one judge said in an interview, "the question of how old you are seems to be almost an automatic…and I would stop and say, 'Well, if we're going to ask the women how old they are, then we need to know how old the men are.'"[204] Some attorneys noted that age and gender intersect in a way that reaffirms the perception that a woman often is mistaken for someone other than a lawyer or judge.[205]

Dismissive or discourteous conduct implies that women have less value than men.

Some women believe that they must also contend with a bias that stems from an attitude or belief system that devalues women on account of their gender, granting them less dignity and respect than men. This form of bias can be heard in a tone of voice, conveyed in an attitude, or reflected in an act that appears benign on the surface, but can nevertheless call a woman's competence into question. Such conduct implies that men's rights or concerns are more valuable or important than women's.

Speakers at public hearings and focus groups most often raised this issue in the context of domestic violence cases. Several speakers noted that some judges appear to give preferential treatment to the men charged with acts of domestic violence.

According to testimony, a problem arises in central Pennsylvania during hunting season, when some judges are reportedly loath to issue orders in protection from abuse (PFA) cases that remove the defendants' firearms, despite having the authority to do so pursuant to the PFA Act.[206] Additionally, attorneys at a Philadelphia focus group charged that some judges go out of their way to prevent the filing of PFA petitions against policemen. One lawyer reported her client being told by a judge, "'Don't you want him to be able to

work? You're going to wreck his job. And so she should risk her life so he can keep working."[207] In yet another example, a judge listened to a tape of a man's telephone threats to his wife, violating a PFA order. The judge laughed with the defendant, told him he understood his Italian temper and joked with him in Italian. The woman in the case was "shocked and confused" by this course of events, the attorney related, and came to believe that a PFA was a meaningless piece of paper.[208]

Women are sometimes subjected to hostile behavior.

Male conduct sometimes goes beyond patronizing and becomes rude and hostile. Female judges interviewed by The Melior Group and V. Kramer & Associates related incidents in which male attorneys tried to take over the courtroom and challenge the judge in ways they would have never challenged a male judge. One female judge reported conduct that bordered upon physical intimidation.[209] "Some attorneys think they can come in and say whatever they want…if it's a female judge," a Philadelphia court employee told the focus group. "An attorney will come in and talk to a female judge as if she's nothing."[210]

A female attorney in the Erie focus group reported an incident in which opposing counsel's client "literally came across the table" at her. When she insisted that opposing counsel rein in his client, he responded in a dismissive manner that she was overreacting because she was a "girl."[211]

Various people also described incidents in which judges exhibited rude conduct toward female attorneys: "My judge told a female public defender…to shut up and sit down," said a Philadelphia court employee, "and in an open courtroom."[212] The employee added, "He [the judge] gets agitated…but in my entire time with him I never saw him address a male attorney in that fashion—ever. It was always the females. And this one in particular—he really chewed her out in a very disrespectful way."[213] Another court employee described a criminal court judge who appeared to discriminate between male and female attorneys in his courtroom. For the three months the employee was assigned to the judge's courtroom, "Half of that time he had a female D.A. and a male P.D., and in that situation the P.D. won most of his cases…Then when it went to a female P.D. and a male D.A., now the D.A. is winning all the cases."[214] According to the employee, "This is unbelievable because it was so blatant. He was a judge that looked at situations like, regardless of what side you were on, [if] you were female, you don't belong there."[215]

Perceptions that there are few viable remedies to redress gender-biased conduct.

When faced with gender-biased conduct, many women find themselves at a loss. They believe there are few viable remedies currently available.[216] Worse, even if satisfactory remedies did exist, the women say they would be reluctant to pursue them.

Some lawyers described their informal, spur-of-the moment responses to instances of gender bias. One attorney said that when a man interrupted her argument, she would raise her voice and shout him down—exactly as he would do if she tried to interrupt him.[217] Another attorney advocated speaking directly to the judge, but in a non-confrontational manner. Her approach is to ask, "Is it something I did, something I said?"[218] Far more people speaking at hearings, interviews, and focus groups said they would do nothing at all in response to expressions of gender bias.

> *"You're afraid to complain because it's going to hurt you professionally."*
>
> —Philadelphia Attorney

The ACBA has a formal, confidential procedure to report instances of gender bias, yet the procedure is rarely used. "I think women are very, very reluctant to ever bring such a thing to the committee," said Susan Yohe, former chair of the committee. "Perhaps they think it's no use. More likely, they think they have to go along. They can't compromise their ability by complaining about a judge. The fear is very well-founded."[219] At focus group sessions in Erie, the attorneys said they would welcome a formal procedure, "because it's a recognition of the problem."[220] Yet the same attorneys said they would not use the procedure, because it would hurt them in both the long and short run.[221]

This reluctance to initiate a formal complaint was expressed throughout the Commonwealth: "If you say something, the only thing that would change would probably be you…you won't have a job. Or you might be put somewhere else," a Philadelphia court employee told a focus group. [222] Attorneys expressed the same belief. "If you file a complaint with the disciplinary board, you know, all these judges talk, they're all friends, you're going to get screwed later on when you go back in a courtroom," a Philadelphia attorney said. "You're afraid to complain because it's going to hurt you professionally."[223]

Others were concerned that filing a complaint would jeopardize their ability to represent their clients. One attorney at the Harrisburg focus group told about a sheriff who made comments about her appearance and repeatedly tried to touch her. "I wish I had the guts to say, 'Keep your stinking hands off me, stay away from me, don't even look at me,'"[224] she said. "But I can't do that." Another lawyer in Harrisburg chimed in with the rationale: "We know that if _____ stood up to the sheriff, that she'd be waiting for her clients to come over from the prison until five o'clock every day…she'd have to go pick them up herself." [225] An Erie attorney summed up the fear: "You can hurt your client. I think that's why each of us will decide to bite our tongue rather than make an overt issue. Because my job is to do the best I can do for my client."[226]

OTHER TASK FORCE FINDINGS

Federal circuit courts and many state court systems in the past 20 years have commissioned studies concerning gender bias within their judicial systems. Lynn Hecht Schafran, director of the National Judicial Education Program of the NOW Legal Defense and Education Fund, reviewed the first nine of those task force reports in the early 1990s in her article entitled, *Overwhelming Evidence: Reports on Gender Bias in the Courts*.[227] Based upon her review, she concluded that, "Although the severity of the problems documented varies in certain instances from state to state, there is an overall uniformity. In the words of the New York Task Force on Women in the Courts, 'Gender bias against women litigants, lawyers and court employees is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment and equal opportunity.'"[228] Since that comparative study, over 30 subsequently published reports have found similar problems and have made similar recommendations. Findings from a sampling of reports selected for their similarity to this Committee's conclusions follows.

STATE TASK FORCES

Washington

In 1989, the Washington State Task Force on Gender and Justice in the Courts issued its final report, Gender and Justice in the Courts. Based upon a statewide survey of attorneys, court employees and judges, it determined that 74 percent of all male and female attorneys, and corresponding numbers of judges, perceived gender bias on some level directed towards female lawyers, litigants, and witnesses, with 54 percent of all responding

attorneys and corresponding numbers of judges perceiving gender bias directed towards judges.[229] Examples of gender-biased conduct included inappropriate uses of first names, terms of endearment, and compliments regarding their physical appearance directed toward female attorneys, witnesses, and litigants. The task force found that female attorneys were asked by opposing counsel if they were lawyers more often than were male attorneys, and that male lawyers and judges regarded female litigants as less credible than male litigants. The task force also found that approximately one-third of all respondents believed female witnesses and litigants were treated condescendingly or disrespectfully in comparison with men.[230] The gender bias directed toward female judges consisted primarily of their being addressed by first names, or being asked to disqualify themselves from a case because of their gender. In addition, most respondents indicated they would not file formal complaints of biased conduct that was directed toward them, even though half of all female lawyers and female judges who had observed such conduct believed it adversely affected case results.[231] The task force concluded, "The manner in which attorneys are treated and perceived by judges, other attorneys and court personnel has a critical impact on their status in court, their credibility and effectiveness as advocates. Behavior demeaning or discreditable in nature distracts attention from the merits of a particular case."[232] Similarly, the task force found that, "If treated condescendingly like children, litigants stand less of a chance of prevailing on the merits of their cases. If treated disrespectfully, at the very least their confidence in the integrity and impartiality of the judicial process is diminished."[233]

Michigan

The Michigan Supreme Court Task Force on Gender Issues in the Courts also issued its Final Report in 1989. The Court formed the task force to address gender bias issues after the Citizen's Commission to Improve Michigan Courts found more than 33 percent of Michigan citizens agreeing that the court system discriminated against individuals on the basis of gender, race, or ethnic origin. The task force defined gender bias as:

> "the tendency to think about and behave toward others primarily on the basis of their sex. It is reflected in attitudes and behavior toward women and men, which are based on stereotypical beliefs about the "true nature," "proper role" and other "attributes" of the gender."[234]

The task force concluded that the perceptions of gender-biased conduct in the judicial system were rooted in reality. As examples of biased conduct, the report cited discourteous, disrespectful, and patronizing language; tolerance of assertive conduct by men that is condemned in women; inequitable assignment of women to court-appointed, fee-generating positions; and relative disregard for the credibility of women's speech, arguments, and testimony. The task force found that such actions and attitudes generally undermined women's credibility, and served to isolate female litigants, witnesses, judges, attorneys, and court employees.

Massachusetts

The Gender Bias Study of the Court Systems in Massachusetts was published in 1989, drawing upon surveys of attorneys, judges, and juries; public hearing testimony; responses to questionnaires; reviews of court records and documents; and other personal and written observations submitted to the task force. The study concluded that gender-biased conduct existed throughout the Massachusetts judicial system. The predominant types of gender-biased conduct included: addressing women inappropriately; chiding women for aggressive or "bitchy" behavior; treating women as less competent than men; commenting on women's clothes and appearance; subjecting women to inappropriate, sexually suggestive remarks; and exhibiting hostile, patronizing, insulting, or disrespectful attitudes toward women. The task force found that female attorneys were subjected to forms of biased conduct that included being appointed to fewer fee-generating positions than men; being stopped from speaking in court; and being subjected to questions about whether they were attorneys in given cases. Most judges who observed such treatment of female attorneys believed it damaged the case by drawing attention away from the issues; placed counsel in a position of inequality, interfering with female counsel's representation; delayed the trial; or demeaned the professional atmosphere of the court.[235] The Massachusetts study also addressed the courtroom treatment of female litigants and witnesses, concluding that they were treated with less respect than men, were often patronized, and were sometimes subjected to unwarranted touching and suggestive and inappropriate comments about their appearance. Forty percent of the judges in the survey agreed that such behavior interfered with the testimony or was otherwise detrimental to the witness.[236] Nearly all judges believed judicial intervention was an appropriate response to gender-biased conduct, yet only 4 percent of attorneys in the survey had seen a judge intervene.[237]

Colorado

The Colorado Supreme Court Task Force on Gender Bias in the Courts issued its Final Report in 1990, which set out to address whether "gender bias exists in the judicial system in Colorado, and, if such gender bias exists, to determine the nature and extent of such bias."[238] Task force members visited courtrooms, held public hearings and listening sessions, conducted surveys and interviews, and reviewed court documents. According to a survey, nearly half of the female attorneys and judges agreed that bias against women in the legal system was widespread but subtle, while fewer than 10 percent of their male counterparts concurred.[239] Men and women had markedly differing opinions on all aspects of gender bias issues, with women reporting far more biased conduct of all types. On the question of whether judges adequately control such conduct when it occurs, "yes" was the answer from 41 percent of male attorneys, 20 percent of female attorneys and 66 percent of judges.[240]

California

Achieving Equal Justice for Women and Men in the California Courts: Final Report was issued in 1996. Citing virtually all forms of biased conduct reported by earlier state task forces, the advisory committee found widespread gender bias throughout the California court system. The report focused upon the need for court employees, including judges, to follow uniform gender-neutral court policies concerning hiring, training, promotions, and family leaves as a means of eradicating gender bias within the judicial system. The committee also cited the need for affordable, accessible childcare for witnesses and litigants in order to minimize unnecessary delays and disruptions in courtroom proceedings. Judges and attorneys appeared to view such interruptions as evidence that a female litigant was shirking her legal responsibilities, which tends to undermine her credibility. The committee also noted the belief of female attorneys that they have fewer opportunities for advancement than men, which relates to the profession's failure to recognize the demands of balancing home and professional life. The report discusses gender-biased courtroom conduct by attorneys and court employees, but focuses primarily on judges because they are responsible for controlling the courtroom.

Oregon

The Oregon Supreme Court/Oregon State Bar Task Force on Gender Fairness took just over two years to study, "whether and, if so, how gender affects the experiences of Oregonians in the state court system and the legal profession."[241] While it found that gender fairness has improved significantly in the last 10 to 25 years, and that gender fairness exists in most aspects of Oregon's justice system and legal profession, it also found that there are still areas of "gender unfairness and perceived gender unfairness."[242] For example, the task force concluded that female lawyers, particularly young female lawyers, are routinely treated with less respect than their male counterparts, and on the average earn less than their male peers, charge less for their time, and generally practice in areas that are known to offer low compensation. It further noted that some judges seem to disproportionately favor men in custody and support proceedings, and that women are often put at both short- and long-term financial disadvantage by spousal support and property division orders put in place by the court in marital dissolutions. With respect to women in the criminal justice system, the task force found that "females housed in adult and youth state correctional facilities do not have access to the same job training, work, and general support programs and services as do male inmates and juvenile detainees."[243] In particular, two general findings of the Oregon task force seem to apply to all states. First, Oregon made a significant effort to show that negative experiences can be, "based on more than gender alone" and, "may be compounded by race, age, sexual orientation, poverty, or other factors."[244] Second, the Oregon task force found that because most remaining gender bias appears to be, "neither malicious nor egregious," it may be more difficult to identify and address than "more glaring problems."[245]

Virginia

The Virginia Task Force issued its report, Gender Bias in the Courts of the Commonwealth, in 2000, incorporating findings from surveys, focus groups, public hearings, court observations, statistical information, and other records. The task force concluded that, while gender bias still existed in Virginia, it was subtler than the bias discussed in other state reports. According to the report, more women than men perceived bias against women, and female attorneys, judges, and magistrates observed gender-biased behavior more often than their male counterparts. The report also found that, among persons perceiving bias, most said it was not widespread; and most believed bias had decreased in the previous five years. Also, attorneys generally believed judges did not intervene to correct gender-biased incidents, while judges believed they did intervene. The

task force found gender bias and the perception of gender bias undermining the integrity of the judicial system, and concluded that perceptions of bias are as important as the realities of bias. The report recommended that the judiciary utilize all appropriate measures to "replace bias with informed and educated impartiality."[246]

FEDERAL TASK FORCES

Ninth Circuit

The Final Report of the Ninth Circuit Gender Bias Task Force was issued in 1993. At the outset, the task force noted that, "The courts aspire to a world in which interactions are gender neutral. One of the task force's charges was thus to ask: How well has this aspiration been met in the Ninth Circuit?"[247] The task force relied on focus group interviews, surveys of judges and lawyers, and information from advisory committees to examine instances and perceptions of gender bias directed toward female attorneys, judges, litigants, and witnesses. The task force noted that female attorneys were offended by the use of their first names and by comments about their physical appearance or dress that called special attention to their gender. Female attorneys, and female judges to a lesser degree, reported hearing disparaging or demeaning remarks about their competence or performance, such as judges' labeling their conduct as "hysterical" and generally holding women to stricter standards than their male colleagues. Female attorneys also cited their exclusion from the "old boys' network," characterized by social and professional events that exclude female attorneys. Female attorneys, and female judges to a lesser degree, reported that aggressive women were labeled as "bitches" and had their sexual orientation called into question, and many women believed that filing a complaint would have an untoward effect on their clients and cases. Female attorneys and judges also reported that female witnesses and litigants were addressed more familiarly than males, and were singled out by both judges and attorneys for demeaning treatment; female witnesses and litigants made similar observations in focus groups. The task force also analyzed its data by age classifications and, without exception, found the same differences in perceptions between men and women under 40 and men and women over 40.

Third Circuit

The Report of the Third Circuit Task Force on Equal Treatment in the Courts was issued in 1997, based primarily upon questionnaires directed to attorneys, court employees, and judges; focus groups sessions; and testimony at public hearings. While most respondents did not believe that gender bias was extensive in the court system, significantly more women than men believed it was. The gap between women's and men's perceptions was a major theme in the report. The task force recommended that courts in the Third Circuit take remedial action to address and eliminate incidents of bias as well as perceptions of bias. Relevant citations from the Third Circuit's study are set forth throughout this chapter.

Eighth Circuit

The Final Report of the Eighth Circuit Gender Fairness Task Force was also published in 1997. The task force commissioned surveys for all judges, all court employees, and a large portion of attorneys who practiced within the Eighth Circuit, but specifically limited its questions to instances and perceptions of biased conduct within the context of litigation. The task force also conducted focus groups and collected data directly from the courts. The task force found that "incivil" behavior existed toward men and women throughout the Eighth Circuit, but determined gender bias was responsible for many of the differences in behavior variously described by men and women. "If participants in the legal process find that they are treated inhospitably within the courts," the task force concluded, "they may believe that the positions they advocate are not being given a fair hearing; and, this incivility may represent evidence that such beliefs are indeed based in fact. Further, to the extent that incivility causes participants in the process to feel unwelcome and thus to withdraw from participation, the system will lose their contribution to the promotion of justice."[248] The most frequently reported difference in the experiences of male and female attorneys with regard to incivility was the extent to which women said they were excluded from professional camaraderie in the course of federal litigation. More than 33 percent of the women respondents felt excluded, but only 10 percent of the men.[249]

The report also cited forms of gender-biased conduct such as unprofessional forms of address, offensive comments about appearance, offensive jokes and comments, and mistaken identification. Women encountering such conduct reported increased job stress, decreased job satisfaction, and a desire to limit their involvement in federal litigation.

Many women indicated, however, that, "They thought it would be useless or unwise to complain."[250] With regard to court employees, the task force found that women filled almost 75 percent of the Eighth Circuit staff positions, but only 33 percent of the management positions.[251] More women than men experienced "incivil" behavior in the courts, especially in the area of unwanted sexual attention, and those women were also more likely than men to believe that making a formal complaint was risky or useless.

Second Circuit

The Report of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts was also issued in 1997. Based upon circuit-wide surveys and reports from judges, attorneys, and court employees, the task force described gender-based conduct that included ignoring, interrupting, or not listening to female attorneys and litigants; helping or coaching females in a patronizing way; mistaking the attorneys for non-lawyers and otherwise challenging their competence; and subjecting female witnesses and litigants to derogatory remarks related to gender and sex. The task force found that male judges and lawyers most often precipitated such conduct. The task force also concluded that women were more likely than men to perceive gender as a disadvantage. Among those lawyers reporting such a belief, most also cited the judge's attitude as the source of the disadvantage.

CONCLUSION

The women who spoke in public hearings, interviews, and focus groups believe strongly in the Pennsylvania judicial system. One praised the Supreme Court of Pennsylvania for commissioning a study on gender bias, saying the Court's "willingness to put this topic on the table is a powerful message to all judges, lawyers and court personnel in the state. Sometimes just asking the question, being willing to take a concern seriously, begins a process of change."[252] Many others registered the belief that the system continues to evolve in a healthy and equitable direction. They acknowledge that many judges are fair and even-handed in their treatment of all who come before them, regardless of gender.

One [woman] praised the Supreme Court of Pennsylvania for commissioning a study on gender bias, saying the Court's "willingness to put this topic on the table is a powerful message to all judges, lawyers and court personnel in the state. Sometimes just asking the question, being willing to take a concern seriously, begins a process of change."

The appearance of gender bias may be waning because the number of women has increased in most corners of the legal system, including the bench. Many female attorneys believe that female judges treat them with more respect, courtesy, and understanding than they typically receive from male judges, (although a smaller group of attorneys said female judges favor men).[253] A minority female attorney from Harrisburg referred to an incident where a sheriff in a female judge's courtroom continually referred to the attorney as "girl," which she found offensive. That same sheriff then tried to reprimand the attorney for whispering to her client while court was in session, although other male attorneys were engaged in the same conduct. When the sheriff motioned for the attorney to leave the courtroom with him, "The judge walked up behind me [the attorney] and tapped me on the shoulder and [said]…'I need to speak with you now, around this side of the corner.' I'm dying. I think she's going to reprimand me. But then the judge said, 'you need to forgive him because he's old, he's set in his ways, sometimes he even refers to me as 'girl'…I didn't believe her," continued the attorney. "I don't believe that man has ever called her 'girl,' but she was doing it to try and make me feel better."[254]

The incidents of bias may be diminishing as more daughters, sisters, and wives enter the workforce alongside their male relatives, gently prodding them into revising their expectations and attitudes concerning their female colleagues. "A lot of male judges now," a Philadelphia attorney reported, "have daughters who are in law school and they say to themselves, 'I don't want my daughters being treated this way.' I know it's happened to me with partners. I brought a situation to their attention and while they may not have thought that what they did was wrong initially, I asked, 'What if I was your daughter and this had been going on in her workplace? How would you feel?' And then they all kind of take a step back and say, 'You know, she's right.'"[255]

Gender bias can result in women's discouraging others from entering the profession. For example, almost all of the female participants of the attorney focus group session in Erie emphatically stated that they did not want their daughters to become attorneys because of the lingering problems with gender bias and the special difficulties it imposes on female attorneys.[256]

Whatever gains there are, however, may make it more difficult to pinpoint and examine the remaining gender-biased conduct. If, as some women argue, gender bias is not what it used to be, then why bother listening to new complaints? Perhaps, in the situation described previously, it was merely a coincidence that only male district attorneys and public defenders were winning cases in one judge's courtroom; perhaps the female district attorneys and public defenders did poor work, or perhaps every case they handled was weak. And perhaps the female attorney mentioned earlier who was told to shut up was acting in an outrageous manner and deserved harsh criticism.

Everyone would like to believe that all behavior is bias-free. Some women spoke of their wish to believe that there are logical explanations behind hostile and disrespectful behavior that is directed toward them. "A lot of people are going to sugarcoat it," one woman said at an Erie focus group. "I know there's a temptation to do that even within yourself…Gee, did that really happen? Did I take that the wrong way? Is there something I did?"[257]

One of the challenges in identifying bias is the many ways in which it manifests itself. It can be exhibited on an individual or a systemic level. It can be overt or subtle. When it is subtle, it can be more difficult to target or identify. But it undeniably causes real harm.

The Committee believes that this study of gender bias in the Pennsylvania justice system raises powerful and useful questions. It demonstrates that instances of gender bias in the Pennsylvania courts continue to thwart and challenge female litigants, court employees, attorneys, and judges. Such bias reflects "an unspoken hostility toward women or a discounting of their abilities and talents," Yohe said. This can compromise a client's case: "And if there is any possibility that may be happening, even rarely," she went on, "the reception of women by the courts becomes a matter that goes to the heart of the fairness of our judicial system."[258]

By commissioning this study and asking those appropriate questions, the Supreme Court of Pennsylvania now has before it a multiplicity of answers. In each focus group conducted by The Melior Group and V. Kramer & Associates, the participants were asked about the role of the judiciary in establishing standards for gender-biased conduct. In every discussion, women of Pennsylvania stressed the primary importance of the judge's role in establishing and enforcing a level playing field within the courtroom, where not even a hint of gender-biased conduct is tolerated. "Their behavior can set the tone for what else goes on in the courtroom," a Philadelphia court employee pointed out, saying that if they are "exhibiting behavior that is inappropriate—gender bias, racial bias—that affects everybody else in the courtroom. It affects how justice is dispensed. Or at least how people perceive it to be dispensed. You make them realize that in those positions they have a lot of influence on what goes on in the room and upon the people who are working in the room as well."[259] Another attorney in Philadelphia spoke of the judge's power to persuade and compel. "When you have a judge who sends a message clearly that conduct is inappropriate, then it is."[260]

This fundamental belief in the judiciary's power to establish and enforce a system wherein bias is not tolerated is reflected in the findings and recommendations of other task forces. Vicki Jackson, a professor at Georgetown University Law Center, in the article, *What Judges Can Learn from Gender Bias Task Force Studies,* observes: "In jurisdiction after jurisdiction, task force reports show that the reported incidence of overtly biased behavior by attorneys is greater outside the presence of a judge than in settings before a judge. This is good news about the power of judges and about lawyers…understandings of what judges stand for…Most lawyers understand that invidious behavior is wrong and believe that judges will enforce norms against such behavior or be offended themselves."[261] The Third Circuit's Task Force reached a similar conclusion: "Probably all participants in and observers of the legal system would agree that the conduct of judges themselves sets the standard for the system as a whole."[262]

As noted by Lynn Hecht Schafran in her review of task force reports cited previously, "Individually and collectively these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims."[263] Moreover, Schafran reports that studies of New Jersey's progress in its efforts to implement its task force recommendations demonstrate that, with, "leadership from all segments of the bench and bar, the task force reports can promote the learning and reform that is essential if we are to eliminate gender bias in the profession and the courts."[264]

There are special challenges in responding to perceptions of gender bias. The first is overcoming the reluctance to acknowledge the subject when many want to believe that no bias exists, or to dismiss any perceptions of bias as ill-conceived. Yet, as Yohe pointed out, "We need to talk about this, wrestle with it, and be receptive to what women have to say. I hear too frequently an impatience with this topic. We have not talked about it too much; we have not talked about it near enough, and we have not been willing to credit the perceptions of women about their treatment, something on which surely they should be given the benefit of the doubt."[265]

The second challenge is a corresponding willingness to overlook instances of bias because they are often subtle or open to other, rational explanations. Ever sensitive to the fact that not all people perceive gender bias to be an issue within the judicial system, the Third Circuit report nevertheless concluded that, "Because of their visibility, their influence and the high repute in which they should be held, even a few instances of perceived gender bias by judges should be taken seriously and examined closely."[266]

This problem was underscored by the attorney who reported her colleague's praise of her for not whining. She began her remarks by stating that she was mostly unaware of gender bias being directed towards her. She concluded her remarks by saying she found her colleague's comments "interesting."[267] She said nothing about those remarks being biased. But other people could reasonably draw that conclusion.

The third challenge is fashioning appropriate preventive measures and remedies in a climate where those aggrieved are reluctant to confront or report the problem because they believe that such an act will result in harm to their clients and/or their careers. It is ironic that in a system dedicated to the fair and impartial redressing of wrongs without fear of reprisal to the aggrieved parties, there are now many women who believe their own grievances cannot or will not be adequately and fairly redressed.

The recommendations, which follow, address these challenges in a manner that will serve the judiciary's goal of eradicating all perceptions of gender bias within the system.

MODEL CODES OF PROFESSIONAL CONDUCT

The Committee concluded, based upon the findings of its study of Perceptions and Occurrences of Racial, Ethnic, and Gender Bias in the Courtroom, that the codes of professional conduct governing the behavior of judges, attorneys, and court personnel should be modified to specifically address biased behavior by those members of the legal community. In December 2000, the Supreme Court of Pennsylvania adopted the Code of Civility, designed to "assist judges and lawyers in how to conduct themselves in a manner that preserves the dignity and honor of the judiciary and the legal profession." While the Committee applauds the effort of the Court to encourage civility among members of the legal community, given the data collected by the Committee, it recommends that new sections be added to the existing Code of Judicial Conduct and to the Code of Professional Responsibility specifically prohibiting the judiciary and attorneys from manifesting bias in the performance of their duties. The Committee also recommends that a code for court employees be adopted in Pennsylvania prohibiting discriminatory conduct based on race, ethnicity, and gender, among other factors.

JUDICIARY

Toward that end, the Committee reviewed codes of judicial conduct enacted by other states and the model code recommended by the ABA. After much deliberation, the Committee decided to recommend that the model code drafted by the ABA be incorporated into the existing Pennsylvania Code of Judicial Conduct. The pertinent sections are set forth below:

CANON 3	A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY.
CANON 3B(5)	A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.[268]
CANON 3B(6)	A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors are issues in the proceedings.[269]

ATTORNEYS

Similarly, the Committee reviewed codes of conduct for practicing attorneys in other states, as well as the model rules of professional conduct recommended by the ABA. Pennsylvania's Code of Professional Responsibility incorporates the model rule of professional conduct recommended by the ABA set forth below:

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

– (d) Engage in conduct that is prejudicial to the administration of justice.

Based upon its review, the Committee recommends that the Code of Professional Responsibility governing the behavior of attorneys licensed to practice in Pennsylvania be amended to include the following additional provision:

A lawyer violates the prohibition against conduct that is prejudicial to the administration of justice when, in the course of representing a client, manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.

COURT PERSONNEL

Codes of professional conduct for court employees are a recent development built on similar codes for judges and lawyers. New Jersey adopted the first state code for court personnel.[270] There is also a national code promulgated by the National Association for Court Management.[271] Additionally, the states of California and Vermont have adopted a code of conduct governing the behavior of judicial branch personnel.[272] Based upon its review of the various conduct codes for court personnel, the Committee recommends that Pennsylvania adopt the following code for employees of the court to follow:

Employees of the court shall not, in conduct of service to the court and public, discriminate on the basis of, nor manifest by verbal or written comment or conduct, a bias or prejudice based upon race, color, sex, religion, national origin, ancestry, age, disability, marital status, sexual orientation or socioeconomic status that adversely affects the person's ability to use the facilities or services provided by the Judiciary. Discriminatory behavior also includes any actions, either implicit or explicit, which adversely affect an employee's work assignment, work environment, salary, career or promotional opportunities due to a bias or prejudice based upon race, color, sex, religion national origin, ancestry, age, disability, marital status, sexual orientation or socioeconomic status.

MODEL GRIEVANCE PROCEDURES

Approximately 10 years ago, the Women in the Law Committee of the ACBA formed a special committee to receive and resolve specific reports of gender bias made by attorneys against judges, lawyers, and court personnel.[273] The Philadelphia Bar Association followed suit in 1999, appointing a similar committee, but with a broader mission.[274] The Philadelphia committee collects and evaluates information about instances of bias in the Philadelphia legal system by lawyers, judges, court-related personnel, and other persons acting in a judicial capacity. The appointed committees devised a set of procedures for individuals to use in filing their reports and obtaining effective resolutions of the issues raised in the reports. The strategies set forth below, or similar strategies, can be adopted by the bar associations of other counties in Pennsylvania, or by a single statewide committee created to address the problem of bias within the legal community.

The salient features of the systems set in place by the Allegheny County and Philadelphia committees include the following:

- A report form is made available by the committee to individuals who feel they have suffered an act of bias. Oral reports can also be made. Reports can be anonymous to protect confidentiality.
- Committee members typically review the report and determine whether, on its face, it has merit.
- One of several possible procedures is selected by the Committee for resolving the matter, including:
  - An initial, informal conference held between the representatives of the committee and the responding party;
  - A meeting between the complaining party and responding party in the presence of the members of the committee;
  - A formal conference held between the committee representatives and the responding party;
  - A letter sent to the responding party by the committee; or
  - A formal complaint filed against the responding party with the appropriate authority such as the Judicial Conduct Board or the Disciplinary Board of the Supreme Court of Pennsylvania.
- Care is taken to preserve the confidentiality of the complaining party and to avoid generating unnecessary publicity that might embarrass both the complaining and responding parties.

The committees recognize that in addition to their complaint resolution function, they also play an educational role in making judges, lawyers, court personnel, and litigants aware of the existence of bias and steps to discourage it. Toward that end, committees design, advocate, and implement seminars and other educational programs aimed at achieving fairness in the legal system. Some observers believe that implementation of a grievance procedure at the local level may render it more effective. Local pressure, or pressure from peers in the legal community to prevent bias, may be more effective than pressure from a more impersonal statewide body. If the procedure is established on a local level, however, it is critical for the local entity periodically to report the filings and resolutions to a statewide commission, in order to create a statewide database of such reports. (*See Recommendation 1 for the Pennsylvania Supreme Court*, below). Finally, the existence of such a committee reinforces the commitment of the legal community to justice and fairness and restores confidence in the legal system among those who feel that the issue of bias is not being addressed.

RECOMMENDATIONS

TO THE SUPREME COURT OF PENNSYLVANIA

The Committee recommends that the Court:

1. Ensure that an effective and impartial grievance procedure,[275] that takes into account the confidentiality needs of the grievant, be available to any person participating in the court system of the Commonwealth who believes that he or she has experienced unfair treatment because of racial, ethnic, or gender biased speech or conduct on the part of a judicial officer, officer of the court, or court employee.

2. Direct that judicial officers adopt and maintain a policy of zero tolerance for racial, ethnic, and gender bias in their courtrooms. In order to assist judicial officers in reaching this goal, the following steps should be taken:

   - all judicial officers should receive periodic mandatory training on the issues surrounding racial, ethnic, and gender bias, including:
     - civility within the courtroom;
     - cultural diversity and its effect upon treatment in the court system;
     - what constitutes, or can be perceived to constitute racial-, ethnic-, and gender-biased language and conduct;
     - the effect of racial, ethnic, and gender biases upon determinations of credibility and competence; and
     - the racial, ethnic, and gender stereotypes and cultural impediments that inhibit minorities, persons of varying ethnic backgrounds, and women from having confidence in, and utilizing, the Commonwealth's judicial system.
   - a handbook should be developed and distributed to every courtroom in the Commonwealth setting forth conduct that is objectionable and suggesting appropriate forms of speech. (A similar type of handbook developed by the Supreme Court of Texas Gender Fairness Task Force may be replicated for use in Pennsylvania.)

3. Require that all Pennsylvania attorneys receive training concerning the effects of racial, ethnic, and gender bias within the legal system as part of their continuing mandatory legal ethics education requirement. The subject matter of this training should include topics such as those set forth above in *Recommendation for the Pennsylvania Supreme Court*, Number 2.

4. Direct that all court employees receive training concerning the effects of racial, ethnic, and gender bias within the legal system. The subject matter of this training should include topics such as those set forth above in *Recommendation for the Pennsylvania Supreme Court*, Number 2.
5. Examine and modify, where necessary, and in a manner consistent with the provisions of the First Amendment, all relevant ethical and civility codes to state clearly that racial, ethnic, and gender-biased speech and conduct are violations of these codes. The Committee's recommended codes of conduct were set forth previously in this chapter.
6. Direct that the judiciary take all necessary steps to enlarge minority representation on juries, in accordance with the recommendations enumerated in Chapter 2.

TO BAR ASSOCIATIONS

The Committee recommends that bar associations:

1. Establish and implement policies and procedures for encouraging minorities and women to seek and obtain positions as judicial officers.
2. Cooperate with the Supreme Court in establishing and maintaining a confidential grievance procedure available to any person who believes he or she has been the recipient of racial-, ethnic-, or gender-biased speech or conduct by an attorney.
3. Initiate and maintain a "mentoring" system for law school graduates and those attorneys recently admitted to the bar, with special attention directed toward minority and female attorneys, whereby those attorneys seeking mentors are paired with a more experienced attorney.

TO LAW SCHOOLS

The Committee recommends that all Pennsylvania law schools:

1. Educate students about the effects of racial, ethnic, and gender bias within the legal system as part of their obligation to provide legal ethics education. The subject matter of this educational information should include topics such as those set forth above in Recommendation for the Pennsylvania Supreme Court, Number 2.

2. Provide opportunities for law school faculty to become better informed about the effects of racial, ethnic, and gender bias in their teaching and in the legal educational environment, and to consider ways of better educating students about the effects of bias in the legal process.
3. Affirmatively recruit men and women of color, as faculty and students, and offer mentoring networks for enrolled students.

TO LAW ENFORCEMENT AGENCIES

The Committee recommends that law enforcement agencies:

1. Provide training to law enforcement officers and agents concerning the effect of racial, ethnic, and gender bias within the law enforcement and legal systems. The subject matter of this training should include topics such as those set forth above in *Recommendation for the Pennsylvania Supreme Court,* Number 2. Additional relevant information should also be presented concerning bias within the context of investigative, detention, and arrest practices and procedures employed by law enforcement agents with regard to racial and ethnic minorities.
2. Establish and maintain an effective and impartial grievance procedure available to any person who believes he or she has been the recipient of racial-, ethnic-, or gender-biased speech or conduct by any law enforcement official or employee of a law enforcement agency. Information concerning the grievance procedure should be clearly set forth and prominently displayed at all law enforcement offices and other appropriate venues.

ENDNOTES

[1] The Melior Group/V. Kramer & Associates, Racial Roundtable Discussion, Philadelphia Attorney Transcript, p. 27 (2001), attached in Appendix Vol. II [hereinafter Melior Group Racial Philadelphia Attorney Transcript].

[2] The Melior Group/V. Kramer & Associates, Final Report on Perceptions and Occurrences of Racial Bias in the Courtroom, p. 11 (April 2002), attached in Appendix Vol. II [hereinafter Melior Group Racial Bias Final Report].

[3] *Id.* at 15.

[4] Report of the Working Committees to the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts, 1997 Ann. Surv. Am L. 117, p. 419 [hereinafter Second Circuit Report].

[5] Melior Group Racial Bias Final Report, *supra* at 10–14.

[6] Testimony of Ronald Felton, Wilkes-Barre Public Hearing Transcript, pp. 64–65.

[7] Philadelphia Bar Association Report of the Special Committee on Employment of Minorities in the Legal Profession, Appendix p. 22, and Table 12 (1988), attached in Appendix Vol. II [hereinafter Special Committee Report].

[8] During that same time period, large firms (more than 75 attorneys) increased their minority attorney presence from 1.7 percent to 3 percent; small/medium firms increased from 0.2 percent to 2.9 percent; and corporations actually decreased their minority hiring, with the number of minority attorneys declining from 7.1 percent in 1976 to 6.7 percent in 1985. *See* Special Committee Report, *supra*.

[9] *See* American Bar Association, Section of Legal Education and Admissions to the Bar, Table C-10, Memorandum QS0102-28 dated Feb. 27, 2002; Memorandum QS0102-22 dated Feb. 27, 2002; Memorandum QS0102-20, dated Feb. 27, 2002, attached in Appendix Vol. II.

[10] The Melior Group/V. Kramer & Associates, Racial Roundtable Discussion, Pittsburgh Attorney Transcript, pp. 3–4 (2001), attached in Appendix Vol. II [hereinafter Melior Group Racial Pittsburgh Attorney Transcript].

[11] The Melior Group/V. Kramer & Associates, Racial Roundtable Discussion, Philadelphia Court Employees Transcript, pp. 33–34 (2001), attached in Appendix Vol. II [hereinafter Melior Group Racial Philadelphia Court Employees Transcript].

[12] Melior Group Racial Pittsburgh Attorney Transcript, *supra* at 9.

[13] *See* Chapter 8 of this Report, Employment and Appointment Practices of the Courts.

[14] *See also* Profile of Pennsylvania Judiciary, Chapter 8 of this Report.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Testimony of Beata Peck Little, Wilkes-Barre Public Hearing Transcript, pp. 12–13. [hereinafter Peck Little Testimony]; *see also*, Monroe County Needs Assessment, p. 11, which notes that according to the U.S. Census Bureau, there were 2,052 Latinos living in Monroe County in 1990, compared with 9,195 in 2000, and that the African American population of the county increased from 1,727 in 1990 to 8,343 in 2000.

[19] Testimony of Felipe Restrepo, Harrisburg Public Hearing Transcript, p. 85.

[20] *See* Chapter 2 of this Report, Racial and Ethnic Bias in Jury Selection.

[21] This perception is borne out by studies conducted for the Committee. *See* Ralph B. Taylor and Lillian Dote, *Understanding the Juror Selection Processes Through Jury Documents and Administrator Surveys: Exploring Implications for Under-Representation of Populations of Color*, Phase I report to the Work Group on Racial and Gender Bias in Jury Selection (Philadelphia: August 2001), p. 41, Appendix Vol. II; and Ralph B. Taylor and Jerry H. Ratcliff, *Potential Under-*

Representation by Race and Class in the Middle Stages of Juror Selection in the Commonwealth of Pennsylvania: A Located Analysis, Phase II report to the Work Group on Racial Bias in Jury Selection (Philadelphia: June 2002), p. 9, Appendix Vol. II.

[22] The Melior Group/V. Kramer & Associates, Racial Roundtable Discussion, Harrisburg Attorney Transcript, p. 4 (2001), attached in Appendix Vol. II [hereinafter Melior Group Racial Harrisburg Attorney Transcript].

[23] The Melior Group/V. Kramer & Associates, Final Report on Perceptions and Occurrences of Racial Bias in the Courtroom, Judges Report, pp. 7–8 (2002), attached in Appendix Vol. II [hereinafter Melior Group Racial Bias Judges Report].

[24] Melior Group Racial Philadelphia Court Employees Transcript, *supra* at 7–8.

[25] Special Committee Report, *supra* at 44.

[26] *Id.* at 30.

[27] Melior Group Racial Bias Judges Report, *supra* at 7–8.

[28] Third Circuit Task Force Report on Equal Treatment in the Courts, 42 Vill. L. Rev. 1355, 1385 (1997) [hereinafter Third Circuit Report].

[29] *Id.* at 1607.

[30] Melior Group Racial Pittsburgh Attorney Transcript, *supra* at 7.

[31] *Id* at 19.

[32] *Id.* at 18.

[33] Melior Group Racial Bias Judges Report, *supra* at 5.

[34] Based upon data from the AOPC, minorities constitute 4 percent of the Pennsylvania judiciary. There is no reliable data kept on the racial composition of attorneys licensed to practice in Pennsylvania, but based on all reports collected by the Committee during the course of the study, it is a small percentage. Similarly, data on the racial composition of the court personnel system is not uniformly kept, but based upon data supplied to the Committee, as detailed in Chapter 8 of this Report, minorities constitute a small percentage of court personnel statewide.

[35] Third Circuit Report, *supra* at 1378–9.

[36] Testimony of Ted Darcus, Harrisburg Public Hearing Transcript, p. 114.

[37] *See* footnote 34 and Chapter 8 of this Report, Employment and Appointment Practices of the Courts.

[38] Melior Group Racial Pittsburgh Attorney Transcript, *supra* at 9–10.

[39] Melior Group Racial Harrisburg Attorney Transcript, *supra* at 7.

[40] Melior Group Racial Pittsburgh Attorney Transcript, *supra* at 19.

[41] Melior Group Racial Harrisburg Attorney Transcript, *supra* at 10.

[42] *Id.* at 5.

[43] Melior Group Racial Bias Judges Report, *supra* at 6.

[44] Melior Group Racial Philadelphia Attorney Transcript, *supra* at 5.

[45] *Id.* at 5–6.

[46] Testimony of Elizabeth Shuster, Harrisburg Public Hearing Transcript, pp. 142–143.

[47] Melior Group Racial Pittsburgh Attorney Transcript, *supra* at 22.

[48] Special Committee Report, *supra* at 44–45.

[49] Third Circuit Report, *supra* at 1377.

[50] Special Committee Report, *supra* at 45.

[51] Melior Group Racial Harrisburg Attorney Transcript, *supra* at 13.

[52] Melior Group Racial Philadelphia Attorney Transcript, *supra* at 6.

[53] Melior Group Racial Harrisburg Attorney Transcript, *supra* at 11.

[54] Testimony of Honorable Kathryn S. Lewis, Philadelphia Public Hearing Transcript, p. 31 [hereinafter Lewis Testimony].

[55] *See* transcript of proceedings in *Commonwealth of Pennsylvania v. Athena Carter*, Montgomery County Court of Common Pleas, July 25, 1995, at p. 24. The transcript is found in Appendix Vol. II.

[56] Third Circuit Report, *supra* at 1580.

[57] Melior Group Racial Philadelphia Court Employees Transcript, *supra* at 6.

[58] *Id.*

[59] *Id.* at 5.

[60] Melior Group Racial Harrisburg Attorney Transcript, *supra* at 11.

[61] Melior Group Racial Philadelphia Attorney Transcript, *supra* at 6.

[62] The Melior Group/V. Kramer & Associates, Final Report on Perceptions and Occurrences of Racial Bias in the Courtroom, Attorneys Report, p. 4 (2002), attached in Appendix Vol. II [hereinafter Melior Group Racial Bias Attorneys Report].

[63] Testimony of Richard Garland, Pittsburgh Public Hearing Transcript, p. 148 [hereinafter Garland Testimony].

[64] Melior Group Racial Philadelphia Attorney Transcript, *supra* at 32.

[65] *Id.* at 10.

[66] Melior Group Racial Harrisburg Attorney Transcript, *supra* at 11.

[67] *See* footnote 34 and Chapter 8 of this Report, Employment and Appointment Practices of the Courts.

[68] Testimony of Carl Romanelli, Wilkes-Barre Public Hearing Transcript, p.185.

[69] Melior Group Racial Pittsburgh Attorney Transcript, *supra* at 5.

[70] Melior Group Racial Bias Judges Report, *supra* at 4–5.

[71] Testimony of Judy Ariola-Rivera, Wilkes-Barre Public Hearing Transcript, p. 39.

[72] Peck Little Testimony,*supra* at 14–15.

[73] Garland Testimony, *supra* at 146.

[74] *Id.* at 145.

[75] Melior Group Racial Philadelphia Attorney Transcript, *supra* at 3.

[76] Melior Group Racial Harrisburg Attorney Transcript, *supra* at 6–7.

[77] Testimony of Jerome Mondesire, Philadelphia Public Hearing Transcript, pp. 47–48.

[78] African American males are more likely to be incarcerated than white males and are given sentences that are on average over four months longer than those of white males. Latino males are even more likely to be incarcerated than African American males and are likely to be incarcerated for longer periods of time. All comparisons are made to white males. *See* Report prepared for the Pennsylvania Supreme Court Committee on Race and Gender Bias prepared by John H. Kramer, Ph.D. and Jeffrey T. Ulmer, Ph.D. The Pennsylvania State University, attached at Appendix Vol. II; *see also* Chapter 4 of this Report.

[79] Third Circuit Report, *supra* at 1378.

[80] Peck Little Testimony,*supra* at 14–15.

[81] Various county bar associations and law firms have implemented grievance procedures or other informal measures designed to address perceived incidents of racial bias or discrimination.

[82] Melior Group Racial Philadelphia Attorney Transcript, *supra* at 20.

[83] *Id.* at 22.

[84] Melior Group Racial Bias Judges Report, *supra* at 8.

[85] The AOPC reported to the Committee that the training for new judges in 2002 included four hours on racial bias issues and that in July 2002, the annual trial judges conference included a three-hour seminar on racial disparities in sentencing.

[86] Melior Group Racial Bias Judges Report, *supra* at 1.

[87] Melior Group Racial Pittsburgh Attorney Transcript, *supra* at 24.

[88] *Id.* at 25.

[89] *Id.* at 23.

[90] Melior Group Racial Philadelphia Attorney Transcript, *supra* at 18.

[91] Final Report of the New Jersey Supreme Court Task Force on Minority Concerns, p. 200 (1992).

[92] *Id.* at 204–205.

[93] *Id.* at 208.

[94] Final Report of the Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts, p. 2 (1989).

[95] *Id.* at 36, 37.

[96] *Where the Injured Fly for Justice*, A Ten-Year Retrospect on the Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission, p. iii (2000).

[97] *Id.* at 3.

[98] *Id.* at 7.

[99] *Id.* at 39.

[100] Washington State Minority and Justice Commission Annual Report, pp. 38–39 (2001).

[101] Report of the New York State Judicial Commission on Minorities, p. 13 (1991).

[102] *Id.* at 27.

[103] *Id.* at 91.

[104] Final Report of the Commission to Study Racial and Ethnic Bias in the Courts, Massachusetts Supreme Judicial Court, p. i (1994).

[105] *Id.* at 117.

[106] *Id.* at 64. (Sixty-three percent of all attorneys surveyed, who had an opinion, responded that white jurors sympathize more with victims who are white than they sympathize with minority victims.)

[107] Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System, p. iv (1994).

[108] *Id.* at v.

[109] State of Connecticut Judicial Branch Task Force on Minority Fairness, Full Report, pp. 52–53 (1996).

[110] *Id.*

[111] *Id.* at 52.

[112] *Id.* at 53.

[113] *Id.*

[114] The Report of the Ohio Commission on Racial Fairness, p.14 (1999).

[115] *Id.* at 14–18.

[116] The Gender, Race and Ethnic Bias Task Force Project in the D.C. Circuit, p. IVB-5 (1995).

[117] *Id.* at IVB-2.

[118] *Id.* at IVB-3.

[119] *Id.* at IVB-23–IVB-27.

[120] Ninth Circuit Task Force on Racial, Religious & Ethnic Fairness, Final Report, p. 7 (1997).

[121] *Id.*

[122] *Id.*

[123] Second Circuit Report, *supra* at 422.

[124] *Id.* at 437.

[125] *Id.* at 452.

[126] *Id*. at 437.

[127] Third Circuit Report, *supra* at 1378.

[128] *Id*. at 1387.

[129] *Id*. at 1580.

[130] *Id*. at 1580.

[131] *Id*. at 1385.

[132] *Id*. at 1378–1379.

[133] Melior Group Racial Bias Final Report, *supra* at 16.

[134] Melior Group Racial Philadelphia Attorney Transcript, *supra* at 5.

[135] Melior Group Racial Bias Final Report, *supra* at 9.

[136] Melior Group Racial Philadelphia Court Employees Transcript, *supra* at 25.

[137] Testimony of Susan Yohe, Pittsburgh Public Hearing Transcript, pp. 217–218 [hereinafter Yohe Testimony].

[138] Melior Group Racial Pittsburgh Attorney Transcript, *supra* at 6.

[139] Third Circuit Report, *supra* at 1380.

[140] Testimony of Dr. Stan Hamilton, Wilkes-Barre Public Hearing Transcript, pp. 293, 303.

[141] Lewis Testimony, *supra* at 24.

[142] The Work Group developed a working definition of bias, based on definitions offered by participants in the focus groups and common usage of the term "gender bias" in the literature and by the task forces of other jurisdictions. Gender bias was defined as differential or unequal treatment based on gender when it is not appropriate—in situations where gender should not make a difference. In addition, gender bias can be defined as behavior or decision-making that is based on stereotypical attitudes, myths and misconceptions.

[143] *See* Pennsylvania Bar Association, Commission on Women in the Profession, 2002 Report Card, attached in Appendix Vol. II [hereinafter PBA 2002 Report Card].

[144] The focus groups were conducted by the Melior Group, a Philadelphia-based independent marketing research organization, and V. Kramer & Associates, a private consulting firm specializing in individual and organizational effectiveness. Both firms were engaged by the Committee to conduct focus groups and interviews on topics of racial and gender bias in the courtroom.

[145] National Association for Law Placement (NALP) Bulletin, p. 4 (August 2002).

[146] The Melior Group/V. Kramer & Associates, Gender Roundtable Discussion, Philadelphia Court Employees Transcript, p. 18, attached in Appendix Vol. II [hereinafter Melior Group Gender Philadelphia Court Employees Transcript].

[147] PBA 2002 Report Card, *supra* at 13.

[148] The Melior Group/V. Kramer & Associates, Gender Roundtable Discussion, Harrisburg Transcript, p. 1, attached in Appendix Vol. II [hereinafter Melior Group Gender Harrisburg Transcript].

[149] As of 2002, one of seven (14 percent) justices of the Supreme Court of Pennsylvania is female, as are five of 15 (33 percent) Superior Court judges and five of nine (over 50 percent) Commonwealth Court judges. PBA 2002 Report Card, *supra* at 14.

[150] PBA 2002 Report Card, *supra* at 13.

[151] Melior Group/V. Kramer & Associates, Final Report on Perceptions and Occurrences of Gender Bias in the Courtroom, Judges Report, pp. 5–6 (2001), Appendix Vol. II [hereinafter Melior Group Gender Judges Report].

[152] PBA 2002 Report Card, *supra* at 7–9. Compare with 1995 survey wherein 29 percent of female attorney respondents and 53 percent of male attorney respondents noted that they were working for organizations or law firms where there were no women in senior level positions. *See* Pennsylvania Bar

Association Joint Task Force to Ensure Gender Fairness in the Courts, Interim Report No. 1, p. 3, 10 (May 1995), attached in Appendix Vol. II [hereinafter PBA Interim Report No. 1].

153 Allegheny County Bar Association Gender Survey Report, p. 19 (1991), attached in Appendix Vol. II. (Female attorneys' average salary was between $35,000–$45,900; male attorneys' average salary was between $60,000–$79,000.); PBA Interim Report, *supra* at 3, 11 (Female attorneys in Pennsylvania earn an average of $30,000 less per year than male attorneys).

154 The Melior Group/V. Kramer & Associates, Gender Roundtable Discussion, Philadelphia Attorney Transcript, p. 25 (2001), attached in Appendix Vol. II [hereinafter Melior Group Gender Philadelphia Attorney Transcript].

155 *See Women in Law: Making the Case*, 2001, attached in Appendix Vol. II.

156 Melior Group Philadelphia Attorney Transcript, *supra* at 22.

157 Yohe Testimony, *supra* at 219.

158 *Id.* at 220–221.

159 Testimony of Caren Bloom, State College Public Hearing Transcript, p.150 [hereinafter Bloom Testimony].

160 The Melior Group/V. Kramer & Associates, Gender Roundtable Discussion, Erie Attorney Transcript, p. 14, attached in Appendix Vol. II [hereinafter Melior Group Gender Erie Attorney Transcript].

161 Third Circuit Report, *supra* at 1413.

162 Melior Group Gender Philadelphia Attorney Transcript, *supra* at 11–13.

163 Melior Group Gender Harrisburg Transcript, *supra* at 10.

164 *Id.*

165 Yohe Testimony, *supra* at 221.

166 Melior Group Gender Erie Attorney Transcript, *supra* at 3.

167 Testimony of Joanne Tosti-Vasey, State College Public Hearing Transcript, p. 295 [hereinafter Tosti-Vasey Testimony].

168 Testimony of Shelley Pagac, Pittsburgh Public Hearing Transcript, p. 168.

169 Melior Group Gender Harrisburg Transcript, *supra* at 32.

170 Yohe Testimony, *supra* at 222–223.

171 Melior Group Gender Harrisburg Transcript, *supra* at 6.

172 Bloom Testimony, *supra* at 158.

173 Melior Group Gender Philadelphia Attorney Transcript, *supra* at 23.

174 Tosti-Vasey Testimony, *supra* at 299.

175 Melior Group Gender Philadelphia Attorney Transcript, *supra* at 26.

176 Yohe Testimony, *supra* at 222–223.

177 Wilkes-Barre Personal Injury Attorney Roundtable Discussion, summary as prepared by Joseph A. Lach, Esquire, pp. 4–5 (December 12, 2001), attached in Appendix Vol. II [hereinafter Wilkes-Barre Roundtable Discussion].

178 Third Circuit Report, *supra* at 1404.

179 Melior Group Gender Harrisburg Transcript, *supra* at 21.

180 Wilkes-Barre Roundtable Discussion, *supra* at 4.

181 Melior Group Gender Erie Attorney Transcript, *supra* at 5.

182 Vicki C. Jackson, *What Judges Can Learn From Gender Bias Task Force Studies*, Vol. 81, Number 1 Judicature Magazine (July–August, 1997), p. 16; quoting Judge Wald, *A Thousand Cuts: The Reality and Perception of Discrimination*, remarks at the Aspen Law and Business Third Annual Institute; Woman Advocate 1995, p. 17 (June 12, 1995) [hereinafter Jackson].

183 Melior Group Gender Erie Attorney Transcript, *supra* at 24.

184 Melior Group Gender Philadelphia Attorney Transcript, *supra* at 23.

185 Bloom Testimony, *supra* at 155–156.

[186] Yohe Testimony, *supra* at 222.

[187] Melior Group Gender Erie Attorney Transcript, *supra* at 29.

[188] Third Circuit Report, *supra* at 1387, 1406.

[189] Tosti-Vasey Testimony, *supra* at 299–300.

[190] Melior Group Gender Philadelphia Attorney Transcript, *supra* at 32.

[191] Melior Group Gender Erie Attorney Transcript, *supra* at 20.

[192] *Id*. at 27.

[193] *Id*. at 17.

[194] *Id*. at 16.

[195] Examples include PBA Interim Report No. 1, *supra* at 13–14; Jackson, *supra* at 16; Third Circuit Report, *supra* at 1407.

[196] Melior Group Gender Erie Attorney Transcript, *supra* at 23.

[197] Melior Group Gender Philadelphia Attorney Transcript, *supra* at 4.

[198] *Id*.

[199] Melior Group Gender Judges Report, *supra* at 6.

[200] The 1991 ACBA Gender Survey Report found that 43 percent of all respondents, including males and females, believed comments were often or sometimes made about the personal appearance of women when similar comments were not made about men. *See* Appendix survey and result, p. 10. Similarly, 51 percent of female attorney respondents said other lawyers frequently or sometimes commented on their appearance or clothes, while only 17 percent of the male attorneys reported that this happened to them. *See* PBA Interim Report No. 1, *supra* at 14–15.

[201] Melior Group Gender Philadelphia Attorney Transcript, *supra* at 3.

[202] *Id*. at 19.

[203] Tosti-Vasey Testimony, *supra* at 297.

[204] Lewis Testimony, *supra* at 31.

[205] Melior Group Gender Philadelphia Attorney Transcript, *supra* at 9.

[206] Bloom Testimony, *supra* at 156–159.

[207] Melior Group Gender Philadelphia Attorney Transcript, *supra* at 7–8.

[208] Testimony of Deborah Donahue, State College Public Hearing Transcript, p. 6.

[209] Melior Group Gender Judges Report, *supra* at 6.

[210] Melior Group Gender Philadelphia Court Employees Transcript, *supra* at 8.

[211] Melior Group Gender Erie Attorney Transcript, *supra* at 19.

[212] Melior Group Gender Philadelphia Court Employees Transcript, *supra* at 4.

[213] *Id*.

[214] *Id*. at 9–10.

[215] *Id*.

[216] Presently there are no statewide reporting or grievance procedures concerning gender bias. There are, of course, various federal and state statutes concerning sex discrimination.

[217] Melior Group Gender Erie Attorney Transcript, *supra* at 18.

[218] Melior Group Gender Harrisburg Transcript, *supra* at 30.

[219] Yohe Testimony, *supra* at 225.

[220] Melior Group Gender Erie Attorney Transcript, *supra* at 28.

[221] *Id*.

[222] Melior Group Gender Philadelphia Court Employees Transcript, *supra* at 16.

[223] Melior Group Gender Philadelphia Attorney Transcript, *supra* at 24.

[224] Melior Group Gender Harrisburg Transcript, *supra* at 26.

[225] *Id*.

[226] Melior Group Gender Erie Attorney Transcript, *supra* at 27.

[227] Lynn Hecht Schafran, *Overwhelming Evidence: Report on Gender Bias in the Courts*, Trial Magazine, 28–34 (Feb. 1990) [hereinafter Schafran].

[228] *Id.* at 28.

[229] Washington State Task Force on Gender and Justice in the Courts, pp. 113–114 (1989).

[230] *Id.* at 124.

[231] *Id.* at 130.

[232] *Id.* at 115.

[233] *Id.* at 123.

[234] Final Report of the Michigan Supreme Court Task Force on Gender Issues in the Courts, p. 3 (1989).

[235] Gender Bias Study of the Court Systems in Massachusetts, p. 146 (1989).

[236] *Id.* at 157.

[237] *Id.* at 160.

[238] Colorado Supreme Court Task Force on Gender Bias in the Courts, Final Report, p. 1 (1990).

[239] *Id.* at 9.

[240] *Id.* at 115–116.

[241] Oregon Supreme Court/Oregon State Bar Task Force on Gender Fairness, p. 1 (1998).

[242] *Id.*

[243] *Id.*

[244] *Id.* at 2.

[245] *Id.*

[246] Virginia Task Force, Gender Bias in the Courts of the Commonwealth, Final Report, p. 1 (2000).

[247] The Effects of Gender in the Federal Courts, The Final Report of the Ninth Circuit Gender Bias Task Force, p. 49 (1993).

[248] The Final Report of the Eighth Circuit Gender Fairness Task Force, p. 87 (1997).

[249] *Id.* at 97.

[250] *Id.*

[251] *Id.* at 119.

[252] Yohe Testimony, *supra* at 224.

[253] Melior Group Gender Erie Attorney Transcript, *supra* at 6.

[254] Melior Group Gender Harrisburg Transcript, *supra* at 17–18.

[255] Melior Group Gender Philadelphia Attorney Transcript, *supra* at 11.

[256] Melior Group Gender Erie Attorney Transcript, *supra* at 28.

[257] *Id.* at 3.

[258] Yohe Testimony, *supra* at 220.

[259] Melior Group Gender Philadelphia Court Employees Transcript, *supra* at 23.

[260] Melior Group Gender Philadelphia Attorney Transcript, *supra* at 9.

[261] Jackson, *supra* at 18.

[262] Third Circuit Report, *supra* at 1399.

[263] Schafran, *supra* at 28.

[264] *Id.* at 35

[265] Yohe Testimony, *supra* at 223.

[266] Third Circuit Report, *supra* at 1399.

[267] Melior Group Gender Philadelphia Attorney Transcript, *supra* at 23.

[268] As of 1998 the following states and the District of Columbia had adopted provisions identical (or almost so) to Canon 3B(5): Arizona, California, Florida, Georgia, Hawaii, Kansas, Maine,

Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Mexico, New York, North Dakota, Rhode Island, Tennessee, Texas, Utah, Vermont, West Virginia and Wyoming.

269 As of 1998 the following states and the District of Columbia had adopted provisions identical (or almost so) to Canon 3B(6): Arizona, California, Florida, Hawaii, Indiana, Kansas, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Tennessee, Texas, Vermont, Wisconsin and Wyoming.

270 The Supreme Court State of New Jersey Code of Conduct for Judiciary Employees is attached in Appendix Vol. II.

271 (2) National Association for Court Management: Model Code of Conduct; Article IV.C.

Members shall not discriminate on the basis of, nor manifest by words or conduct, a bias or prejudice based upon race, color, religion, national origin, gender, or other groups protected by law, in conduct of service to the court and public.

272 (1) California: Code of Ethics for the Court Employees of California

Tenet Ten

Guard against, and, when necessary, repudiate any act of discrimination or bias based on race, gender, age, religion, national origin, language, appearance, or sexual orientation.

Guideline for *Tenet Ten*—

Each day court employees assist users of court services of many races, religions, national origins, languages, sexual orientations, and varieties of personal appearances. They may deal with accused felons, child abusers, participants in painful dissolutions, those grieving from an injury or loss of a loved one, or people experiencing any one of numerous kinds of human pain or dysfunction. Court employees are expected to treat each other and each user of court services equally and with compassion. Equal access to the court system and equal treatment for all is the cornerstone of the administration of justice. Court employees must expose and discourage discrimination wherever it exists.

Tenet Eleven

Renounce any use of positional or personal power to harass another person sexually or in any other way based on that person's religious beliefs, political affiliation, age, national origin, language, appearance, or other personal choices and characteristics.

Guideline for *Tenet Eleven*—

Court employees are to refrain from making sexual advances and insinuations that are inappropriate and offensive, or that could be perceived as such. Harassment may also take nonsexual forms such as verbal, physical, and psychological. The investigation of a harassment complaint is difficult because a determination will often be based on the credibility of the parties. A supervisor is obligated, however, to conduct a prompt and through investigation of any allegations of harassment. If the investigation reveals that harassment has occurred, corrective action should be taken immediately. The supervisor should then conduct further inquiry to ensure that the action was effective and that the harasser has not retaliated against the complainant.

(3) Vermont: Judicial Branch Personnel Policy

It is the policy of the Judiciary that discriminatory behavior will not be condoned or tolerated. Discriminatory behavior includes any implicit or explicit action or behavior based on race, color, sex, religion, national origin, ancestry, age, disability, marital status, or sexual orientation which adversely affects the person's ability to use the facilities or services provided by the Judiciary. It also includes verbal or written comments or actions which disparage or deride an individual's race, color, sex, religion, national origin, ancestry, age, disability, marital status, or sexual orientation. Discriminatory behavior also includes any actions, either implicit or explicit, which adversely affect an employee's work assignment, work environment, salary, career or promotional opportunities due to race, color, sex, national origin, ancestry, age, disability, marital status, or sexual orientation. Any employee who violates this policy is subject to disciplinary action up to and including dismissal.

273 The Gender Bias Subcommittee of the Women in the Law Committee of the Allegheny County Bar Association was established in 1993.

[274] The Committee to Promote Fairness in the Legal System of the Philadelphia Bar Association was established in 1999.

[275] The Committee recognizes that there may be existing effective procedures in place in some counties that address these concerns. Significantly, procedures that are in place in Allegheny County and Philadelphia rely principally on an informal resolution process that is possible because of the voluntary collaborative work of well-respected judges and lawyers who are able to communicate with both judicial officers and court participants. The Code of Judicial Conduct, as well as the Code of Civility, also includes provisions that may subject judicial officers to sanctions for some kinds of conduct evidencing bias. The Committee believes that there is value in having procedures in place and available to all participants in the judicial system that can address informally and, when necessary, more formally, a broad array of bias-related conduct and speech that can adversely affect the experiences of the participants. The procedures should have an education component so that participants are informed about the opportunities and procedures for grieving and resolving perceived bias. It is also important for data to be collected centrally to better inform the courts about the prevalence of experiences and perceptions of bias.

10 DOMESTIC VIOLENCE

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INTRODUCTION

Experts define domestic violence as purposeful, violent behavior used to maintain power and control over an intimate partner.[1] As such, it imposes enormous physical, psychological, and financial risks upon the survivors[2] of domestic violence, most often women and their children. According to the Centers for Disease Control and Prevention, nearly one million incidents of non-lethal intimate partner violence (defined as violence between spouses or past/present intimate partners) occurred in the U.S. from 1992 through 1996, and women accounted for 86 percent of the people who were abused.[3] The National Coalition Against Domestic Violence estimated that more than 50 percent of all women will experience physical violence in an intimate relationship in their lifetimes. For as many as 30 percent of these women, the violence will be regular and ongoing.[4]

In 1999, more than 52,000 petitions requesting protection from abuse were filed pursuant to the PFA Act in Pennsylvania courts. Data from the major domestic violence advocacy groups throughout Pennsylvania show that more than 95 percent of those cases were filed by women.

The Pennsylvania Legislature responded to the risk of domestic violence by enacting the Protection From Abuse Act (PFA Act) in 1976,[5] which provides a comprehensive framework for addressing the needs of survivors.[6] In 1999, more than 52,000 petitions requesting protection from abuse were filed pursuant to the PFA Act in Pennsylvania courts. Data from the major domestic violence advocacy groups throughout Pennsylvania show that more than 95 percent of those cases were filed by women.[7]

Focus of the Inquiry

This chapter focuses upon the experiences of domestic violence survivors within the justice system. Specifically, the Committee reviewed the implementation and enforcement of the PFA Act, seeking to determine whether current practice has upheld the PFA Act's stated purpose: the protection of survivors of domestic violence from the perpetrators of such abuse.[8]

The Committee focused its inquiry on the following issues:

- Whether persons involved with the adjudication of domestic violence cases understand the unique circumstances and particular problems raised by domestic violence, in contrast with other forms of violence;
- The ability of the court system as presently structured to accommodate domestic violence cases within the system;
- The implementation of appropriate and effective remedies by the courts; and
- The enforcement of those remedies when protective orders are violated.

Methodology

In the course of its research, the Committee examined task force reports from other states, professional treatises, and other articles on the issue of domestic violence. It also reviewed domestic violence statistics for the nation and for Pennsylvania. Further, the Committee made a concerted effort to understand the experience of survivors of domestic violence as they proceed through the court system. Roundtable discussions were held in Pittsburgh, Philadelphia, and Harrisburg, with racially and culturally diverse groups of seven to 12 battered women in each session. The Committee also sought expert testimony on the issue of domestic violence. At its public hearings the Committee heard testimony from administrators of domestic violence programs; domestic violence counselors, advocates, and professionals; and survivors of domestic violence.

SYNOPSIS OF FINDINGS AND RECOMMENDATIONS

Gender is at the core of many domestic violence issues. Women are traditionally the recipients of violence at the hands of their intimate partners. If the judicial system is to understand domestic violence as something more than a criminal assault case, it must first examine and understand the nature of domestic violence and how the intimate relationship between the abuser and the survivor gives rise to a unique dynamic that distinguishes domestic violence from other crimes. Without this understanding, courts may be less likely to accept survivors' assertions, which, in turn, may bring rejection of their PFA petitions, thereby jeopardizing their safety.

The danger may be exacerbated for racial and ethnic minorities, who are often perceived as less credible than their white counterparts. Further, differing cultural attitudes towards the abuse of women and children may make women from particular ethnic backgrounds even more ambivalent about seeking protection. Our legal system, which strives to guarantee safety to all, must understand these cultural differences if it is to attain the goal of the PFA Act, which is to prevent future acts of intimate partner violence.

Pennsylvania currently has no statewide system in place for processing domestic violence cases, and court personnel are often inadequately trained to understand the needs of domestic violence survivors. Many counties have no family court systems and no persons specifically responsible for these cases. This results in uneven and often inadequate procedures for the disposition of domestic violence cases.

Implementation and enforcement of the PFA Act is left to the discretion of individual judges. If a judge is not sensitive to the dynamics of domestic violence, a survivor's petition is more likely to be met with skepticism or to be dismissed. When a petition goes forward, petitioners are often hurried through a judicial system already backlogged by other cases. Moreover, the full measure of remedies available under the PFA Act is not consistently granted. Some judges, for example, have been reluctant to take away an abuser's weapons. Courts have fashioned makeshift remedies, such as mutual no-abuse orders, which do not ensure the safety of the survivor.

Although the PFA Act provides relief in the form of child custody and financial support, these remedies are often not utilized in an appropriate fashion. A final order is rendered useless when a court fails to provide meaningful and effective enforcement.

In order to achieve the goals of the PFA Act, and to secure the safety of Pennsylvania families, domestic violence complaints must be treated with respect and given due regard by the legal system. Lancaster, Allegheny, and Philadelphia counties have designed systems that are noteworthy for their efforts to respond to the needs of survivors of domestic violence. While these programs represent a significant improvement over past practices, more can be done to establish a system in which justice is expeditiously and effectively dispensed to all survivors of domestic violence. Descriptions of the three noteworthy programs are set forth later in this chapter. This report concludes with additional recommendations to ensure that the stated purposes of the PFA Act are met throughout Pennsylvania, and that all citizens have access to those services.

GENERAL FINDINGS

DOMESTIC VIOLENCE IS DISTINGUISHABLE FROM OTHER VIOLENT CRIMES, AND THE COURTS MUST UNDERSTAND AND ADDRESS IT WITHIN THIS CONTEXT.

Domestic violence occurs against a backdrop of emotional, physical, biological, familial, residential, and financial ties between the abuser and the abused. Criminal law, which contemplates violence between persons who are not usually intimate partners, is often ill-equipped to address the multiple problems raised when there is violence between intimate partners.

In the roundtable discussions held with survivors of domestic abuse, many reported that the judges before whom they appeared did not seem to understand domestic violence issues. These survivors found their courtroom experiences to be demeaning.[9] According to survivors, when judges fail to understand the causes and consequences of domestic abuse and do not treat it seriously, the abusers, in effect, are granted permission to continue the abuse without fear of penalty.

Domestic violence experts have concluded that perpetrators of domestic violence seek power and control over their survivors. Women who are survivors of domestic violence have often been abused over an extended period. The abuse generally escalates; it often includes repeated emotional mistreatment, coupled with a range of physically violent acts used by the perpetrator to gain emotional and physical power and control over the survivor.[10]

Abusers do not generally act out of sudden anger; their violence is often calculated and deliberate and often includes psychological intimidation, coercion, and threats. “Most of the perpetrators I’ve dealt with did not have a problem with anger management,” said attorney Lorraine Bittner, the legal systems advocate from the Women’s Center and Shelter of Greater Pittsburgh, at the Pittsburgh hearing. “It was power and control issues. For example, if he wants to make a point in the middle of a mall, he waits until they are in the car in the parking lot. Then he punches her.”[11]

It is imperative that legal personnel coming into contact with these survivors realize that they are afraid, often for their lives. Fear of their abuser can and does cause survivors to refrain from filing for protection,

or to withdraw petitions after they have been filed. This can lead to instances in which survivors, for example, plead with the court not to take away their abusers' guns. Caren Bloom, an attorney with Mid-Penn Legal Services in Centre County, speaking at the public hearing in State College, explained: "It sounds like they're not afraid, or they wouldn't agree he should keep his guns. But many times, my client says to me, 'If I take his guns, he will kill me.'"[12]

Another reason women either fail to come forward, or withdraw cases after the initial filing, is that abusers often threaten to harm their children or withhold access to them. Women also withdraw cases because they have insufficient financial resources to press forward, especially when the course of action will necessitate the filing of custody, divorce, or support papers.

Some women refuse to come forward or withdraw their legal actions out of a concern that the abuser will be inordinately harmed by the judicial system. In immigrant populations, women fear that pursuing an abuse action will result in the deportation of the abuser. When domestic abuse survivors seek protection, they often are not willing to proceed with the case if it compromises the legal status of the abuser. This is especially true if he is also the father of their children.[13]

African American women often have concerns in this area. Their mistrust of the legal system may lead them to fear for the physical well-being of their abuser if he is arrested. As Judy Ariola-Rivera, bilingual and bicultural domestic violence counselor for Women's Resources of Monroe County, said at the Wilkes-Barre hearing: "African American women fear the police retaliating against their partner because they [the partner] will be treated differently. And so the fear is not only for their own lives, but also that their spouses or partners would be injured or treated differently than a Caucasian male."[14]

Many batterers develop a long-term pattern of insults, belittling statements, threats, intimidation, and physical violence to "brainwash" the survivor into believing that she deserves or has caused the abuse, and that she is inadequate and has no choice but to continue in the relationship.[15] Survivors are often ashamed that they are abused, and this shame creates a reluctance to discuss their abuse, even when such a discussion could lead to assistance. Shame can lead survivors to downplay or deny the existence of the violent relationship, making it all the more difficult for the courts to determine what has actually occurred. In order for courts to identify such abuse, they need to set aside sufficient time to hear the evidence. In addition, courts should ensure that survivors have the time to secure legal representation.

Mostly, though, it is important to understand that the survivors are afraid. "He will ultimately get me no matter what," said one survivor during a roundtable discussion. Another said, "Oh, he'll get me. I've written my will. Nothing will stop him. If it's not next week, it will be next month. I never go anyplace without constantly looking over my shoulder." A third survivor explained, "He's a deputy sheriff. I'm petrified of him. The police came one time and exchanged badge numbers with him." Yet another said, "I know he's going to kill me. It's just a question of when."[16]

If a survivor does not obtain protection through the legal system, her abuser may feel more empowered to continue the pattern of abuse or even to intensify it.

Survivors live in the same culture and community where their batterers reside. Consequently, courts must understand how culture and community may contribute to a batterer's control over a survivor. In some cultures it is still considered acceptable by some members of the community for men to exercise physical authority over women. Attorneys and advocates who counsel Latina women, for example, report that the women may not only be afraid of the men, but of what others will think of them if they come forward with stories of abuse.[17]

Persons who are not in abusive relationships often fail to understand the impact that a history of abuse has upon the survivor. Law enforcement officials, judges, and attorneys in domestic violence cases may not only fail to perceive the life-threatening danger in which a survivor finds herself, but may also have a mistaken understanding of the consequences if the legal system fails to act to protect her. If a survivor does not obtain protection through the legal system, her abuser may feel more empowered to continue the pattern of abuse or even to intensify it. For survivors to be afforded the full remedy of the law, it is essential that people in the legal system understand the likely behavior of the survivor as she faces issues raised by the abuse.

THERE ARE NO UNIFORM PROCEDURES FOR HANDLING PFA CASES

Of the approximately 52,000 PFA petitions filed in Pennsylvania in 1999 and again in 2000, more than 13,000 were filed in Philadelphia. In Allegheny County, approximately 4,000 cases are filed each year. The courts in these two counties have family divisions that have established specific procedures to ensure that domestic violence cases proceed in an orderly fashion through the judicial system.[18]

Other Pennsylvania counties employ a variety of approaches in the processing of domestic violence cases. With no uniform statewide systems or guidelines in place, advocates, attorneys, and survivors often find that the existing systems are inadequate.

A system that devotes little time and resources to domestic violence cases sends a message that it is indifferent to the needs of domestic violence survivors, many of whom, as discussed above, are all too willing to believe they do not deserve protection, and all too likely to abandon their cases for the least excuse.

Even in counties devoting significant resources to domestic violence cases, survivors are confronted by an overworked and understaffed legal system that does not process these cases with the respect and courtesy given to other civil, criminal, and domestic actions. The failings of the system also stem from a misunderstanding of the importance of abuse cases and of the urgency of protecting the survivors.

At the Philadelphia public hearing, Iraida Afanador, associate executive director of The Lighthouse, observed, "Victims are being herded in like cattle and not really being looked at as individuals."[19] Another witness at the same hearing reported lengthy delays, multiple continuances, and short hearings often lasting only five minutes.[20] In Harrisburg, legal advocates noted that the judges were overburdened, and appeared to be squeezing PFA cases into their already crowded schedules. Similarly, at the hearing in State College, a witness testified that a judge in Centre County had a practice of scheduling all PFA cases on one day per week at 11:45 a.m., with the expectation that they would be completed by the noon lunch hour. She testified that not only did this practice create intense pressure on her and other petitioners to settle within a short period of time, but it left a strong impression that the court did not consider her case or those of the other petitioners to be important. The particular judge in this case subsequently modified his procedure for scheduling PFA hearings after personally listening to the testimony of this witness during the Committee's public hearing in State College.

The accounts by these witnesses demonstrate the serious effect the courts' treatment of such cases has upon the petitioners. A system that devotes little time and resources to domestic violence cases sends a message that it is indifferent to the needs of domestic violence survivors, many of whom, as discussed above, are all too willing to believe they do not deserve protection, and all too likely to abandon their cases for the least excuse. Court-ordered delays and continuances cause survivors to abort their legal actions, while extremely brief hearings leave little time to address complex safety, custody, and support issues. "I had to wait three months for my PFA hearing, then 18 months for a custody hearing," a survivor said at one roundtable discussion. "When the custody trial happened, the judge wouldn't allow any discussion of the history of the domestic violence in our family."[21] This experience was shared by many survivors, suggesting that courts are unable (or unwilling) to integrate domestic violence issues into other legal cases.

Often, courts also fail to address problems posed by the survivors' scant economic resources. Under these circumstances, the survivors are usually compelled to proceed *pro se*, or to use advocates from legal services agencies who are usually available only on a limited basis.[22] When a survivor files a *pro se* petition, observed Grace Coleman at the Pittsburgh public hearing, "She is far less likely to artfully draft the petition in a manner that clearly expresses a true sense of the danger she is in." [23] The survivor may have no understanding of ancillary legal issues. She may not know, for example, that she is entitled to seek temporary financial support; and later, she may not understand the consequences of failing to file for permanent support.[24]

When survivors seek private counsel, their tight financial situation often compels them to hire less-skilled attorneys with little knowledge of domestic violence and its ancillary implications in family law. Indeed, many family law attorneys fail to integrate domestic violence issues into their family law cases, especially in custody matters. Even lawyers familiar with family law may not be cognizant of the unique interplay between traditional domestic law and the particulars of the PFA Act.[25] In this regard, if lawyers miss important legal issues, they have failed to provide competent representation.

As discussed in the first chapter of this report, few courts provide interpreters for litigants with a poor grasp of English. In the area of domestic abuse, interpreters can be extremely important, especially if they are trained in domestic violence issues and sensitized to the cultural barriers

experienced by minorities. Advocates report that non-English speaking survivors risk having their statements misconstrued when they work with untrained interpreters.[26] "Sometimes their victimization was not actually presented," attorney Bloom reported at the State College hearing.[27]

Pennsylvania courts do not consistently permit non-attorney advocates to accompany survivors to all court proceedings. While lawyers primarily deal with legal issues, domestic violence advocates focus on the entire spectrum of issues confronting the survivor.[28] Advocates work with survivors to consider lethal risks and plan safe courses of action when an incident begins. Advocates speak out for and with the survivor as she proceeds through the court system. Advocates direct survivors to housing agencies, shelters, support groups, day care centers, and job training programs. In short, advocates help survivors take advantage of all available resources. Advocates also help survivors make safe, independent decisions concerning their welfare and the welfare of their children.

Advocates are especially important in minority and ethnically diverse communities where, as discussed previously, survivors are often reluctant to bring their full plight to the attention of the court system. Members of minority communities often fear that they will not be believed by the court simply because of their racial or ethnic background,[29] or that they will not have opportunities to present their cases.

Many Pennsylvania counties have small minority populations that feel isolated and believe that they are surrounded by people who do not understand their culture or way of life. Deborah Donahue, executive director of Domestic Violence Services of Cumberland and Perry Counties, speaking at the Harrisburg hearing, cited the example of Cumberland and Perry counties, where members of the small African American communities believe the lack of understanding means they will not receive justice.[30] Conversely, minority group members may fear that, if they are believed, their abusers, with whom they often still share emotional, familial, and other bonds, will be over-prosecuted or even physically harmed by law enforcement officials.[31] In some cultures, women and children are still viewed as a man's property. Under these circumstances, survivors are often reluctant to report abuse. Without strong advocacy and support, they may be unable or unwilling to take the necessary steps to protect themselves and their children.[32]

Other cultural misconceptions create additional barriers for survivors who seek protection. For example, Beata Peck Little, executive director of the Women's Resource Center in Monroe County, testified in Wilkes-Barre about a Latino woman who was married to an abusive man. She felt compelled by her religious faith and cultural background to do everything she could to save the marriage, even though her husband abused her physically, mentally, and sexually. "She was told by the court and the attorneys that she was manipulating the system, lying and pretending not to speak well," Little said.[33] The court denied her PFA petition because she admitted to having sex with her husband, even though she believed it was her duty, and her husband had threatened her with loss of her children if she refused. Little went on to explain that minorities share a knowledge "that almost everyone you have to share your story with is Caucasian and knows little about the cultural aspects of your life, how you interact and communicate with others, or the social mores which govern your behavior. Add in also the fact that domestic and sexual violence are rooted in issues of power and control and you can begin to see the difficulties faced by people of color who need assistance."[34] As a result, many survivors without strong advocates do not seek assistance at all. By coming to the court system for help, survivors risk their privacy. They risk further and potentially lethal abuse. They risk losing their children. They risk losing their voice or access to justice when interpreters are not available.

COURTS FAIL TO GRANT SURVIVORS CREDIBILITY

Attaining credibility in the court system is one of the greatest challenges for all survivors of domestic violence. Courts may question a survivor's credibility for a variety of reasons. One reason may be a survivor's delay in reporting the abuse, seeking a PFA order, or withdrawing a previous petition. In the eyes of the court or a jury, such behavior may be interpreted as evidence that a survivor acquiesced to the abuse, or that the abuse was not as serious as the survivor now claims it to be. Such misconceptions stem from a failure to understand the dynamics of the domestic violence relationship. Courts may assume that if the violence were intolerable, the survivor would have left her abuser long ago. That line of thinking fails to take into account the now well-documented internal and external forces that may keep a survivor tied to her abuser.[35]

Another issue that complicates the court's ability to view the survivor's narrative as credible is the tendency of survivors to revise their accounts of abuse, generally by supplying greater detail. "Revised stories present problems in the law because one of the implicit rules judges and juries use for finding stories to be true is, to be believable, stories must be told immediately and must stay the same over time," Kim Lane Scheppele writes in her article on the subject, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of the Truth*. [36] Survivors of domestic violence are believed to exhibit signs of post-traumatic stress disorder as a consequence of their traumatic experiences with abuse. To maintain her safety, a survivor may at first feel compelled to withhold information, or may blame herself, thereby accepting the abuser's distorted version of events. As a survivor begins to gain a sense of safety or emotional distance from the trauma, she may then be able to divulge the facts in a more expansive and legally coherent manner.

> *Courts may assume that if the violence were intolerable, the survivor would have left her abuser long ago. That line of thinking fails to take into account the now well-documented internal and external forces that may keep a survivor tied to her abuser.*

Whatever the reason, the court's dismissal of abuse cases can set the stage for increased violence within the coming months and years. In one case in Eastern Pennsylvania, for example, a woman was denied a final order after she stated that her husband had assaulted her and had frightened the children by destroying some of their toys. The judge asked her lawyer if the woman really wanted the court to "kick the breadwinner out of the house," and dismissed the case. After the survivor filed a second PFA, the judge again denied her petition and warned the woman not to re-file. A few months later, the husband burned down the woman's house.[37]

Advocates for survivors of domestic violence assert that multiple filings and withdrawals of PFA petitions should send to the court a clear signal of a long-standing pattern of abuse.[38] When survivors persevere and seek long-term protection, their lack of medical records, broken English, or tattered clothing should not be a bar to the court's granting of relief. All too often, a failure to grant immediate relief has lethal consequences. At the Pittsburgh hearing, for example, Bittner told about a woman who alleged abuse by her husband, even though her injury had not required medical attention. Her petition was denied. Months later, the husband murdered her.[39]

In Philadelphia, Afanador observed that the legal system sometimes tends to "evaluate people almost exclusively by their verbal skills and their ability to articulate white middle-class values."[40] Courts that fail to recognize the cultural practices of ethnic groups will sometimes dismiss the credibility of witnesses who behave in a way that is culturally or ethnically appropriate. A domestic relations lawyer, for example, questioned a Latino woman about why she continued to sleep with the man who abused her. She responded by saying that if she behaved otherwise, the man would take her children. Clearly doubting her, the lawyer told her that she dressed flamboyantly and said, "I understand that the women from your country are accustomed to being sexually aggressive and flamboyant."[41] The woman was from Puerto Rico. This lawyer found her less than credible because he misunderstood the cultural meaning of her clothes and behavior.

Racial or ethnic discrimination toward a survivor can also discourage a court from imposing sanctions upon an abuser. Stereotypical thinking about a survivor's background, in other words, may render the court less likely to view her case in an objective manner.

Courts have also raised credibility issues about males alleging domestic violence. Many people scoff, for example, at the very idea of a man seeking protection under the domestic violence statute. Yet, most of the advocacy groups in Pennsylvania readily acknowledge that the problem exists for men and that they have represented men in domestic abuse cases.[42]

Credibility issues may also affect the outcome of same-sex allegations of abuse.[43] People who believe that same-sex partnerships are immoral may also conclude that no protection is warranted for persons engaged in such a relationship. At one of the roundtable discussions, a survivor in a same-sex relationship said that the court had not protected her from abuse by a male relative, apparently because of the court's belief that her relationship was immoral.[44]

PENNSYLVANIA COURTS SHOULD DEVELOP AND FASHION ORDERS THAT PROVIDE ADEQUATE REMEDIES FOR ALL LEGAL ISSUES CONFRONTING DOMESTIC ABUSE SURVIVORS.

After determining that a petitioner's assertions are credible and they meet the requirements of the PFA Act, a court in Pennsylvania must issue an appropriate order, the paramount goal of which is to protect the survivor and, if necessary, her children. When a court repeatedly delays final

hearings or schedules them at inconvenient hours, the court's orders do not immediately or adequately protect the person who has suffered abuse.

From 1990–1998, guns were responsible for 67 percent of all spouse and ex-spouse homicides in the United States.[45] In light of the long-standing danger, Pennsylvania's PFA Act and, more recently, the Domestic Violence Firearm Protection Amendment to the Federal Gun Control Act, passed in 1996,[46] prohibit PFA defendants from possessing or acquiring firearms while the protective order is in effect.[47] The Pennsylvania Supreme Court has made it simple to comply with the law. A court has only to check a box indicating "no guns" on the final standardized PFA order.

> *"Judges have said…I'm not sure how strong your client's testimony was, and I have to weigh that against—it's November."*
>
> —Attorney Caren Bloom

Yet many believe that courts, especially in central Pennsylvania, are reluctant to hold final hearings or implement final PFA orders because they are unwilling to remove abusers' guns, especially during hunting season. Attorney Bloom, testifying at the State College hearing, said, "Judges have said…I'm not sure how strong your client's testimony was, and I have to weigh that against—it's November."[48] Other judges have been reluctant to take guns away from defendants who were police officers or were otherwise licensed to carry firearms through their employment.[49] In such situations, the courts appear to be upholding the right to bear arms without adequately weighing the clear and present danger to survivors of abuse.

Many courts pressure both the petitioner and the defendant to enter into consent orders prohibiting abuse by either litigant. The rationale for this approach may be to placate or cajole the abuser into signing a consent order, thereby avoiding an actual trial on the issue of abuse. Sometimes the survivor is told her case is not strong enough and that she has nothing to lose in signing a mutual order because she will never abuse the perpetrator. After all, the argument goes, she comes away with exactly what she sought—an order prohibiting abuse.

The rationale for mutual PFA orders, however, fails to address an inherent problem. Unless there is actual evidence of the survivor acting as the initiator of violence, a mutual order grants the perpetrator a victory and does nothing to diminish his power and control over the survivor. It is a victory for a variety of reasons. First, the order implies that the survivor's allegations were not sufficiently believable to warrant a final order directed solely at the perpetrator. Second, the perpetrator can use this order as leverage against the survivor in a future retaliatory action by claiming she violated the order. Third, the survivor, having entered the legal system as a result of the perpetrator's physically violent exercise of control, may perceive that she leaves the system with the court's continued endorsement of his power. An order against the survivor emerges as an officially sanctioned consequence of the initial abuse.

The PFA Act grants courts the power to fashion temporary support orders for the economically dependent spouse and/or children. But some courts fail to enter these support awards into their final order. This failure often creates a dangerous dilemma for the financially dependent survivor.

Courts often impose orders requiring joint counseling in domestic abuse cases, in what could be viewed as a well-meaning but often misguided attempt to provide appropriate social services to the parties. Researchers have concluded, however, that joint counseling can actually be harmful to the survivor.[50] This type of therapy may place her in danger of further abuse or retaliation. Further, when survivors are forced into joint counseling, they are stripped of the right to make independent choices about how to become and remain safe. [51] Yet, when they object, the court too often views them as obstructive and questions their credibility.[52]

The PFA Act grants courts the power to fashion temporary support orders for the economically dependent spouse and/or children. But some courts fail to enter these support awards into their final order.[53] This failure often creates a dangerous dilemma for the financially dependent survivor. If she is not awarded immediate support, she may be forced to return to an unsafe home where she is in danger of being abused. On the other hand, if she stays out of the home, she may have no money and nowhere to go. If the court grants a temporary support order but neglects to advise the survivor about how, where, and when to file a complaint for permanent support, then the court has merely delayed the survivor's dilemma for two weeks.[54]

Cases involving custody of minor children are another area in which courts often fail to grant appropriate or full relief. "A battered woman's ability to secure safety for herself and her children often depends on her ability to secure a custody order that provides conditions and protection for her and her children," Grace Coleman testified at the Pittsburgh hearing.[55] The PFA Act allows for the imposition of a custody order, and specifies that the abuse of a parent (and, of course, a child) is a factor to be considered in fashioning an appropriate order.[56] In practice, however, a variety of custody problems have arisen in the application of the Pennsylvania law.

First, the custody provisions in the order must address both the immediate and long-term safety needs of the survivor in order to be effective. Protective orders with custody provisions should be in place to provide for the safety of the survivor and her children. They also promote her autonomy, something batterers are loath to allow. The imposition of an inadequate custody order can force the survivor into continuous, unsafe contact with the abuser. Unless there has been actual violence perpetrated against the children, however, the courts often dismiss the safety concerns and fashion the more "typical' custody order envisioned by the Child Custody Act, wherein the parents have nearly equal contact with the children in completely unsupervised circumstances. "It's rare that the judges will even consider abuse once we get to the custody part of the case,"[57] Bloom said at the State College hearing.

In addition, courts often fail to consider the impact upon the child of continued unsupervised contact with the abuser. According to an American Psychological Association task force, between 40 and 60 percent of men who abuse women have also been found to abuse children, although the abuse may not occur simultaneously.[58] Courts also fail to consider the serious psychological harm done to the children, whether they are battered themselves or are witnesses to battering. In such cases, the abuse and control permeates the family life. Children who witness domestic violence show symptoms similar to children who have been abused. They may become fearful, anxious, aggressive, or depressed. They may develop less empathy and self-esteem than children who do not witness violence in the home; and they may also have lower verbal, cognitive, and motor abilities.[59] These effects may be long-term and may lead to violent acts by the children themselves.

Several courts view the request for a custody order as a clear indication that the petitioner's motivation for filing a PFA petition is to obtain a quick, favorable custody award.[60] When the court believes this, the PFA petition is generally denied in its entirety, rendering the petitioner completely without protection.

One woman separated from her husband because he was verbally abusive. When the man wanted to see his 3-month-old child, they all met in public places for the exchange. One day the mother was late. When she arrived, her husband flew into a rage, grabbed the baby out of the car seat in the mother's car, threw the baby onto the front seat of his truck and sped away. He had no car seat. The mother filed a PFA petition. The court refused to grant an order, saying it was really a custody case. The mother "was devastated. She had turned to the courts for protection and assistance; protection that she did not receive. She knew her baby was…at risk."[61]

While some courts are all too willing to challenge the domestic abuse survivor's motivations for filing a PFA petition, they often fail to question the abuser's motive for requesting substantial custody. Research indicates that custody disputes are more frequent when there is a history of domestic violence. Moreover, fathers who are batterers are twice as likely to seek sole custody of their children.[62] Such requests for substantial custody may be a misuse of the legal system, motivated by the batterer's continuing need to control and abuse the mother through harassment and retaliatory legal action. Fathers in such cases may use children as an excuse to have contact with the women they are otherwise prohibited from seeing. Yet, if mothers seek to protect themselves and their children by moving frequently or seeking to limit the father's contact, the courts may view the mothers as unstable, uncooperative, and unwilling to share access to their children, all in contravention of Pennsylvania's Custody Act. In this regard, a mother's acts of self-protection may also harm her case within the confines of the PFA Act by raising doubts about her credibility and stability.

WHEN A PFA ORDER IS VIOLATED, THE COURT SHOULD TAKE IMMEDIATE STEPS TO ENFORCE ITS ORDER.

Consistent and meaningful enforcement of PFA orders is a vital element in protecting domestic violence survivors and their children, and in maintaining public confidence in the judicial system. Orders that are not properly and consistently enforced simply become meaningless pieces of paper, sending a strong message to both survivors and abusers that crimes

resulting from domestic violence are given little priority by the judiciary and the legal system. Enforcement should not be dependent upon the number or severity of bruises inflicted upon the survivor. The continued safety of the survivor should be the paramount concern. Deborah Donahue, speaking in Harrisburg, recalled a man who was arrested for violation of his PFA order. Because he had done nothing more than issue threats, he was released on his own recognizance prior to the contempt hearing. Two days later, he broke into the house where the survivor was staying. He shot and killed her, and then himself.[63]

Even when failure to enforce orders effectively does not lead to such a tragic consequence, the judicial system should ensure that all parties coming before the bench are respected, as well as protected, to the full measure of the law.

In another instance, a man was arrested for violation of his PFA order after he vandalized his wife's car and "threatened to do to her what O.J. did to Nicole." He was released on his own recognizance pending the contempt hearing, although the judge promised to jail him for another violation of the order. Within three days, and in violation of the order, the man called his wife again and was arrested. A contempt hearing was held two days later. At the hearing, the judge told the defendant that he understood his Italian temper, because he also was Italian. They laughed and joked together, in Italian. The sentence imposed by the judge was time served and supervised probation. The petitioner was shocked, not just by the mere slap on the wrist, but by the friendly exchange between the judge and her husband. "Now the PFA seemed like a piece of paper that had no meaning." [64]

Some courts are especially reluctant to enforce orders against defendants who are law enforcement officers or other powerful members of a community. But regardless of the identity or profession of the perpetrator, judges must be cognizant of, and willing to utilize, all available remedies. These include criminal sanctions, seizure of weapons, bond posting and incarceration. Judges must remember that the purpose of the PFA Act is to ensure the safety of the survivor. As Sharon Lopez, senior attorney, Pennsylvania Coalition Against Domestic Violence, said at the Harrisburg hearing: "If judges issue orders that they refuse to enforce, then those orders mean nothing."[65]

CONCLUSION

The purpose of the PFA Act is clear[66]—to protect victims of domestic abuse through enforcement of provisions that enable courts to respond quickly and flexibly to abuse by issuing appropriate protective orders.[67] The mantle of protection is meant to extend from early signs of abuse to repeated acts. The PFA Act, however, has been implemented in uneven and sporadic fashion, negating its stated purpose of keeping survivors safe. Behind the uneven implementation is a systemic failure to understand the nature of domestic abuse; to recognize its brutal effect upon survivors and their children; to understand and appreciate ethnic and cultural contexts of domestic violence; and to effectively carry out the goals of the PFA Act. The practices outlined below, and the recommendations that follow, are set forth to help ensure that the PFA Act's mandate is carried forward throughout the Commonwealth.

OTHER TASK FORCE FINDINGS

Each state has its own criminal and/or civil statutes addressing domestic violence. Thus, task forces from other states report varied and unique problems in implementing and enforcing their respective laws. Several common concerns exist from state to state, however, many of which are also raised and addressed within this chapter.

One common theme addressed by other reports was the detrimental "myths" surrounding domestic abuse and the judicial system's lack of understanding of the nature of the crime. For example, the Gender Bias Task Force of Texas found that, "In too many instances, domestic violence is viewed as less serious than other criminal acts, the women's experiences are minimized, a victim's credibility is questioned, and…women suffering from abuse may even be blamed for causing the abuse."[68] The Gender Bias Study of the Court System in Massachusetts discussed this failure to understand the nature of the crime and the psychological profiles of the abuser and the survivor, in light of the effect on legal outcomes, noting, "The tendency to doubt the testimony of domestic violence victims and to 'blame' them for their predicament not only hampers the court's ability to provide victims with the protection they deserve, it also has a chilling effect on victims' willingness to seek relief."[69] Similarly, the Michigan Task Force on Domestic Violence called for extensive training and educational programs to dispel erroneous understanding of the profiles of abusers and survivors.

Several task forces have addressed the unique problems of minority and ethnic communities. The Massachusetts study and the New Jersey Supreme Court Task Force on Women in the Courts both found that racial, ethnic, and sexual preference biases were obstacles to seeking and receiving justice for survivors of domestic violence. Both the Massachusetts study and the final report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts, for example, discussed the need for interpreters. The California and Massachusetts reports also expounded upon the harm engendered by racial stereotypes—especially stereotypes that characterize minority communities as inherently violent, which fosters tacit judicial acceptance of violent relationships within that community. The California study found that, "Inevitably, judges appeared to believe that in the African American community, violence was much more acceptable 'culturally' and, therefore, there was not the same seriousness paid to the testimony of African American women."[70] The Massachusetts report went on to conclude, "Such stereotypes serve to minimize and condone violence that would not be tolerated among strangers or acquaintances who are white."[71]

Several task force reports have identified problems caused by inadequate procedures and facilities for the processing of domestic violence cases. While each state had its own particular shortcomings in this area, many reported conditions similar to those found in Pennsylvania:

- The Texas task force noted that even relatively wealthy survivors often had difficulty obtaining legal counsel.
- The Massachusetts study called for increasing access for survivors to legal counsel and domestic violence advocates.
- The Report of the New York Task Force on Women in the Courts noted that many courthouses had no safe areas for the processing of cases.
- The Washington State Task Force on Gender and Justice in the Courts called for simplified user-friendly complaint forms that were better suited to *pro se* litigants.
- The New Jersey task force reported that many court calendars were too crowded, and that judges did not have ample time to hear and appropriately address all issues within each case.
- Michigan's task force noted that prosecuting attorneys in some jurisdictions had insufficient time to prosecute all appropriate cases. The task force also recommended the establishment of special prosecution units for domestic violence.

Several states also found that court orders sometimes failed to address all appropriate issues or to fashion appropriate remedies. The Massachusetts and New Jersey studies found that some courts failed to order spousal or child support, while the Washington, New York, and Michigan studies found that that some courts awarded custody to fathers who were abusers, or failed to ensure abused mothers' safety by providing supervised visitation between the abuser and the children.[72] Further, several task force reports, including Massachusetts, Michigan, and Washington, decried the use of mutual protection orders. In Texas, 82 percent of female lawyers and 80 percent of male lawyers confirmed that judges sometimes issued orders that "in effect, place some of the blame for the crime on the victim."[73]

Similarly, the New York, Washington, New Jersey, Massachusetts, California, and Texas task forces found it inappropriate to order mediation or joint counseling for batterers and their victims. The New York task force concluded that mediation "ignores the legitimate fear of the battered woman…trivializes her victimization and disregards that the empowerment of the two parties is disproportional."[74]

The lack of uniform, consistent enforcement of orders was another common theme in the state task force reports. The New Jersey study reported that each judge appeared to have his or her own method of enforcing, or not enforcing, orders. In Washington, which prides itself on having two of the toughest criminal and civil domestic violence statutes in the country, the state task force found fault with both law enforcement and the courts. The California report noted that calling the police did not guarantee that the protective order would be enforced.

The Massachusetts study similarly decried the lack of consistent, meaningful enforcement of protective orders, noting, "The imposition of sanctions for violations of protective orders and criminal penalties for abusive behavior can significantly alter behavior and enhance compliance with orders. Failure to use available sanctions and criminal penalties undermines the efficacy of orders for protection and weakens the response of the legal system to domestic violence."[75]

BEST PRACTICES

LANCASTER COUNTY

Lancaster County has implemented a countywide program for the filing and processing of PFA petitions, providing survivors with safe and efficient access to the judicial system. The County Court of Common Pleas has established the following procedural safeguards for petitioners:

- A building-wide security system in the courthouse;
- Security personnel in the courtrooms and hallways; and
- A separate, private area in which to prepare legal pleadings.

The court also maintains an efficient system for adjudicating domestic violence cases. Built into the system is continued oversight of the case by the court, guaranteeing judges access to all necessary information to facilitate the best possible remedies for each particular case. This system includes:

- The assignment of each case to one judge who then is responsible for all additional proceedings involving that family;
- Guidelines that prohibit unnecessary continuances;
- The provision of interpreters for non-English speaking litigants; and
- Access to experienced legal counsel for litigants through MidPenn Legal Services and the Domestic Violence Legal Clinic. The latter is a program of the Lancaster Shelter for Abused Women.

To maintain the safety of domestic violence survivors, the courts in Lancaster County coordinate efforts with other agencies. Representatives from the court and its administrative division meet regularly with domestic violence advocates and litigants to address ongoing concerns and issues.

PHILADELPHIA COUNTY

The Philadelphia County Court of Common Pleas operates a program designed to assist survivors in the preparation of Protection from Abuse petitions. The Domestic Violence Unit (DVU) is a *pro se* filing unit for unrepresented survivors of domestic violence.

Located in Philadelphia Family Court's Domestic Relations Section, the DVU is open from 8 a.m. to 5 p.m. Clients are interviewed on a first-come, first-served basis. Client interviews are conducted in private offices and last approximately 30 minutes. All information is entered into the computer and becomes part of the petition. After the interview, the case interviewer dockets the petition and schedules a court hearing to be held within 10 days. The petition is then sent for review to one of two judges assigned full-time to hear domestic violence cases. The judge decides whether or not a 10-day temporary protection order should be granted immediately. Generally, the entire process takes approximately two hours to complete. On that day, a petitioner can leave the court with a completed petition and a temporary order.

For the past 12 years, this unit has filed the overwhelming majority of PFA petitions in Philadelphia County, averaging 15,000 per year over the past five years. The unit supervisor has been with the unit since it opened in 1990, and there are six case interviewers, three filing clerks and four clerical workers.

By all accounts, this system has greatly benefited abused individuals filing for PFA orders in Philadelphia County. Everyone who seeks assistance receives individualized attention in a calming, caring environment from experienced staff members who understand the trauma associated with domestic violence and are recognized as well-versed in the laws and procedures in Philadelphia County. Staff members periodically receive training in new developments in domestic violence. The supervisor regularly participates in workshops given for community groups, law enforcement officers, and others who are interested in the workings of the domestic violence unit. Those who work in the unit take great pride in the importance of the services they provide.

ALLEGHENY COUNTY

The Family Division of the Allegheny County Court of Common Pleas has long recognized the special needs of domestic violence survivors. In 1993, the division created an administrative attorney position (PFA coordinator) to guide and oversee the division's handling of PFA cases. Since then, the Family Division has committed more and more resources to PFA matters and now has a special PFA unit.

The unit is headed by the PFA coordinator, who is a resource for law enforcement officers, attorneys, and others in the justice system. The unit also includes two domestic relations office-level positions, two clerks, and one receptionist. A deputy sheriff is assigned each day to provide security in the unit. Two senior judges of the Court of Common Pleas work with the unit to hear all 10-day temporary order requests, as well as many of the final hearings. Under the division's "one judge, one family" practice, PFA cases in which the parties are either married or have a child together are scheduled for final hearings before a newly assigned Family Division judge or the same Family Division judge who heard their case previously. In addition, the unit handles PFA contempt hearings every Wednesday. In 2001, there were 4,082 PFA petition filings heard at temporary hearings. In these cases, 3,131 temporary orders for relief were granted and final hearings scheduled. In addition, there were approximately 1,000 contempt cases scheduled for hearings before the unit's senior judges.

The unit is located in the Family Courthouse, which has metal detectors and security at each entrance. The newly renovated building—formerly the Allegheny County Jail—was designed for safe and efficient case handling. The space includes:

- A receptionist check-in desk/area for domestic violence survivors who walk in or have scheduled court appearances, with screening services by the court receptionist to ascertain any court case history;
- A large room for domestic violence survivors to complete *pro se* petitions and to receive services from domestic violence program legal advocates. The room also serves as a resource center for referrals to the domestic violence units of the county district attorney's office and the county probation department, concerning related criminal matters or other county services and resources;
- A courtroom designated only for PFA matters;
- A separate waiting room for PFA plaintiffs who are appearing for PFA hearings;
- A waiting area for PFA defendants that is physically separated from the PFA plaintiffs' waiting room;
- A conference room where attorneys can meet parties they are representing in PFA matters. The room is centrally located between the plaintiffs' waiting room and the defendants' waiting area; and
- Access to a children's playroom in the same building where domestic violence survivors can safely leave their children while attending PFA proceedings.

PFA petitions may be prepared in the PFA unit on any morning that the Family Division is in session. The petitions are then heard the same day at a 1:00 p.m. preliminary hearing in the PFA courtroom before one of the PFA senior judges. Any plaintiff can then sign up in court for a free attorney for the final hearing, thanks to a legal services/pro bono collaboration. Final hearings are scheduled each day at 9:00 a.m. in the PFA courtroom before a PFA senior judge or the Family Division judge assigned to the parties. PFA contempt cases are scheduled for 9:00 a.m. every Wednesday before the unit's senior judges. The district attorney's office sends prosecutors from its domestic violence unit to assist survivors in the contempt cases. The same prosecutors coordinate the contempt cases with related matters in the Criminal Division.

RECOMMENDATIONS

TO THE SUPREME COURT OF PENNSYLVANIA

The Committee recommends that the Court:

1. Require periodic training about domestic violence issues for persons involved with domestic violence cases, including judges, district justices, masters, court administrators, and other court personnel.[76]
2. Require the establishment of uniform statewide requirements for all county courts concerning the processing of domestic violence cases. It is recommended that these requirements include the following:
   - Establish a physically safe environment for survivors within each courthouse where they can proceed with their legal actions free of interference from the defendant;
   - Establish a simplified and accessible system for the filing of *pro se* domestic violence complaints; and
   - Allot sufficient time and personnel on a weekly basis for the court of each county to hear PFA petitions, establish temporary orders, and hold final hearings and additional hearings, as necessary, concerning violations of previous orders.
3. Direct all courts in the Commonwealth with jurisdiction to hear cases filed pursuant to the PFA Act to adopt the following two policies:
   - Mediation should not be used to resolve any issue with respect to the issuance of an order of protection, including custody, visitation, or support issues, unless the petitioner is represented by counsel and consents; and
   - Mutual protection orders should not be issued unless both parties have filed a PFA petition and the court makes specific findings of fact that each party against whom an order is issued has engaged in behavior sought to be prevented by the PFA petition.
4. Direct the AOPC to collect and annually analyze statewide data regarding the type of relief entered in final PFA orders, violations of PFA orders as reported to or by police, and the types of criminal resolution in PFA cases.

TO THE LEGISLATURE

The Committee recommends that the Legislature:

1. Modify Title 23 of the Pennsylvania Consolidated Statutes to permit domestic violence advocates to accompany their clients to court in any proceeding under that Title.
2. Review current Pennsylvania custody, child endangerment, child protection, and domestic violence laws with consideration for the survivor's safety, and resolve any existing conflicts.
3. Conform Pennsylvania weapons laws with federal law, which prohibits the acquisition or retention of weapons by perpetrators of abuse.
4. Authorize further study on the need for additional shelters, "safe" visitation centers, additional advocacy organizations, and interpreter services for non-English speaking litigants within each county, and, if warranted, appropriate additional funds to meet those needs.
5. Appropriate funds for community education concerning domestic violence.

TO LAW ENFORCEMENT AGENCIES

The Committee recommends that law enforcement agencies:

1. Provide appropriate training to all agents or officers concerning domestic violence. The training should be similar to that provided to the judiciary and court personnel set forth in *Recommendations for the Supreme Court*, Number 1, of this chapter, but should also emphasize the critical role played by law enforcement agencies in the enforcement of PFA orders.
2. Develop and implement appropriate investigation procedures and sanctions to address instances in which law enforcement officials are personally involved in domestic violence crimes.

TO BAR ASSOCIATIONS

The Committee recommends that county bar associations:

1. Establish committees to study, develop and maintain *pro bono* programs that include the provision of legal services to PFA petitioners, with appropriate training for attorneys representing domestic violence survivors.
2. Review and comment on legislation affecting domestic violence survivors and evaluate court procedures and practices that affect domestic violence survivors.
3. Take an active role in ensuring that the topic of domestic violence is appropriately integrated into continuing legal education courses.

TO COUNTY ADMINISTRATORS AND MANAGERS

The Committee recommends that county administrators and managers:

1. Establish domestic violence task forces that might include a representative from that county's law enforcement agency; civil, criminal, and administrative representatives from the court system; a representative from a domestic violence advocacy program; lawyers knowledgeable about domestic violence; and concerned citizens. The task forces should be responsible for assessing the status of enforcement efforts, coordinating information by and among the respective agencies, proposing and implementing training, and establishing procedures for more streamlined and less burdensome processes for accessing the judicial system.

ENDNOTES

[1] Written Testimony of Patricia A. Dubin, director of Women Against Abuse Legal Center (Philadelphia) p. 3 (2001), attached in Appendix Vol. III [hereinafter Dubin Written Testimony].

[2] While the Committee recognizes that not all victims survive their ordeal, many victims and their advocates prefer the term "survivor," which connotes strength and perseverance, to the more negative term "victim," which is considered stigmatizing and suggests helplessness. Thus, the Committee has chosen to use the term survivor in keeping with much of the current literature and commentary on domestic violence.

[3] Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *Intimate Partner Violence Fact Sheet*, available at http://www.cdc.gov/ncipc/factsheets/ipvfacts.htm.

[4] National Coalition Against Domestic Violence: http://www.ncadv.org.

[5] 23 Pa. Cons. Stat. Ann. § 6101, et seq.

[6] Survivors of abuse may also file criminal charges against the perpetrators of these acts.

[7] Ninety-five percent of Domestic Violence Services of Cumberland and Perry Counties' clients are women. *See* Testimony of Deborah Donahue, Harrisburg Public Hearing Transcript, p. 4 [hereinafter Donahue Testimony]. JoAnn Massaro, of the Domestic Abuse Project of Delaware County, reported that 96 percent of her agency's clients are women. *See* Written Testimony of Jo Ann Massaro, attached in Appendix Vol. III and Testimony of Grace Coleman, Crisis Center North Pittsburgh, Pittsburgh Public Hearing Transcript, p. 116 [hereinafter Coleman Testimony]. Over 95 percent of Philadelphia's Women Against Abuse Legal Center's clients are female. *See* Dubin Written Testimony, *supra* at 4.

[8] *Lee v. Carney*, 453 Pa. Super 405, 645 A.2d 1363 (1994).

[9] Report of Focus Groups, Ann L. Begler, (Dec. 19, 2001), p. 89, attached in Appendix Vol. III [hereinafter Begler Report].

[10] *Id.* at 4.

[11] Testimony of Lorraine Bittner, Pittsburgh Public Hearing Transcript, p. 97 [hereinafter Bittner Testimony].

[12] Testimony of Caren Bloom, State College Public Hearing Transcript, p. 164 [hereinafter Bloom Testimony].

[13] Testimony of Iraida Afanador, Philadelphia Public Hearing Transcript, p. 103 [hereinafter Afanador Testimony].

[14] Testimony of Judy Ariola-Rivera, Wilkes-Barre Public Hearing Transcript, p. 28 [hereinafter Ariola-Rivera Testimony].

[15] Bittner Testimony, *supra* at 88–89.

[16] Begler Report, *supra* at Appendix A.

[17] Afanador Testimony, *supra* at 104.

[18] Philadelphia's system is set forth at length in the Best Practices section of this chapter.

[19] Afanador Testimony, *supra* at 100.

[20] Testimony of Terry Fromson, Philadelphia Public Hearing Transcript, p. 193.

[21] Begler Report, *supra* at Appendix A.

[22] Though all poverty law programs receiving state funding in Pennsylvania are mandated to provide some form of representation to victims of domestic abuse, it is left to the individual programs to fashion an appropriate system. The various legal services programs do not have adequate funding or staffing to represent everyone who needs an attorney. Nor do they have the resources or staff to provide interpreters, criminal legal counsel when appropriate, non-attorney advocates, or even continued representation through custody, support and, when necessary, enforcement proceedings for violations of PFA orders.

[23] Coleman Testimony, *supra* at 124125.

[24] The PFA Act states that if a complaint for permanent support is not filed within two weeks of the issuance of a temporary order, then that temporary order is void. *See* 23 Pa. Cons. Stat. Ann. § 6108(a)(5) as set forth below. After a hearing in accordance with Section 6107(a), directing the defendant to pay financial support to those persons the defendant has a duty to support, requiring the defendant, under Sections 4324 (relating to inclusion of medical support) and 4326 (relating to mandatory inclusion of child medical support), to provide health coverage for the minor child and spouse, directing the defendant to pay all of the unreimbursed medical expenses of a spouse or minor child of the defendant to the provider or to the plaintiff when he or she has paid for the medical treatment, and directing the defendant to make or continue to make rent or mortgage payments on the residence of the plaintiff to the extent that the defendant has a duty to support the plaintiff or other dependent household members. The support order shall be temporary, and any beneficiary of the order must file a complaint for support under the provisions of Chapters 43 (relating to support matters generally) and 45 (relating to reciprocal enforcement of support orders) within two weeks of the date of the issuance of the protection order. If a complaint for support is not filed, that portion of the protection order requiring the defendant to pay support is void. When there is a subsequent ruling on a complaint for support, the portion of the protection order requiring the defendant to pay support expires.

[25] For example, Pennsylvania's custody statue (23 Pa. Cons. Stat. Ann. § 5310 et seq.) is commonly interpreted to encourage each parent to have as much contact as possible with his or her child, but the PFA Act (23 Pa. Cons. Stat. Ann. § 6108(a)(4)) acknowledges that violence between the parents is a factor the court can consider in ordering limited contact. But a parent who denies the other parent access to the child because of fear of abuse may be viewed as obstructing the goals of the Custody Act.

There is also potential disparity between the PFA Act and Child Protective Services Act (23 Pa. Cons. Stat. Ann. § 6301), which allows a court to remove children from a parent who hasn't protected that child from witnessing domestic violence in the home. This act thereby establishes the possibility that a domestic violence survivor whose child witnesses the abuse could have the child removed from her custody because she failed to protect him from witnessing the act. *See* 23 Pa. Cons. Stat. Ann. § 6108(a)(4) set forth below:

The order or agreement may include:

(4) Awarding temporary custody of or establishing temporary visitation rights with regard to minor children. A defendant shall not be granted custody, partial custody or unsupervised visitation where it is alleged in the petition, and the court finds after a hearing under this chapter, that the defendant abused the minor children of the parties or where the defendant has been convicted of violating 18 Pa. Cons. Stat. Ann. § 2904 (relating to interference with custody of children) within two calendar years prior to the filing of the petition for protection order. When the court finds after a hearing under this chapter that the defendant has inflicted serious abuse upon the plaintiff or a child, the court may require supervised custodial access by a third party. The third party must agree to be accountable to the court for supervision and must execute an affidavit of accountability. Where the court finds after a hearing under this chapter the defendant has inflicted serious abuse upon the plaintiff or a child, or poses a risk of abuse toward the plaintiff or a child, the court may award supervised visitation in a secure visitation facility or may deny the defendant custodial access to a child. If a plaintiff petitions for a temporary order under Section 6107(b) (relating to hearings) and the defendant has partial, shared, or full custody of the minor children of the parties by order of court or written agreement of the parties, the custody shall not be disturbed or changed unless the court finds that the defendant is likely to inflict abuse upon the children or to remove the children from the jurisdiction of the court prior to the hearing under Section 6107(a). Where the defendant has forcibly or fraudulently removed any minor child from the care and custody of a plaintiff, the court shall order the return of the child to the plaintiff unless the child would be endangered by restoration to the plaintiff. Nothing in this paragraph shall bar either party from filing a petition for custody under Chapter 53 (relating to custody) or under the Pennsylvania Rules of Civil Procedure. In order to prevent further abuse during periods of access to the plaintiff and child during the exercise of custodial rights, the court shall consider, and may impose on a custody award, conditions necessary to assure the safety of the plaintiff and minor children from abuse.

[26] Bloom Testimony, *supra* at 164; Afanador Testimony, *supra* at 95.

[27] Bloom Testimony, *supra* at 164.

[28] Testimony of Sharon Lopez, Harrisburg Public Hearing Transcript, pp. 17–18 [hereinafter Lopez Testimony].

[29] See Chapter 9 for a full discussion of this perception.

[30] Donohue Testimony, *supra* at 11.

[31] Ariola-Rivera Testimony, *supra* at 2.

[32] Bloom Testimony, *supra* at 167; Afanador Testimony, *supra* at 104.

[33] Testimony of Beata Peck Little, Wilkes-Barre Public Hearing Transcript, pp. at 16–17.

[34] *Id.* at 14–15.

[35] Begler Report, *supra* at 4, 8; Dubin Written Testimony, *supra* at 5–7.

[36] Scheppele, Kim Lane, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of the Truth*, 37 New York Law School L.J. 123, 144 (1992).

[37] Dubin Written Testimony, *supra* at 6.

[38] *Id.* at p. 6.

[39] Bittner Testimony, *supra* at 95–96.

[40] Afanador Testimony, *supra* at.93.

[41] Ariola-Rivera Testimony, *supra* at 40–41.

[42] Women's Center and Shelter of Greater Pittsburgh; The Lighthouse (Philadelphia); PA Coalition Against Domestic Violence; and Women Against Abuse Legal Center (Philadelphia) all report representation of men as survivors of domestic violence.

[43] *See* Nancy Knauer, *Same-Sex Domestic Violence: Claiming A Domestic Sphere While Risking Negative Stereotypes*, 8 Temp. L. Rev. Pol. & Civ. Rts. 325 (1999).

[44] Begler Report, *supra* at 4.

[45] U.S. Department of Justice, Bureau of Justice Statistics, *Homicide Trends from 1976–1999* (2000); *available at* http://www.ojp.usdoj.gov./bjs.

[46] 18 U.S.C. §922 (g)(h).

[47] Additionally, Pennsylvania criminal law makes possession of a weapon in violation of a PFA order a misdemeanor of the first degree. 18 Pa. Cons. Stat. Ann. § 6105(c)(6). *See also* the relevant section of the PFA Act at 23 Pa. Cons. Stat. Ann. § 6108(a)(7) set forth below:

> Ordering the defendant to temporarily relinquish to the sheriff the defendant's weapons which have been used or been threatened to be used in an incident of abuse against the plaintiff or the minor children and prohibiting the defendant from acquiring or possessing any other weapons for the duration of the order and requiring the defendant to relinquish to the sheriff any firearm license the defendant may possess. The court's order shall provide for the return of the weapons and any firearm license to the defendant subject to any restrictions and conditions as the court shall deem appropriate to protect the plaintiff or minor children from further abuse through the use of weapons. A copy of the court's order shall be transmitted to the chief or head of the police force or police department of the municipality and to the sheriff of the county of which the defendant is a resident.

[48] Bloom Testimony, *supra* at 158.

[49] Begler Report, *supra* at 9; Dubin Written Testimony, *supra* at 12–13.

[50] Judicial Checklist, prepared by the Judicial Subcommittee of the ABA's Commission on Domestic Violence. *See* Dubin Written Testimony, *supra* at 13.

[51] Lopez Testimony, *supra* at 17.

[52] Bittner Testimony, *supra* at 93–96.

[53] Dubin Written Testimony, *supra* at 11.

[54] As discussed previously, the PFA Act mandates the expiration of the temporary award unless a complaint for permanent support is filed within two weeks of the date of the final order.

[55] Coleman Testimony, *supra* at 116.

[56] 23 Pa. Cons. Stat. Ann. § 6108(a)(4)

[57] Bloom Testimony, *supra* at 161–162.

[58] American Psychological Association Presidential Task Force on Violence and the Family, *Violence and the Family* 40 (1996) [hereinafter APA Report].

[59] Susan Schechter and Jeffrey L. Edleson, *In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies,* briefing paper prepared for the conference Domestic Violence and Child Welfare: Integrating Policy and Practice for Families, 1994. *See also* Dubin Written Testimony, *supra* at 10–11.

[60] Bittner Testimony, *supra* at 93; Coleman Testimony, *supra* at 122.

[61] Coleman Testimony *supra* at 121–123.

[62] APA Report, *supra*.

[63] Donahue Testimony, *supra* at 8.

[64] *Id*. at 5–6.

[65] Lopez Testimony, *supra* at 22.

[66] *Fonner v. Fonner*, 731 A.2d 160 (1999); *Dye v. McCoy*, 423 Pa. Super. 334, 621 A.2d 144 (1993); *Snyder v. Snyder*, 427 Pa. Super. 494, 629 A.2d 977 (1993).

[67] *Commonwealth v. Snell*, ___ Pa. Super. ___, 737 A. 2d 1232 (1999).

[68] The Gender Bias Task Force of Texas Final Report, p.72 (1994) [hereinafter Texas Report].

[69] The Report of the Gender Bias Study of the Supreme Judicial Court, Commonwealth of Massachusetts, p. 80 (1989) [hereinafter Massachusetts Report].

[70] Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts, p. 138 (1997).

[71] Massachusetts Report, *supra* at 90.

[72] A Massachusetts civil abuse statute prohibits the awarding of temporary custody or visitation to batterers.

[73] Texas Report, *supra* at 68.

[74] Report of the New York Task Force on Women in the Court, Fordham Urban Law Journal, Vol. XV, Number 1 (1986–1987), p. 46.

[75] Massachusetts Report, *supra* at 92.

[76] The training should include but not be limited to:

a. the dynamics of domestic violence;

b. the psychological characteristics of abusers and survivors;

c. the impact of domestic violence on children and basic child development;

d. the racial stereotypes and cultural impediments that may inhibit minorities and persons of various ethnic backgrounds from coming forward or proceeding with domestic violence cases;

e. the procedural and substantive laws that affect the processing, implementation, and enforcement of PFA orders in domestic violence cases;

f. the availability of advocacy programs, shelters, and other related social services agencies for persons who have experienced domestic violence; and

g. related state and federal laws concerning weapons, custody, spousal and child support, advocacy, confidentiality, and criminal offenses.

11 SEXUAL ASSAULT

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INTRODUCTION

Law enforcement officials consider sexual assault to be the most underreported violent crime in America. Nearly 75 percent of the survivors[1] of sexual violence nationwide do not report the incidents, according to official estimates.

Statistics demonstrate that sexual violence is occurring with frequency in communities across the nation. Every 46 seconds a rape occurs somewhere in the United States; this translates into 1.3 rapes every minute, 78 every hour, 1,871 every day, and 683,000 every year.[2] Moreover, sexual assault is undeniably a gender-based crime. According to recent statistics released by the U.S. Department of Justice, 89 percent of reported sexual assaults were against women and 11 percent were against men.[3] One national study revealed that 17.7 million women in the United States have experienced rape or attempted rape at some time in their lives.[4]

The exact prevalence of rape and sexual assault is difficult to determine, however, because the crime is so underreported. In fact, law enforcement officials consider sexual assault to be the most underreported violent crime in America.[5] Nearly 75 percent of the survivors of sexual violence nationwide do not report the incidents, according to official estimates.[6] This is the case for a variety of reasons. First, sexual violence differs from all other crimes in that it hurts individuals at the most personal level.[7] It is taboo to discuss the subject in many sectors of our society, and the survivor is often blamed for instigating the crime through suggestive dress or behavior. Second, about 22 percent of survivors are raped by intimates such as husbands or boyfriends, 47 percent by acquaintances and 2 percent by other relatives.[8] The circumstances of acquaintance rape add to the discomfort and shame of survivors, and often diminish their credibility in the eyes of the justice system. When a survivor is a person of color, she is even less likely to report a sexual assault because she may perceive that the system is already predisposed against her.[9]

Statistics reveal a similar reluctance on the part of survivors in Pennsylvania to report these offenses to authorities. In 2001, Pennsylvania police departments received 3,139 forcible rape reports, but the actual number would likely have been closer to 10,000 if the rate of unreported rapes had been taken into account, and the number would have been even higher if

rape crisis center statistics had been considered.[10] In fiscal year 2001–2002, Pennsylvania Coalition Against Rape (PCAR) crisis centers provided counseling services to 11,616 female survivors 18 years of age and older,[11] and served 8,840 female survivors under age 18.[12]

Clearly, there is a pressing need to address crimes of sexual violence in our society and, in particular, the manner in which the justice system responds to such crimes. While most commentators recognize recent significant improvements in the way the law enforcement community treats survivors of sexual violence after an assault, the medical community and the public at large remain concerned about the manner in which the justice system investigates and prosecutes crimes of sexual violence.[13]

Focus of the Inquiry

In its study of sexual assault, the Committee sought to determine how the Pennsylvania justice system processes rape and sexual assault cases and how survivors are treated throughout the legal process. The inquiry focused on the experiences of sexual assault survivors, and also examined the perceptions and views of other parties involved in prosecuting and defending sexual assault cases, including survivors' advocates, prosecutors, and defense attorneys. Of special interest to the Committee were survivors' impressions of their experiences in the justice system and their suggestions about ways that the experiences might be improved. Attorneys involved in the prosecution of sexual assault cases were asked to provide their insights as to whether those cases are handled in the same manner as other serious felonies with regard to bail, sentencing, and assignment of credibility to survivors; whether cases where the parties know each other are investigated and prosecuted differently from cases involving strangers; and other pertinent issues.

Specific Research Methods

The Committee obtained data and guidance through four primary avenues of inquiry: a survey that was disseminated to district attorneys and public defenders throughout the Commonwealth of Pennsylvania; three roundtable discussions led by a trained facilitator and attended by rape and sexual assault survivors and their advocates; a review of testimony from witnesses at the Committee's six public hearings; and other state task force reports and studies on the issue.

SYNOPSIS OF FINDINGS AND RECOMMENDATIONS

The research of the Committee reveals that in Pennsylvania, as in other states, many survivors of rape and sexual assault, by reason of their experiences, have low expectations that their cases will be treated with objectivity and due diligence. Stereotypical attitudes about rape and about women in general are still present in the society at large and in the minds of some judges, prosecutors, defense attorneys, and police officers. The biases are most apparent in cases in which the survivor knows the perpetrator. Many survivors reported that some judges and attorneys seemed to hold them responsible for the offenses perpetrated against them by acquaintances. Survivors also noted serious deficiencies in the investigation of, and trial procedures for, sexual assault cases—deficiencies that can effectively re-traumatize survivors. For example, survivors cited as particularly difficult the often repetitive aspects of the investigation stage, during which they can be subjected to multiple interviews and forced to recall and retell their stories of sexual and physical violence many times. Survivors reported that trial delays, caused when defendants were granted a series of continuances, created additional stress and prolonged the ordeal, making it difficult for survivors to put the assaults behind them.

In light of this information, it is clear that better training of all persons involved with sexual assault cases is necessary to ensure that these cases are handled more effectively and that survivors are treated with sensitivity. In particular, training about sexual violence should be provided to judges, court staff, prosecutors, and defense attorneys. Police officers should be encouraged to receive similar training. This training should address the manifold legal and social issues concerning rape and sexual assault. Beyond training, there is a need for significant changes in the procedures employed by the law enforcement community and by prosecutors' offices during the investigation and prosecution of sexual assault cases. These changes should include:

- Coordinating a process for interviewing survivors that reduces the necessity of repeated interviews;
- Reducing the number of continuances granted to both parties to ensure a speedier trial;
- Assigning only experienced prosecutors to cases involving sexual assaults;
- Incorporating vertical prosecution by assigning a single prosecutor to handle a case from start to finish;[14]
- Notifying survivor advocates when a sexual assault survivor enters the criminal justice system; and
- Improving courtroom facilities in order to protect the mental and physical well-being of survivors.

RESEARCH METHODOLOGY

SURVEY OF PROSECUTORS AND DEFENSE ATTORNEYS

With the assistance of Nancy Hirschinger, Ph.D., assistant professor at Widener University and former research consultant with the Center for Clinical Epidemiology and Biostatistics at the University of Pennsylvania, the Committee designed a survey that was distributed to all district attorney and public defender offices throughout Pennsylvania. The survey was designed to assess whether sexual assault offenses are prosecuted in a way that meets a survivor's needs without violating the rights of the defendant.

THE SURVEY INSTRUMENT AND METHOD

The survey, attached in Appendix Vol. III, consisted of 60 questions, 16 of which were both quantitative and open-ended. Most of the quantitative questions elicited "yes" or "no" responses or provided a three-point scale that allowed respondents to choose "lower," "the same," or "higher."

The survey addressed the following issues related to the prosecution of rape and sexual assault cases: differences in pre-trial release, bail amounts, sentencing, willingness to prosecute, and treatment of survivors in assaults of a sexual nature compared to other types of assaults; treatment of survivors with a prior relationship with the assailant compared with those who did not know their assailant; the influence of the survivor's personal characteristics, such as socioeconomic status, style of dress, and patterns of speech, on the conduct of the prosecutors, defense attorneys, and the judiciary; differences in the credibility accorded survivors by prosecutors, defense attorneys, and judges; the frequency of the use of weapons in the commission of sexual assault; evidence of coercion and its effect on the decisions of prosecutors, judges, and juries; a comparison of the use of polygraphs by prosecutors for survivors of sexual assault versus other types of assault; the influence of survivor witness statements on the court; the layout of court facilities relative to the needs of survivors; the needs of non-English speaking survivors of sexual assault; the charging of defendants in sexual assault offenses; and the effects of the survivor's race, ethnicity, and gender upon the prosecution and trial of sexual assault offenses.

A total of 86 respondents answered the survey, including 46 district attorneys (54 percent) and 40 public defenders (46 percent). The age of the respondents ranged from 28 to 70. Approximately 65 percent of the

respondents were men, 30.5 percent were women and most of the respondents were white (97.6 percent). All but two of the respondents are currently practicing law, and have been for three to 37 years; the two exceptions left the answer blank. And in the past two years, each respondent, or his/her office, handled between one and 275 sexual assault or rape cases.

According to the survey analysis, attached in Appendix Vol. III, prepared by Barry Ruback, professor of criminology at The Pennsylvania State University, and his graduate assistant, Amy L. Anderson, most of the survey results are based on frequencies, meaning the percentage of respondents who fall into each category. In many cases, statistical tests were conducted using a chi-squared test when appropriate (i.e., 2 X 2 tables). For other questions, a univariate analysis of variance was conducted. This type of analysis (F tests) determined whether there were main effects of independent variables as well as interaction effects of the main independent variables on the outcome of interest.

The small sample size (n=86) makes a determination of statistical significance difficult, but if significance is achieved it means that there is a strong relationship between the variables. The three main independent variables for respondents were age, gender, and respondents' job classification as a prosecutor or defense attorney. Since there was virtually no variation in the race of respondents, results were not analyzed on that basis. When high correlations occurred, the relationship of other independent variables was assessed. Statistically significant findings are noted as such, with the appropriate test included in parentheses.

FINDINGS

Bail and sentencing

More than 39 percent of respondents [to the survey]…reported that the sentence length in cases where the parties were acquainted was shorter than the sentence length where the parties were strangers.

With regard to bail and sentencing, the survey indicated that defendants were not receiving lower bail or shorter sentences in rape or sexual assault cases when compared with other felonies of the same class. There were differences, however, in bail decisions for rape and sexual assault cases when the

individuals involved knew each other. While over half of the respondents reported that the bail was the same whether the parties were acquainted with each other or not, approximately 39 percent of the respondents noted that bail was lower when the survivor and offender were acquainted. Only 3.7 percent reported bail being higher in such cases.

In terms of sentencing, more than 95 percent of respondents reported that sentences in rape and sexual assault cases were the same or higher than those for other felonies of the same class. More than 60 percent of respondents reported that sentence length in cases where the parties were acquainted was the same or higher than sentence length in cases where the parties were strangers. More than 39 percent of respondents, however, reported that the sentence length in cases where the parties were acquainted was shorter than the sentence length where the parties were strangers.

Treatment of survivors and use of court facilities

More than 91 percent of respondents said judges treated survivors of rape or sexual assault with the same sensitivity as survivors of other assaults, and that judges assessed the complaints objectively. Additionally, almost 88 percent of respondents felt that judges treated allegations of emotional or psychological coercion the same as they did physical compulsion.

Three questions were combined in a scale (alpha=.93) to assess whether respondents believed that judges understood the psychological and long-term effects of sexual assault on adult and juvenile survivors. This scale had a mean of approximately 2.5 out of 3, suggesting that most respondents indicated that judges understood the impact. However, the findings also indicated that although most respondents felt this way, female respondents were significantly more likely ($F=7.0$, $p<.02$) to think judges did not understand the psychological and long-term impact on survivors.

More than 96 percent of respondents noted that prosecutors did not subject survivors of sexual assault or rape to polygraph examinations.

Three survey questions addressed the issue of court facilities and how survivors were treated before trial. Eighty-two percent of respondents reported that there were separate waiting facilities for the survivor and the defendant in rape or sexual assault cases. Additionally, 89 percent of respondents reported that survivors of sexual assault or rape were sequestered with a survivor's advocate. When asked whether results in these cases differed if survivor advocates

accompanied survivors, about 80 percent of respondents said that results did not differ.[15] There was a statistically significant difference based upon the age of the respondent in the answer to this question. Among prosecutors and defense attorneys who answered the survey, those under the age of 44 were statistically more likely than the older respondents ($x=5.0$, 1df; $p<.03$) to believe that the survivor advocate made a difference in the outcome of the case.

Impact of a prior or current relationship between survivor and assailant

The impact of a relationship between the survivor and the assailant was also examined in the survey. Respondents were asked to consider whether a past or present relationship (spouse, acquaintance, or family member) between the survivor and the assailant affected the manner in which cases were presided over, prosecuted, or defended by judges, prosecutors, and defense attorneys.

Eighty-three percent of the respondents reported no difference in the manner in which judges preside over such cases. The percentage of respondents who reported no difference declined, however, when respondents were asked about prosecutors rather than judges. Sixty-seven percent reported no difference, but, significantly, 33 percent of respondents did report a difference in the manner in which a case is prosecuted where the survivor and the assailant knew each other. This was attributed to a shift in responses by male public defenders, who were more likely than their female counterparts to report a difference in the prosecution of cases in this context.

Many survey respondents noted that defense attorneys handled acquaintance and stranger cases differently. Sixty-two percent of respondents reported that defense attorneys defended a rape case differently when the parties have a current or past relationship or acquaintance.

When asked whether acquaintance rape or sexual assault cases were brought to trial less often, more often or the same as stranger cases, 64 percent of the respondents indicated that acquaintance cases were just as likely to go to trial. Thirty percent, however, said acquaintance cases were less likely to be brought to trial. In terms of cross-examination, more than 61 percent of respondents reported that survivors of acquaintance rapes or sexual assaults were subjected to more extensive cross-examination than were survivors in rape and sexual assault cases involving strangers. The respondents who were

more likely to believe that survivors were subjected to more extensive cross-examination were district attorneys (x=10.1, 1 df; p=.001), and particularly female district attorneys (F=7.57, p,.01).

Impact of survivors' personal characteristics on trial tactics

Survey responses revealed that trial tactics employed by defense attorneys in rape and sexual assault cases were also influenced by the personal characteristics of survivors, such as manner of dress, hair styling, and pattern of speech. Forty-eight percent of respondents agreed that defense attorneys reference such characteristics in order to discredit survivors. Similarly, more than 23 percent of respondents said a survivor's low socioeconomic status affected trial strategies regarding, for example, the scope of cross-examination and the acceptance of plea bargains made by defense attorneys. Likewise, almost 21 percent of respondents said high socioeconomic status impacted the same types of trial strategies.

Respondents were also asked to list the reasons they thought socioeconomic status mattered for either prosecutors or defense attorneys. The most frequent answers included the following:

- Survivors with higher socioeconomic status have more resources at their disposal to assist them in securing a conviction (e.g., availability and use of expert witnesses or private investigators);
- Survivors with higher socioeconomic status elicit more sympathy, possibly as a result of more family or community support;
- Survivors with lower socioeconomic status are accorded less credibility in the minds of many parties, including the jury;
- Survivors with lower socioeconomic status are more likely to be perceived as having a prior record or as being drug or alcohol users;
- More aggressive cross-examination may be allowed where there is a survivor of lower socioeconomic status; and
- Socioeconomic status of the survivor may affect decisions with regard to challenges to be exercised in jury selection.

Credibility of survivors

Survey respondents were asked questions about whether law enforcement officers, prosecutors, and judges accorded survivors of sexual assault or rape less, more, or the same level of credibility, as compared with victims of other types of assaults. The majority of the respondents reported that rape or sexual assault survivors were treated the same as victims of other assaults. The responses varied, however, on the basis of whether the respondent was a prosecutor or defense attorney. Prosecutors generally felt that law enforcement officers, judges, and defense attorneys accorded rape and sexual assault survivors less credibility than survivors of other assaults. Prosecutors saw many reasons behind the effect, including inaccurate stereotypes about women; prior failure of survivors to follow through with prosecutions; and preconceived and erroneous ideas about the crime of rape. Public defenders, in contrast, felt that law enforcement officers, judges, and prosecutors accorded rape and sexual assault survivors more credibility than victims of other types of assaults.

Treatment of juvenile survivors

Asked whether juvenile survivors of rape or sexual assault were treated the same or differently from adult survivors, respondents divided almost evenly, with 51 percent reporting that juveniles were treated differently. The most frequently reported differences included closed courtrooms; preparing juveniles for the court experience by showing them the courtroom before trial or explaining procedures in detail; protecting juveniles from cross-examination; the softening of cross-examination by public defenders to avoid alienating the jury; the presence of a child advocate, a special team or services for the juvenile survivor; additional credibility accorded to juveniles by judges; better understanding of reasons for a juvenile survivor's delay in reporting an offense; and greater interest in convictions and stiffer penalties when the survivor was a juvenile.

Impact of gender, race, and ethnicity of survivor on trial

Two survey questions were designed to evaluate how respondents viewed judges' reactions to female and male survivors of rape and sexual assault. The survey asked whether judges assessed the credibility of men and women in the same manner; and whether judges treated men and women with the same degree of sensitivity. More than 91 percent of the respondents said judges assessed the credibility of male and female survivors in the same manner. However, 17 percent of the sample did not respond or indicated that there were too few male survivors to answer the question. With regard to sensitivity, slightly fewer respondents (80 percent) reported that judges were likely to treat male survivors with the same degree of sensitivity as they do females.

The survey also contained three questions relating to whether the gender of the judge, the prosecutor, or the defense attorney had an effect on the outcome of a rape or sexual assault case. The overwhelming majority of respondents reported that the gender of the judge, prosecutor, or defense attorney had no impact on the outcome of rape and sexual assault cases.

Another question asked whether the race or ethnicity of the survivor affected the outcome of a rape or sexual assault case. Almost 88 percent of respondents reported no impact. Among the remaining 12 percent of survey respondents who felt that the race or ethnicity of the survivor did affect cases, all gave reasons that pertained to jury attitudes. Respondents cited examples that included the perceived bias of white jury members against survivors of color; and the perceived unwillingness of jurors to assign the same credibility to African American survivors that they assigned to white survivors.

The questions regarding race and ethnicity appeared to have gender implications. A chi-squared test revealed a significant effect for gender ($x=12.0$, 1df; $p=.001$) among respondents, with men less likely to report that race or ethnicity had an impact on the outcome of a case and women more likely to report that race or ethnicity had an impact.

Use of voir dire

With respect to *voir dire*, there were differences in responses as to whether more *voir dire* would help to uncover bias in potential jurors, with more than 62 percent of respondents answering in the affirmative. While males were split in terms of whether more *voir dire* would be helpful, women were more likely to believe that more *voir dire* would be helpful. In contrast, district attorneys were more likely to think more *voir dire* would not be useful to uncover bias in potential jurors.

Need for training for prosecutors and defense attorneys

Respondents were asked to identify the nature of training available to them, and to indicate whether additional training would be advisable. The graph below depicts the responses to this question:

TABLE 1
Training Offered

Training Offered	Number
Special services training: (e.g., sexual abuse, domestic violence)	16
Mentoring by experienced attorneys	15
Continuing legal education (CLE)	14
PA District Attorney s Association or PA District Attorney s Institute training classes	14
Other training	14

Respondents were also asked to indicate the type of assistance that could better prepare them to handle rape/sexual assault cases. The most common responses included the following:

- Funding to consult with experts;
- Seminars with hands-on experience;
- More training in jury selection and case preparation;
- Multidisciplinary training and medical evidence training; and
- More funding for prosecution.

Other questions of significance

The survey contained several general questions that do not fit under any of the categories set forth above. First, approximately 70 percent of respondents reported that survivors of rape or sexual assault sometimes withdrew their complaints or failed to follow through with criminal proceedings against assailants. Analysis of the responses found a significant effect for gender (x^2 = 6.3, 1 df; p<.02) and the respondent's job classification as a prosecutor or a defense attorney (x^2 = 8.5, 1 df; p<.01), with males and district attorneys more likely to say that the survivors failed to follow through. Second, when asked whether survivors encouraged sexual assaults through behavior toward the assailants preceding the incidents, 62 percent of respondents said the survivors did not. Chi-squared tests suggested a significant effect in the responses for both gender (x^2 = 5.9, 1 df; p<.02) and respondent's job classification (x^2 = 5.0, 1 df; p<.03), with females and district attorneys more likely to report in the negative. Third, respondents were divided on a question that asked their perceptions of whether survivors truthfully reported complaints against defendants. Approximately 52 percent reported that they felt that most survivors told the truth and 49 percent of respondents reported that survivors did not. Chi-squared tests found a significant relationship with job classification (x^2 = 27.1, 1 df; p<.001) in the responses, with district attorneys much more likely to say "yes" and public defenders much more likely to say "no."

ROUNDTABLE DISCUSSIONS

In addition to the survey, the Committee conducted roundtable discussions in Allegheny, Delaware, and Jefferson counties. The locations were chosen to represent a range of geographic regions and a balance of urban, suburban, and rural participants. Participants included survivors of rape and sexual assault as well as persons who advocate on their behalf. Survivor participants were white and African American women, ages 17 to over 50, with a range of experiences in the criminal justice system. Each roundtable had seven to 12 participants led by the same facilitator, who had been trained in both facilitation and in the legal aspects of sexual violence.

The purpose of the roundtable discussions was to assess the nature of survivors' experience with the various aspects of the criminal justice system. The roundtables provided a unique opportunity for the Committee to gather information directly from survivors themselves. All participants were women, and most of the women were survivors of either rape or sexual assault. In some instances, participants were parents of child survivors.

The facilitator asked the survivors three primary questions:

1. What is it that occurred that brought you into contact with the criminal justice system?
2. Given everything that has occurred, what would you say was at the heart of your experience in the criminal justice system?
3. If possible, what would you change about your experience within the criminal justice system?

The survivors extensively discussed three main areas of concern in each of the roundtable sessions. First, roundtable participants were concerned that law enforcement officials and prosecutors failed to investigate and prosecute cases thoroughly when the survivor knew the assailant. Second, survivors widely believed that law enforcement officials did not understand the serious, deeply disturbing, and long-term effect of sexual assault upon an individual. Third, survivors and advocates recounted many problems with the investigation and trial process, including repetitious interviews, multiple continuances that repeatedly delayed the trial, unprepared and insensitive prosecutors, and inadequate physical accommodations in the courthouse. A copy of the report prepared by the roundtable discussion facilitator is attached in Appendix Vol. III.

Perceptions of the criminal justice system were remarkably similar at the three roundtables. Most frequently expressed were the following concerns:

DIFFERING RESPONSES BY LAW ENFORCEMENT OFFICERS AND PROSECUTORS IN SEXUAL ASSAULTS INVOLVING ACQUAINTANCES.[16]

In situations in which survivors of rape and sexual assault knew the perpetrator, roundtable participants perceived a distinct bias by law enforcement officers and prosecutors against the survivors. Survivors said the bias affected the extent and thoroughness of the investigation, as well as whether a case would be prosecuted.

Roundtable participants also expressed a belief that, when the survivor and the defendant knew each other, law enforcement officers were less inclined to believe the survivor. In such cases, a survivor's credibility is often at issue; participants frequently reported that law enforcement officers appeared to proceed as if the charges had been fabricated and to search for a motive to support that view. Respondents said that even when law enforcement officers appeared to believe survivors, they often discouraged survivors from pressing charges or pursuing the cases, explaining that convictions were difficult to obtain.

In situations in which survivors of rape and sexual assault knew the perpetrator, roundtable participants perceived a distinct bias by law enforcement officers and prosecutors against the survivors. Survivors said the bias affected the extent and thoroughness of the investigation, as well as whether a case would be prosecuted.

When a survivor knew the defendant, participants reported that some law enforcement officers ignored extensive evidence offered by the survivor. For example, participants noted that police did not always speak to available witnesses. In another example, police declined to go to the survivor's home to search for a bloodstained towel that she reported had been used during the rape.

Survivor participants identified race as an added factor that impeded the investigation and prosecution of sexual assault, particularly in cases involving assailants known to the survivor. All survivors of color who participated in the roundtable discussions perceived some level of racism among some law enforcement officers and some prosecutors. The participants said the perception of racism was particularly apparent when the defendant was a person of color and when the survivor of color knew the defendant.

Other issues raised in the roundtable sessions included male-on-male rape and sexual assault, and cases in which the survivor has an history of illicit drug use. Participants were asked whether law enforcement officers investigate such cases thoroughly. One participant recounted an incident involving a male survivor who was sexually assaulted while hitchhiking. The survivor immediately went to a local hospital emergency room and told police the name stitched on the man's shirt and the license plate number of his vehicle. The survivor, who had recently been in a drug rehabilitation program, ended up being accused of exchanging sex for drugs. When police finally checked the survivor's story, they found that the man he named had a sexual assault record. Presenting this example at the roundtable, an advocate from a sexual assault center explained that the survivor had later committed suicide.

INSENSITIVITY DISPLAYED BY LAW ENFORCEMENT COMMUNITY AND PROSECUTORS

Frequently, a survivor's contact with a law enforcement agency following a rape or sexual assault is her first experience with the criminal justice system. The agency may be a city or borough police department, the general or special units of a county police department, or the Pennsylvania State Police. Many roundtable participants, however, expressed serious concern about the lack of understanding and sensitivity that law enforcement officers exhibit towards survivors of rape and sexual assault.

Participants described situations in which a survivor might be reluctant to report a sexual assault offense or might feel compelled to continue a relationship with the perpetrator and delay reporting the offense, particularly in situations in which the survivor knew the perpetrator. In such circumstances, survivors at the roundtables said law enforcement officials were reluctant to believe the survivor and to file criminal charges. One participant described her need to remain in her home for six months after being raped and assaulted by

her husband. The police eventually helped the survivor seek a protection from abuse order, but only after saying they had doubted her credibility because she had remained in the home after the assault. Another participant reported an instance of severe insensitivity by a police officer after she reported being raped by her husband, from whom she had been separated from for several months. Following the incident, the officer put the woman in the back of the police car and said he should have a third person present in the car so that he would not be accused of rape as well.

Similarly, participants talked about prosecutors who consistently displayed a lack of knowledge, biased and stereotypical beliefs, and extreme insensitivity to the needs of survivors. Describing the problems as chronic, participants cited a litany of examples, including prosecutors unwilling to prosecute unless a conviction appeared to be certain, or minimizing the severity of the crime if the survivor knew the perpetrator. Roundtable participants also described complaints never being prosecuted and cases taking an unreasonable length of time or occurring only because of the survivor's persistence.

Some participants described prosecutors who were not prepared, who met with survivors for the first time on the day of trial, and who had inadequate knowledge about the underlying facts. Participants also called prosecutors insensitive to the shame, embarrassment, and anxiety experienced by survivors as they proceeded to trial. Participants described inadequate waiting facilities where survivors were forced to stand in court hallways with the perpetrator and/or his family and support network—a description contrary to the perceptions of prosecutors and defense attorneys in the separate survey. One roundtable participant described the prosecutor's conducting conversations with her in the hallways of the courthouse. When the embarrassed survivor complained, the prosecutor said, "Don't worry. No one will hear you," even though they were surrounded by strangers.

The initial incident report is often a difficult decision because of shame and fear on the part of a rape or sexual assault survivor. When prosecutors exhibit insensitive attitudes and show their reluctance to pursue the case, the survivor's shame and fear intensify, contributing to the long-term harm that a survivor experiences.[17]

PROBLEMS WITH THE INVESTIGATION AND THE TRIAL PROCESS WHICH RE-TRAUMATIZE SURVIVORS

Roundtable participants also described what they perceived as serious deficiencies in investigation and trial procedures that cause discomfort for survivors. As soon as survivors of rape and sexual assault enter the criminal justice system, they are subjected to repeated interviews and duplicate elements in the investigation. It is difficult for survivors—particularly child survivors—to recall and retell their stories of sexual and physical violence.

In addition, survivors said they were often frightened or traumatized by the presence of the defendants in the courtroom—in some cases because the defendants had threatened them with severe physical violence if they ever revealed what happened.

Even when the investigation is properly completed, many sexual assault survivors note that the defendants are able to delay the trial process by changing lawyers or seeking continuances for additional investigation time. The delays are often permitted without regard for the survivors, causing them additional stress as well as economic hardship. In such cases, survivors may arrange for days off from work, only to arrive at the scheduled times and learn that matters have been or are going to be postponed.

PUBLIC HEARING TESTIMONY BY ATTORNEYS, ADVOCATES AND EXPERTS

The experiences and concerns of sexual assault survivors were also presented at six public hearings held by the Committee. Testimony was offered by advocates and attorneys who work with sexual assault survivors throughout Pennsylvania, and by academics who study sexual assault. The testimony echoed the recurring themes of this and other state task force reports: that victims believe they are not taken seriously; that a relationship with the perpetrator tends to minimize the seriousness of the crime; that there can be insensitivity and gender stereotyping; and that cultural, ethnic, and racial factors affect the outcome of cases.

In addition, there were speakers who noted positive trends. In particular, Jacqueline Mae Johnson, of the Pennsylvania Coalition Against Rape, said at the Erie hearing that she has had "the good fortune to work in a county where victim advocates, law enforcers, and prosecutors could sit down in the same room and talk honestly and respectfully with each other."[18]

In an analysis of the public hearing testimony, the Committee found several recurring themes:

CREDIBILITY OF SURVIVORS QUESTIONED BY LAW ENFORCEMENT OFFICERS, JUDGES, ATTORNEYS, AND JURORS

Many witnesses at the hearings complained that law enforcement officers, officers of the courts, and jurors do not accord appropriate credibility to survivors. At the Erie hearing, Joyce Lukima, training and technical assistance director of the Pennsylvania Coalition Against Rape, testified that fear of being blamed and not believed is the primary reason women either do not report sexual assault or delay in reporting it. "Our system reinforces the larger societal belief that a woman is somehow responsible for sexual assault committed against her," [19] Lukima said. "The victim of violence is held responsible for enticing the offender, luring him into committing a felony."[20] The implication of this attitude is that the behavior of the survivor somehow makes the offender less responsible for the assault. At least two witnesses reported that the physical maturity of a young girl or her sexual behavior prior to the assault often leads prosecutors to question the veracity of her story.[21] In a brutal rape by two 16-year-olds, a judge was reported as describing the 11-year-old survivor as "fresh and flirty."[22] In other cases, older women and married women may be accused of reporting an assault in order to cover up an affair or other illicit deed.[23]

INSENSITIVITY TO SURVIVORS ON THE PART OF JUDGES, PROSECUTORS, AND THE LAW ENFORCEMENT COMMUNITY

Joyce Lukima told about a judge who allowed a class of students to…observe as a 13-year-old girl testified about being sexually assaulted by her stepfather. Afterwards, what stood out most for the girl…was the fact that she had been forced to testify about a highly traumatic and personal situation in front of…her peers.

Another recurring theme in the public hearing testimony was that many people in the justice system are not generally aware of the seriousness of sexual assault and the difficulties that survivors experience afterwards. One witness described the situation clearly for the Committee: "Sexual assault is a crime of profound personal injury…the very nature of sexual assault frequently causes feelings of shame, humiliation, and degradation for its victims."[24]

People within the justice system may contribute to such feelings, perhaps without being aware that they are doing so. For example, Lukima told about a judge who allowed a class of students to enter the courtroom and observe as a 13-year-old girl testified about being sexually assaulted by her stepfather. Afterwards, what stood out most for the girl regarding her experience in the justice system was the fact that she had been forced to testify about a highly traumatic and personal situation in front of a group of her peers.[25] Additionally, survivors are routinely asked to discuss their assault in graphic detail, with little or no attention given to the stress and discomfort this can cause. Often, no one explains to the survivors why such detail may be necessary. On a final note, testimony at the hearings revealed significant misunderstandings over the nature of rape and sexual assault. As Ellen Kerr, crisis intervention coordinator of the Pennsylvania Coalition Against Rape, aptly put it, "Sexual assault cases still…hinge on the juror's perception of who rapes as well as the difference between what's sex and what's rape. And that's a distinction that needs to be made in this society. What's the difference between sex and rape? People don't understand it."[26]

ACQUAINTANCE WITH THE PERPETRATOR INFLUENCES TREATMENT OF SURVIVORS AND PROSECUTION OF CASES

Witnesses also testified about the disparity in treatment of survivors, depending on whether the assailant is an acquaintance or a stranger. At the Philadelphia hearing, witnesses testified about the myth that stranger rapes are more traumatic than acquaintance rapes. Witnesses noted that self-blame is likely to be higher when a woman is raped by an acquaintance, but that many judges and attorneys were less likely to believe an acquaintance rape survivor.[27] Witnesses also said a relationship with the perpetrator could have additional complications, especially in relation to childcare and custody. One witness testified about being sexually assaulted by her husband, and her experience with a judge who refused to prosecute the husband because he would have surely been found guilty. Asked to explain his logic, the judge reportedly asked the woman who would care for her and her children if her husband were sent to prison.[28] In other instances, witnesses observed that a woman could fear a spouse so much that she would do anything to remain safe and be able to see her children.

DISPARITY IN SENTENCING NOTED BY WITNESSES

A teacher convicted of statutory rape, aggravated indecent assault, and corruption of minors in a case involving students was sentenced to three years in a work-release program. His 17-year-old victim, who had been afraid to testify against the teacher, received a six-month contempt sentence for refusing to testify.

Another common observation at the hearings was that sentences for rape or sexual assault are lighter than for non-violent offenses. In Wilkes-Barre, a witness told about the day she watched a judge sentence a high school student to four months in prison for decapitating a statue with a sledgehammer, and then sentence another student to "completing his education" for hitting a woman with a hammer.[29] In another case, a man convicted of a separate offense subsequently raped a 15-year-old girl before he was imprisoned. For the rape, he received only a one-to-two-year sentence that he served concurrently with his original sentence.[30] In yet another case, a teacher convicted of statutory rape, aggravated indecent assault, and corruption of minors in a case involving students was sentenced to three years in a work-release program. His 17-year-old victim, who had been afraid to testify against the teacher, received a six-month contempt sentence for refusing to testify.[31]

LACK OF ADEQUATE REPRESENTATION FREQUENTLY REPORTED BY SURVIVORS AND ADVOCATES

Several witnesses testified that the courtroom environment is intimidating for sexual assault survivors. Survivors often do not know or understand the language of the system, and they are frequently not informed of the status of the case or actions taken by the defense. This is especially true when the survivor's native language is not English. Further, at the Pittsburgh hearing, Ellen Kerr testified about several assistant district attorneys exhibiting troubling behavior toward survivors. In one case, an assistant district attorney failed to meet with the survivor prior to the preliminary hearing, and then at the hearing told an advocate that her presence in the courtroom was unnecessary. Kerr also told about assistant district attorneys pressuring clients into accepting plea bargains that did not match the severity of the assaults. Finally, she noted that many survivors suffered from psychological problems or physical disabilities, including hearing and visual impairments, which were not properly accommodated by the courts.[32]

RACE AND ETHNICITY PLAY A ROLE IN THE INVESTIGATION AND PROSECUTION OF CRIMES OF SEXUAL VIOLENCE

Culture, race, and ethnicity can also influence the way a sexual assault crime is reported by the survivor and processed by the judicial system. Kerr explained, "Often all the participants in a courtroom are white except the defendant and the victim, including the jurors." Such a situation, she added, can leave a survivor wondering if an all-white jury might dismiss her experience; or wondering, in the case of a white survivor accusing a black man, if she might be assigned blame for associating with African Americans.[33] Jacqueline Mae Johnson, testifying at the Erie hearing, noted that, "Race plays a key factor in the comfort of individuals that are pursuing justice through the criminal justice system."[34] Johnson also noted that there was only one African American prosecutor out of 14 in her county and that the racial imbalance in the police department was similar. She explained that reporting a sexual assault could be especially problematic for African American women because they perceived that African American men were treated unfairly by the justice system.[35]

At the Wilkes-Barre public hearing, Beata Peck Little, executive director of Women's Resources of Monroe County, testified to the perceived bias against Latinos and African Americans who have recently moved to the northeastern region of the state from New Jersey or New York. She said judges and attorneys failed to understand ethnic and cultural differences that might explain why a woman would wear revealing clothes or why she would stay in an abusive relationship.[36] Judy Ariola-Rivera, bilingual and bicultural domestic violence counselor at Women's Resources of Monroe County, also testified in Wilkes-Barre about an attorney telling his client that he understood women from her country were sexually aggressive and flamboyant.[37] Such stereotypes can influence whether a prosecutor pursues a case. At the Philadelphia hearing, Iraida Afanador, associate executive director of The Lighthouse, noted the reluctance by prosecutors to pursue cases brought by women of color from certain areas of the city; the prosecutors, she said, did not want to bring cases they felt they had little chance of winning.[38]

RELEVANT PENNSYLVANIA LAW

Since 1972, the Pennsylvania Legislature has instituted dramatic changes in the laws surrounding sexual assault, gradually abolishing loopholes and eliminating language that impeded sexual assault prosecutions. Significant progress was made during the Legislature's 1995 Special Session on Crime, when the current statutes were enacted. The 1995 legislation, known as Act 10 of 1995, went into effect May 30, 1995. It was particularly noteworthy for its creation of the new offense of sexual assault, also known as the "no-means-no law," which made non-forcible yet non-consensual sex a second-degree felony.[39] Act 10 also expanded the definition of "forcible compulsion" as follows:

> "compulsion by use of physical, emotional, or psychological force, either express or implied. The term includes, but is not limited to, compulsion resulting in another person's death, whether the death occurred before, during, or after sexual intercourse." (18 Pa.C.S.A.§3101)

These changes were a direct response to the Supreme Court of Pennsylvania's decision in *Commonwealth v. Berkowitz,* 415 Pa. Super. 505 (1992) *vacated in part on other grounds,* 537 Pa. Super 143 (1994), in which the Court held that "even though the victim repeatedly said 'no' throughout her attack, the assailant's act of non-forcible, non-consensual sex did not rise to the level of rape because force of compulsion or threat of forcible compulsion did not exist." A watershed in Pennsylvania rape law, the *Berkowitz* decision called attention to historical difficulties in the law, noting that "traditionally, Pennsylvania law looked with peculiar suspicion upon the rape complaint."[40] While Act 10 did incorporate a measure of compromise, the advocates for change have generally responded positively to it. According to the Pennsylvania Coalition Against Rape, the new statutes "eliminated completely the differential treatment of spousal rape, codified a broader definition of forcible compulsion, upgraded the offense of non-consensual sexual contact, and confirmed as a matter of law that 'no means no.'"[41]

OTHER TASK FORCE FINDINGS

Victim credibility is a recurring theme in the findings of similar studies conducted by other states. Credibility issues can be a matter of perception; that is, a survivor may not believe that she is being taken seriously by a prosecutor, while the prosecutor may have quite a different opinion of the matter. Still, deeply-rooted and long-standing societal biases may affect the way in which sexual violence is processed by the judicial system. Many studies found that negative societal attitudes and stereotypes towards women can still influence the way that people think. At least two other states, Michigan and Colorado, found that because of these attitudes, juror reaction can be a particular problem in sexual assault cases. For example, the Final Report of the State Bar of Michigan Task Force on Racial/Ethnic and Gender Issues in the Court and the Legal Profession revealed that some common societal attitudes and stereotypes might reinforce the idea that a woman invites abuse and rape. "Jurors not only tend to be biased against rape prosecutions, but will be lenient with defendants if there is any suggestion that the victim contributed in some way. There is a disturbing juror attitude that the woman 'asked for it.'"[42] Similarly, a Denver attorney told the Colorado Supreme Court Task Force on Gender Bias in the Courts that juries, not judges, are to blame for the difficulty prosecutors have in convicting men of sexual assault.

> "When people in the community, or average citizens, hear that a woman has been raped, two questions come to mind very quickly. The first is, did it really happen? And the second is, was it her fault?…Why didn't she do anything to stop it?…Did she provoke it?…I've generally found that judges seem to be quite sympathetic to women…but I do think in jury trials you have a problem with juries."[43]

Similar studies in other states have also found that sexual violence goes largely unreported, in part because survivors either think that they will not be believed or that they will be blamed for their situation. Eighty percent of respondents to an attorney survey circulated by the Gender Bias Task Force of Texas noted that, "One of the primary reasons that victims don't report incidents of rape or sexual assault to the police is the fear that the police would not believe the victim's story, while three-quarters indicated that they fear that they will be blamed by the police for the assault."[44] The Washington State Task Force on Gender & Justice in the Courts found that

a "victim's fear of the justice system (as opposed, for example, to fear of the rapist) is directly responsible for the victim's decision not to make a police report."[45] A recent report by the California Coalition Against Sexual Assault corroborates these findings, pointing out that, "Some in our communities think rape only happens to other people, or only to certain types of women. Too often, they blame the victim for teasing…It should come as no surprise that three out of every four victims of rape do not report the crime to the police."[46]

Studies conducted by other states consistently reported that, when sexual assault cases do go to court, survivors have concerns about the sensitivity of prosecutors, defense attorneys, and judges before, during, and after trial. Of particular concern are the manner and substance of questions posed to the survivor. For example, the Nebraska Supreme Court Task Force on Gender Fairness in the Courts found that 86 percent of the attorneys and 41 percent of the judges agreed that defense attorneys appeal to gender stereotypes, "(i.e., 'women say no when they mean yes;' 'provocative dress is an invitation') in order to discredit the victim in sexual conduct cases."[47] Some states also found a general lack of understanding surrounding the dynamics of sexual assault, even in courts that have paid particular attention to these issues. The Gender Bias Task Force of Texas Final Report noted that 67 percent of the respondents to a rape crisis center survey indicated that prosecutors only "rarely" or "sometimes" understand the dynamics of sexual assault and its impact on the survivor, with more than 50 percent of the respondents noting that the same is true for judges.[48]

Another common complaint—also raised in the Committee's hearings and roundtables—is that the courts treat cases of acquaintance rape or sexual assault less seriously than instances of sexual violence by strangers, with acquaintances routinely receiving shorter sentences or lower bail. There is general agreement that a prior relationship between the defendant and survivor will affect the litigation process, although there can be a significant difference between male and female perceptions. The Washington State Task Force on Gender & Justice in the Courts noted that, "A common complaint of rape service providers is that judges and prosecuting attorneys treat cases of acquaintance rape less seriously than those of rape by a stranger."[49] In Massachusetts, the Supreme Judicial Court's Gender Bias Study of the Court System there found that after a prosecution is brought, differences in the treatment of acquaintance cases emerge, most often with respect to bail and sentencing.[50] The discrepancy often appears to go

unrecognized by judges, as reflected by survey results from the Nebraska Supreme Court Task Force on Gender Fairness in the Courts. Their survey revealed that while 82 percent of the judges claimed that a relationship between the parties is irrelevant in deciding the severity of the penalty in rape cases, 31 percent indicated that, "All other factors being equal, they set a lower bail in criminal sexual conduct cases where the parties know one another than where the parties are strangers."[51]

Significantly, the need for education regarding sexual assault for all participants in the justice system was uniformly recommended as essential by other states' studies.[52] According to the studies, such education should cover a wide variety of issues, ranging from practical legal matters to sensitivity training. Education on how the judicial system works should also be provided to survivors and advocates.

GENERAL FINDINGS

The Committee reviewed data from the survey of prosecutors and defense attorneys; relevant testimony from the statewide hearings; information from the three roundtable discussions held for survivors and their advocates; and the findings of other state task force studies on this issue. The information received from all of these sources was remarkably consistent.

The Committee found that Pennsylvania's justice system appears to be more sensitive than in the past to the unique issues that sexual assault cases present. However, improvement is still needed in the manner in which such cases are handled by law enforcement officials, attorneys, and the judiciary.

SURVIVORS ARE FREQUENTLY NOT ACCORDED CREDIBILITY BY LAW ENFORCEMENT AUTHORITIES, OFFICERS OF THE COURT, AND JURORS.

The research of the Committee indicates that survivors' fears that they will not be believed, or that they will be implicated in, or blamed for, the assault, are a primary reason that they do not report these crimes.

Roundtable participants noted that a survivor's relationship with his or her assailant and a past criminal record could affect whether police officials investigate or pursue complaints of sexual assault. Public hearing participants indicated that prosecutors have questioned the veracity of a young survivor's story based upon her physical maturity and prior sexual behavior. Similarly, older women and married women have been accused of reporting assaults in order to cover up affairs or other illicit deeds. In addition, credibility is often particularly troublesome for survivors of color.

Perceptions of survivors' credibility differ markedly, depending on who is discussing the issue. Many of the survey respondents felt that survivors of rape or sexual assault were accorded the same level of credibility as survivors of other non-sexual assaults. Certain survey respondents, however, felt that sexual assault survivors were accorded either more or less credibility, depending on whether the respondent was a prosecutor or a defense attorney. Prosecutors noted that law enforcement officers, judges, and defense attorneys tended to accord survivors less credibility, while public defenders suggested that those same individuals tended to accord survivors more credibility.

CASES IN WHICH THE ASSAILANT IS KNOWN TO THE SURVIVOR ARE REPORTED TO BE LESS LIKELY TO BE INVESTIGATED AND PROSECUTED—AND THE SURVIVOR'S CREDIBILITY IS MORE LIKELY TO BE CHALLENGED—THAN THOSE IN WHICH THE ASSAILANT IS A STRANGER.

The consensus at the public hearings and roundtable discussions was that cases in which the assailant was known to the survivor, so-called "acquaintance" cases, were handled differently from those in which the perpetrator appeared to be a stranger. Survivors reported that police in acquaintance cases were less likely to investigate the cases, or that they conducted less vigorous investigations; and that prosecutors were less likely to proceed to trial in such cases. Moreover, nearly 40 percent of prosecutors and defense attorneys surveyed by the Committee reported lower bail and shorter sentences for defendants who were acquainted with the survivor. Nearly 33 percent of the survey respondents also reported that acquaintance cases were less likely to be brought to trial; and a clear majority of prosecutors and defense attorneys, 61 percent, noted that survivors of acquaintance rape or sexual assault were subjected to more extensive cross-examination than survivors in stranger cases.

SOME LAW ENFORCEMENT OFFICERS, PROSECUTORS AND JUDGES WERE ALSO REPORTED TO DISPLAY A LACK OF SENSITIVITY AND UNDERSTANDING TOWARD SURVIVORS OF SEXUAL ASSAULT AND RAPE, WHICH CAN RESULT IN FURTHER TRAUMA.

Survivors speaking at the Committee's hearings and roundtable discussions reported experiences with police officials, prosecutors, and judges who displayed a significant lack of understanding of the complexities surrounding crimes of sexual violence, and the impact such crimes have on the lives of survivors. Participants reported instances of police refusing to believe the survivor's account or to investigate the case when the survivor delayed in reporting the offense or when he or she failed to leave the home where the assailant also resided. Survivors, particularly in cases involving assailants known to them, also reported numerous accounts of insensitivity by prosecutors. They described experiences with prosecutors who consistently displayed a lack of knowledge about the case and the crime, exhibited biased and stereotypical beliefs about women and crimes of sexual violence, and showed a lack of sensitivity toward the shame, anxiety, and humiliation experienced by survivors of rape or sexual assault.

Survivors also related instances of insensitivity by the judges, citing one noteworthy case in which a judge permitted middle school students to observe a 13-year old girl testifying about a sexual assault by her stepfather. Most survey respondents were less critical of the judiciary, reporting that judges treated survivors of rape or sexual assault with the same sensitivity as survivors of other assaults and assessed their claims with equal objectivity. Female respondents, however, were statistically more likely to conclude that judges did not understand the psychological and long-term impact of crimes of sexual violence upon survivors.

Survivors reported that the shame and fear they experienced in the assault was intensified when prosecutors and other parties in the justice system displayed insensitivity toward them, and that this contributed to the long-term harm from the offense itself.

THE PROCEDURES FOR THE INVESTIGATION AND PROSECUTION OF SEXUAL VIOLENCE CRIMES SUFFER FROM DEFICIENCIES THAT HAVE HARMFUL REPERCUSSIONS FOR SURVIVORS.

From the time survivors of rape and sexual assault enter the criminal justice system, they are subjected to repeated interviews and are forced to recall and retell their stories of sexual and physical violence. The repetition is particularly difficult for juvenile survivors. Often, the interviews are conducted in public places with little concern for the survivor's privacy. Once the case is scheduled for trial, repeated delays are granted without regard for the survivors. The delays cause enormous stress for the survivors, in addition to economic hardship from the lost days of work. The courthouse facilities are often inadequate to protect the privacy and the physical well-being of the survivor, in part because they generally lack separate, secure waiting rooms for the survivor and the assailant.

It is important to note that prosecutors and defense attorneys had one perception of the adequacy of court facilities and of the value of advocates during trials, while roundtable participants, i.e. survivors and their advocates, had markedly different perceptions. The roundtable participants found court facilities inadequate because they did not separate survivors from defendants and did not protect survivors' privacy during conversations with prosecutors. Moreover, the survivors reported that the presence of survivor advocates during trial was critical to their ability to function in court, a perception that was not shared by prosecutors and defense attorneys.

THE RACE AND ETHNICITY OF A RAPE OR SEXUAL ASSAULT SURVIVOR PLAYS A ROLE IN THE MANNER IN WHICH A CASE IS HANDLED IN THE CRIMINAL JUSTICE SYSTEM.

Survivors of color expressed reluctance to report or prosecute a rape or a sexual assault because of their perception that their testimony would not be given credibilility by the predominantly white juries, prosecutors, or judges in most areas of the Commonwealth. They also reported that the law enforcement community sometimes fails to investigate their reports of sexual violence, particularly when they involve assailants of color with whom the survivors are acquainted. Witnesses at public hearings also reported that judges and attorneys displayed a lack of understanding of cultural differences, especially with regard to the Latino community. The witnesses said this lack of understanding not only affected behavior during trial, but contributed to their own reluctance to report and to proceed with prosecuting crimes of sexual violence.

RECOMMENDATIONS

TO THE SUPREME COURT OF PENNSYLVANIA

The Committee recommends that the Court:

1. Establish a program of education[53] for the judiciary, on the subject of crimes of sexual assault and rape.
2. Require periodic training[54] for all court personnel on the nature of the crimes of rape and sexual assault. The training should be directed toward court administrators, clerks, and others whose duties bring them into contact with survivors of rape and sexual assault.
3. Require trial courts to devise and implement guidelines for ensuring that sexual assault and rape cases are effectively managed. Such guidelines should address:
    - The impact that granting multiple continuances in rape and sexual assault cases has upon survivors;
    - Providing more opportunities for survivors to make statements at sentencing; and
    - Protecting the mental and physical well-being of survivors by providing a comfortable, safe environment within the courthouse. This room or space should be located in a secure area separate from the defendant and his or her family.

TO THE LEGISLATURE

The Committee recommends that the Legislature:

1. Enact legislation enabling sexual assault survivors to obtain civil protection orders.

TO DISTRICT ATTORNEYS

The Committee recommends that district attorney's offices:

1. Provide educational programs for prosecutors handling cases involving rape or sexual assault survivors, similar to the education programs recommended above for court personnel. Prosecutors should also receive training that helps them to better understand survivors' fears of the court process and the effect that multiple interviews and continuances have upon survivors' emotional well-being.
2. Provide oversight that ensures that acquaintance rape and sexual assault cases are prosecuted with the same vigor as stranger rape and sexual assault cases.

3. Coordinate with and make use of sexual assault forensic examiners in rape cases.[55]
4. Routinely inform a sexual assault advocate/counselor when a sexual assault case is initiated and support each survivor's request to have an advocate attend all court appearances with the survivor.
5. Promote the use of and coordinate efforts with sexual assault response teams (SART), which are multidisciplinary teams that support survivors throughout the investigation and trial process.
6. Whenever possible, implement vertical prosecution of sexual assault cases.

TO BAR ASSOCIATIONS

The Committee recommends that the Pennsylvania Bar Association and/or county bar associations:

1. Incorporate representation of sexual assault survivors' civil legal needs into *pro bono* programs.
2. Provide programs to members of the bar and the law enforcement community addressing the issue of sexual violence.
3. Offer continuing legal education courses for attorneys that include the same information on rape, sexual assault, and related legal issues as addressed in the education programs for court personnel.

TO LAW ENFORCEMENT OFFICES/AGENCIES

The Committee recommends that law enforcement offices and agencies:

1. Provide education for law enforcement officers regarding the nature of the crimes of rape and sexual assault, similar to the education programs recommended above for court personnel and district attorneys.
2. Provide survivors with interpreters who are sensitive to ethnic and cultural issues and the emotional needs of sexual assault survivors at all stages of the investigation.
3. Make efforts to reduce the number of interviews that survivors are subjected to during the investigation and trial.
4. Investigate acquaintance rape and sexual assault cases with the same vigor as stranger rape and sexual assault cases.
5. Provide survivors with information on the availability of special assistance programs.
6. Work with a sexual assault response team.

ENDNOTES

[1] While the Committee recognizes that not all victims are survivors, many victims and their advocates prefer the term "survivor," which connotes strength and perseverance, to the more negative term "victim," which is considered stigmatizing and suggests helplessness. Thus, the Committee has chosen to use the term survivor in keeping with much of the current literature and commentary on sexual assault.

[2] D.G. Kilpatrick, C.N. Edmunds and A. Seymour, *Rape in America: A Report to the Nation*, Arlington, Virginia: National Victim Center, 1992 [hereinafter Kilpatrick, et al.].

[3] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Publications, *1999 National Crime Victimization Survey (NCVS)* 2000.

[4] National Institute of Justice and the Centers for Disease Control, *Research in Brief, Findings from the National Violence Against Women Survey*, November 1998.

[5] Kilpatrick, et al., *supra*.

[6] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics,* 1999.

[7] *A Vision to End Sexual Assault*, The California Coalition Against Sexual Assault (CALCASA) Strategic Forum Report, p. ii (2001), attached in Appendix Vol. III [hereinafter CALCASA Report].

[8] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Criminal Victimization 1999: Changes 1998–1999 with trends 1993–1999,* August 2000.

[9] Bowker, L., *Women as Victims: An Examination of the Results of L.E.A.A.'s National Crime Survey Program*, Women and Crime in America (1981).

[10] 2000 Annual Uniform Crime Report, *Crime in Pennsylvania,* < http://ucreport.psp.state.pa.us>.

[11] Pennsylvania Coalition Against Rape Annual Service Statistical Report 2002.

[12] *Id*.

[13] CALCASA Report, *supra* at 13.

[14] Vertical prosecution is a "method of handling a case whereby a single prosecutor or prosecution unit is responsible for conducting the case from start to finish, including the sentencing phase." CALCASA Report, *supra* at 47.

[15] While the survey respondents did not report a difference in "results" of a trial when advocates accompanied survivors during the trial, survivors themselves reported the presence of advocates to be critical to their needs during trial.

[16] Acquaintances included family members (parents, children, and spouses) as well as friends, neighbors and casual acquaintances.

[17] The psychological effects of sexual assault are closely related to anxiety and depression disorders. The chances that a woman will develop post-traumatic stress disorder (PTSD) after being raped are between 50–90 percent. *Ending Violence Against Women*, Population Reports, Population Information Program, Center for Communication Programs of the Johns Hopkins Bloomberg School of Public Health.

[18] Testimony of Jacqueline Mae Johnson, Erie Public Hearing Transcript, p. 53 [hereinafter Johnson Testimony].

[19] Testimony of Joyce Lukima, Erie Public Hearing Transcript, p.48.

[20] *Id*. at 47

[21] *Id*. at 48–50

[22] *Id*. at 48.

[23] *Id*. at 47–49.

[24] *Id*. at 46.

[25] *Id.* at 46–47

[26] Testimony of Ellen Kerr, Pittsburgh Public Hearing Transcript, p. 214 [hereinafter Kerr Testimony].

[27] Testimony of Michelle J. Anderson, Philadelphia Public Hearing Transcript, p. 5.

[28] Testimony of Kathlene Russell, Wilkes-Barre Public Hearing Transcript, p. 58.

[29] *Id.* at 48.

[30] *Id.* at 53.

[31] *Id.* at 54.

[32] Kerr Testimony, *supra* at 213.

[33] *Id.*

[34] Johnson Testimony, *supra* at 58.

[35] *Id.* at 59.

[36] Testimony of Beata Peck Little, Wilkes-Barre Public Hearing Transcript, p. 39.

[37] Testimony of Judy Ariola-Rivera, Wilkes-Barre Public Hearing Transcript, p.40.

[38] Testimony of Iraida Afanador, Philadelphia Public Hearing Transcript, pp. 96–97.

[39] The most commonly prosecuted sex crimes are rape, involuntary deviate sexual intercourse, sexual assault, and indecent assault. "Rape" is defined at 18 Pa. Cons. Stat. Ann. §3121 as sexual intercourse with a complainant:

1. by forcible compulsion;
2. by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
3. who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring;
4. where the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants, or other means for the purpose of preventing resistance;
5. who suffers from a mental disability which renders the complainant incapable of consent; and
6. who is less than 13 years of age.

"Involuntary deviate sexual intercourse" is defined at 18 Pa. Cons. Stat. Ann. § 3123 as deviate sexual intercourse with a complainant:

1. by forcible compulsion;
2. by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
3. who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring;
4. where the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants, or other means for the purpose of preventing resistance;
5. who suffers from a mental disability which renders him or her incapable of consent;
6. who is less than 13 years of age; or
7. who is less than 16 years of age and the person is four or more years older than the complainant and the complainant and person are not married to each other.

"Sexual assault" is defined at 18 Pa. Cons. Stat. Ann. § 3124.1 as sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent.

"Indecent assault" is defined at 18 Pa. Cons. Stat. Ann. § 3126 as indecent contact with the complainant.

"Forcible compulsion" is defined at 18 Pa. Cons. Stat. Ann. § 3101 as compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied. The term includes, but is not limited to, compulsion resulting in another person's death, whether the death occurred before, during, or after sexual intercourse.

[40] *Commonwealth v. Berkowitz,* 415 Pa. Super. 505, 519, 609 A.2d 1338, 1345 n.5 (1992) *vacated in part on other grounds,* 537 Pa. Super 143, 641 A. 2d 1161 (1994).

[41] Brief for Amici Curiae in *Commonwealth v. Fischer*, filed by The Women's Law Project, Pennsylvania Coalition Against Rape, et al. In Support of Appellee, filed October 22, 1999, p. 15.

[42] Summary of Michigan's 1989 Gender Report *The Court's Response to Violence Against Women*, p. 114.

[43] Final Report Colorado Supreme Court Task Force on Gender Bias in the Courts, p. 90 (1990).

[44] The Gender Bias Task Force of Texas Final Report, p. 82 (1994) [hereinafter Texas Report].

[45] The Final Report of the Washington State Task Force on Gender & Justice in the Courts, p. 39 (1989) [hereinafter Washington Report].

[46] CALCASA Report, *supra* at 16.

[47] Nebraska Supreme Court Task Force on Gender Fairness in the Courts Final Report, p. 60 (1994) [hereinafter Nebraska Report].

[48] Texas Report, *supra* at 83.

[49] Washington Report, *supra* at 43.

[50] Report of the Gender Bias Study of the Supreme Judicial Court, Commonwealth of Massachusetts, p. 100 (1989) [hereinafter Massachusetts Report].

[51] Nebraska Report, *supra* at 61.

[52] Sources consulted for this review included: CALCASA Report, *supra;* Massachusetts Report, *supra;* Nebraska Report, *supra;* Texas Report, *supra;* and Washington Report*, supra*.

[53] This program should include:

a. Training sessions that emphasize hypothetical situations regarding bail conditions, motions *in limine*, jury instructions, and sentencing; followed by a discussion;

b. Use of materials developed by The National Judicial Education Program for the seminar "Understanding Sexual Violence: The Judicial Response to Stranger and Non-Stranger Rape and Sexual Assault";

c. Education regarding the nature of the crime of rape, the psychology of offenders, the prevalence of and seriousness of acquaintance rape, rape trauma syndrome, child sexual assault and delayed reporting, drug facilitated sexual assault, racial stereotypes and cultural impediments to reporting, and the long-term psychological injury to rape survivors;

d. Training and sensitizing judges to the difference between vigorous cross-examination that protects the defendant's rights and questioning that includes improper sex stereotyping and harassment of the survivor; and

e. Training on the Survivor Bill of Rights.

[54] The training should include such topics as the psychology of offenders, the prevalence of and seriousness of acquaintance rape, rape trauma syndrome, child sexual assault and delayed reporting, drug-facilitated sexual assault, racial stereotypes and cultural impediments to reporting, and the long-term psychological injury to rape survivors.

[55] Such examiners are specially trained registered nurses or physicians who provide comprehensive care, timely collection of forensic evidence, and testimony in sexual assault cases.

12 FAMILY LAW

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INTRODUCTION

More Pennsylvania citizens come into contact with the Commonwealth's judicial system through the family law court system than through any other avenue.[1] Yet, family law issues are often viewed as less prestigious and less important than other legal cases.[2] The diminished status of the family law system is reflected in the lack of economic resources invested into many of Pennsylvania's family law courts and by the sometimes confusing legal and procedural policies encountered by litigants.[3] Many courts that hear family law cases require families to tell their stories multiple times to different judicial officials, usually in a piecemeal fashion that is financially and emotionally costly to litigants.[4]

The low prestige assigned to the family law system impacts directly on the quality of services provided to all family law litigants, but the Committee discovered that low-income individuals are most severely affected. Low-income litigants, especially those proceeding *pro se*, are confronted with a complex and often bewildering court system.[5] These low-income litigants are primarily women, often minorities, and often economically dependent spouses.[6] As such, they experience a triple bias—racial, gender, and economic—within the judicial system. As family law attorney Rebecca Ardoline testified at the State College public hearing: "When there are gender biases, when there are racial biases, they're made worse by class prejudices."[7]

Focus of Inquiry

The Committee focused its family law study on three aspects of the family law system within Pennsylvania. First, the Committee examined whether low-income female and minority litigants encountered difficulties in gaining access to the family court system. Second, the Committee sought to evaluate how Pennsylvania's domestic relations laws and procedural rules affected low-income litigants, especially women and members of minority groups. Third, the Committee conducted an inquiry into how minority and female litigants fared within the dependency system, compared with other participants. The inquiry ranged from the adequacy of court facilities to an examination of whether cultural stereotypes and biases affect the outcomes of cases involving minority and female litigants.

Sources of Information

The Committee acquired primary source information through public hearings, roundtable discussions, and litigant surveys. Additionally, a survey was commissioned to obtain information about court resources, practices, and procedures. The survey was distributed to a representative sampling of 15 Pennsylvania counties.

The public hearings, conducted throughout the Commonwealth, provided an opportunity for court personnel, practitioners, interest groups, and private individuals to relate experiences and concerns regarding racial and gender bias in family courts and juvenile dependency proceedings.

In addition to the public hearings, five roundtable discussions were held with experienced and well-regarded family law attorneys, judges, and social service agency personnel. In Pittsburgh, one roundtable discussion concentrated exclusively on dependency issues, and another was devoted to general family law concerns. In Philadelphia, one roundtable discussion focused on substantive and procedural family law issues, while the other concentrated on issues of access to the legal system. The roundtable discussion in State College addressed legal access as well as procedural issues affecting low-income female and minority litigants.

Surveys were also distributed to former litigants in family law cases in Allegheny, Bucks, Chester, Montgomery, and Philadelphia counties. The surveys were designed to evaluate the experiences of *pro se* litigants in accessing their county's family court. A copy of the survey instrument and a summary of the results are attached in Appendix Vol. III.

The Committee commissioned The Pennsylvania State University's Statistical Consulting Center to produce an extensive case processing survey of the Commonwealth's family law courts. The survey was distributed to a representative sample of 15 large, small, urban, and rural counties: Allegheny, Bradford, Beaver, Bucks, Butler, Cameron, Clarion, Elk, Dauphin, Delaware, Indiana, Juniata, Perry, Lancaster, and Philadelphia. Only Clarion County failed to respond; Juniata and Perry counties returned a combined response, as did Elk and Cameron counties. Copies of the survey instrument and the analysis of the results are attached in Appendix Vol. III.

The Committee also gathered information from other recent reports concerning Pennsylvania's family and dependency court systems. These reports included the Report of the Pennsylvania Bar Association Task Force on Family Court Reform (2000); the Juvenile Law Center's Promises Kept, Promises Broken: An Analysis of Children's Right to Counsel in Dependency Proceedings in Pennsylvania (2001); and A Report by Philadelphia's Public Interest Bar and Advocacy Community on Dependent Court Resources and the Need for Judges (2001). The Committee reviewed other state task force reports on gender and racial bias in the family court system, as well as a variety of articles published in various social science and legal journals about these issues.

SYNOPSIS OF FINDINGS

Among the findings of the Committee were:

1. Low-income litigants, who include a disproportionate number of women and minorities, are often disadvantaged in the family court system because they are not represented by counsel. Specifically, they often do not receive sufficient and comprehensible information concerning the availability of reduced fee and *pro bono* representation, nor do they receive complete information about their procedural and substantive rights and responsibilities. If the litigants have limited proficiency with the English language, the obstacles become even more daunting.
2. The application of some of Pennsylvania's substantive family laws can have a particularly negative impact upon low-income litigants' legal rights and remedies. For example, the alimony that judges order to compensate the economically dependent spouse is often insufficient and of too short a duration. Alimony awards are often made with little consideration of the factors set forth in the Divorce Code. In the absence of consistent guidelines, alimony requests are frequently denied or, if granted, are insufficient to address the needs of the dependent spouse. Incorrect applications of the law, in conjunction with minimal or non-existent alimony awards, can go unremedied because the dependent spouse has inadequate resources to file an appeal.
3. Support cases are generally not resolved for several months, and sometimes not for years. During that time, the parties may have to attend numerous hearings. This presents significant difficulties for low-income litigants who may incur childcare and transportation costs and lost wages for missed work, in addition to having to pay attorney's fees. The award of a support order, even with a provision for arrears, generally does not make the dependent spouse whole.
4. Low-income litigants encounter financial obstacles that inhibit their access to the family courts. Filing fees, attorney's fees, and fees for masters or other special personnel or programs are direct costs that low-income litigants often cannot bear. The addition of indirect costs, such as childcare, transportation, and lost wages for missed work, along with delays in receiving support, alimony, and equitable distribution of assets, can result in further impoverishment of the dependent spouse.

5. Low-income litigants encounter procedural obstacles that impede their ability to litigate their family law cases. The multiple and fragmented nature of hearings in family court and dependency court places a considerable burden on hourly workers whose employment is imperiled by frequent absences.
6. In family and dependency proceedings, cultural and gender stereotypes and biases sometimes affect female and minority litigants. For example, some report being treated as "less than equal" to more affluent litigants; being held to stricter behavioral standards than men; and being subjected to inequitable decisions because of racial and cultural biases.
7. Several problems primarily affect minority litigants in child dependency proceedings:
    - African American children may be at risk of physical harm because some caseworkers believe corporal punishment is acceptable in the African American community. In such cases, African American children may not be removed from their homes while white children under similar circumstances would be removed from their parents for their protection;
    - Inconsistencies in the application of the law, coupled with cultural biases and inadequate representation and facilities, can have a disproportionately negative impact upon minority and female litigants. For example, policies that promote the adoption of relatives have a substantial negative impact upon minority litigants, who often do not believe it to be an appropriate remedy for the issues surrounding dependent children. On the other hand, minority litigants are discouraged from seeking to become foster and adoptive parents by regulations which foster the perception that criminal records, no matter how remote or insignificant, bar them from parenthood.
    - Parents are not always advised of their right to be represented by counsel. The guardians *ad litem* appointed for the children often do not adequately represent the children or their interests. Many guardians do not meet their clients until moments before the hearing and do not devote sufficient time or resources to preparing their cases. They are also under-compensated for their work.

8. Many members of the legal and lay communities expressed the opinion that the family and dependency court systems are accorded little respect. This impression is borne out by, among other things, the substandard condition of facilities and the fragmentation of hearings.
9. The courts rarely grant advance distributions of marital assets. Because most non-consensual divorce cases take more than two years for assets to be distributed, the court's reluctance to enter interim awards places a burden on the economically dependent spouse and may inhibit his or her full access to the legal system. The spouse controlling the marital estate may also dissipate the assets, leaving no recourse for the dependent spouse.
10. Family courts infrequently award attorney's fees, and when fees are granted, they are often inadequate. As a result, low-income litigants are often unable to hire and retain counsel. In dependency court, the low rate of pay makes it difficult to attract court-appointed attorneys to provide effective counsel.

GENERAL FINDINGS

LOW-INCOME LITIGANTS OFTEN DO NOT RECEIVE SUFFICIENT AND COMPREHENSIVE INFORMATION THAT WOULD ENABLE THEM TO NAVIGATE THE FAMILY COURT JUDICIAL SYSTEM SUCCESSFULLY.

A significant number of low-income litigants are women and minorities.[8] They often receive inadequate assistance from the courts as they make their way through the legal system. Their problems are exacerbated when they are unrepresented or when they are held to the same standards as represented litigants.

Public hearing testimony

Most family law litigants in Pennsylvania are not represented by counsel.[9] In Philadelphia County, an attorney of record was listed for less than 8 percent of the 739,000 people listed in a recent domestic relations database.[10] By one account, 92 percent of defendants are unrepresented in child support cases in Philadelphia.[11]

At public hearings throughout Pennsylvania, attorneys and litigants testified that the judicial system often provides little or no help to *pro se* litigants who are either initiating legal proceedings or responding to actions against them. Caren Bloom, a legal services attorney from central Pennsylvania, reported that in some central Pennsylvania counties, court employees are prohibited from providing the type of legal information *pro se* litigants need.[12]

A lack of assistance can severely affect *pro se* litigants who have poor English speaking or writing skills. Teenage mothers often drop out of school and later may experience difficulty in comprehending written instructions, or in completing the requisite legal pleadings for their cases.[13]

Litigants with a limited command of English may experience difficulty articulating their concerns during hearings. As was discussed in the chapter on domestic violence, one judge denied a woman's request for a translator and then denied her protection from abuse petition in a meritorious case because he said he could not fully understand her testimony.[14]

Speakers at the public hearings believed that judges were obligated to assist *pro se* litigants. Based on those perceptions, they felt the judges held them to the same standards as litigants represented by experienced counsel.[15] In addition, the speakers said some judges and opposing counsel made it a practice to interrogate women aggressively when they appeared without counsel, making them fearful of returning to court.[16] Attorney Ardoline, who represents low-income clients in central Pennsylvania, reported that women who were unable to afford legal representation at support hearings had been denied the right to testify, and had been turned away from the court when their physical disabilities prevented them from entering the domestic relations offices.[17]

Roundtable discussions

The theme of the relationship among poverty, race, and indigency was echoed in the Philadelphia roundtable discussions. Attorneys participating in the roundtable on substantive and procedural barriers noted that a disproportionate number of *pro se* litigants were women or members of minority groups.[18] Some of the attorneys asserted that judges allowed *pro se* litigants too much leeway, while others said they valued the assistance that judges provided.[19] Most participants agreed, however, that *pro se* litigants were at a distinct disadvantage in the courtroom.

As reported in the chapter on litigants with limited English proficiency, attorneys said non-English speaking litigants were especially disadvantaged when the court did not make interpreters available. Some judges ordered the attorney, a witness, or even the opposing party to translate the litigant's testimony. It was feared that this practice could alter the outcome of a case, as the personal agenda of the non-professional translator could significantly affect the translation.[20] One attorney speaking at the State College roundtable discussion also noted that when people struggled to speak English it was difficult for them to accurately convey their thoughts, resulting in the loss of the fine points of their testimony.[21]

Participants in the State College roundtable also stated that many courthouses in small counties had waiting rooms too small to accommodate the needs of the court. In other counties, family court proceedings were relegated to overcrowded, sub-standard facilities separate from the main courthouses.

Philadelphia roundtable participants noted a general lack of information available to litigants concerning substantive and procedural family law issues. Because many *pro se* litigants have limited reading skills, they need alternative methods of information delivery.[22] Even for literate litigants, the complexity of the system is confusing. Procedures vary from one judge to the next. Written information is often inadequate.[23]

Participants in the State College roundtable also stated that many courthouses in small counties had waiting rooms too small to accommodate the needs of the court.[24] In other counties, family court proceedings were relegated to overcrowded, sub-standard facilities separate from the main courthouses. Many speakers said the condition of the courtrooms and poor scheduling reflected the lack of respect granted to domestic law cases.[25]

An attorney at the Philadelphia roundtable on access issues recounted hearing a judge say he presided over "pervert's court."[26] The lack of respect for family law was also discussed with regard to judges, who were said to be disinclined to hear testimony in "pots and pans" cases in which the low-income parties had few assets to distribute.[27]

Roundtable participants reported that family courts were also understaffed, and the court facilities were often inadequate. Some family law facilities had dirty halls and restrooms, which detracted from the dignity of the court. [28] The lack of prestige spilled over to judges who, upon election, were typically assigned to family court before transferring to other divisions. As a result, the least experienced judges usually preside over family court cases.[29]

Litigant interviews

Of the litigants surveyed, almost half proceeded *pro se*. One reported that she was not permitted to file her complaint. Half of the *pro se* litigants reported receiving no assistance in understanding court procedures.[30]

All litigants were asked about the types of assistance available at courthouses. One county had no information desk. Some courthouses provided a telephone recording of general information regarding court hours, location, case scheduling, and other pertinent information. One litigant said it took persistence to obtain help by telephone. Half of the litigants reported that the assistance provided was helpful; half reported that it was not. Half of the litigants said that the court did not disseminate information regarding the availability of *pro bono* counsel.

County surveys

Elk County has no formal *pro bono* program. Perry/Juniata, Dauphin, and Lancaster counties refer indigent litigants to their local legal aid programs. Bradford, Indiana, Dauphin, Lancaster, Delaware, Bucks, and Allegheny counties supply representation for some cases—generally support cases—through the offices of the county attorney, district attorney, and/or public defender. Elk, Indiana, Beaver, Dauphin, Lancaster, Delaware, and Philadelphia counties make referrals through bar associations or court-appointed attorney programs, which provide some representation to indigent litigants. Perry/Juniata and Allegheny counties have established programs to assist *pro se* litigants in pursuing their claims.[31]

In each county in the survey, respondents said litigants were informed about how to obtain counsel. When asked how the information was disseminated, three counties failed to provide a response; three counties said they provided written information; and three counties said they provided both oral and written information. Oral information alone was given in two counties, and in one county the information was provided only upon request.[32]

Counties were asked to estimate what percentages of indigent litigants were able to obtain *pro bono* assistance or representation. Only three counties provided meaningful responses to this question: Perry/Juniata Counties reported that half of their litigants obtained *pro bono* assistance or representation, and both Lancaster and Delaware counties reported that this assistance was available to approximately 90 percent of the qualifying litigants.[33]

All counties reported some form of telephone information assistance for family court litigants. Seven counties reported having recorded information about court locations and hours of operation. Eight counties reported that a person was available to provide childcare information. Twelve counties reported that a person was available to discuss case scheduling information, and 10 counties reported that a person was available to discuss court procedures with *pro se* litigants. Every county in the survey had a person available to provide information about language and disability accommodations.[34]

LOW-INCOME LITIGANTS ENCOUNTER FINANCIAL OBSTACLES THAT INHIBIT THEIR ACCESS TO THE FAMILY COURTS.

A low-income litigant's progress through the family court system can be halted by court costs, attorney's fees, and special costs such as master's fees. Some counties are reluctant to award attorney's fees and many counties have inadequate *pro bono* attorney programs. Additionally, family court litigation often involves several hearings, which result in additional costs that the low-income litigant cannot afford.

Public hearing testimony

The general consensus at the public hearings was that women in many family court cases have little income and few economic resources, while men tend to have higher incomes and greater economic control. The basic inequity is exacerbated by the multitude of family court hearings and extra costs that can bring hardship to the financially dependent spouse, usually the woman.

In rural counties, *pro bono* legal assistance is often unavailable[35] and there are court fees that can limit citizen access to the judicial system. Attorney Ardoline, testifying in State College, told of counties that require up-front payment of fees in domestic violence cases before a *de novo* hearing will be scheduled before a judge.[36]

Roundtable discussions

Lawyers commented on the costly nature of family law cases.[37] Private attorneys and legal aid attorneys agreed that legal aid organizations simply do not have the financial resources to represent all low-income litigants, and the *pro bono* funding is too limited to meet the needs of the remaining clients.[38] While court costs can be waived if *in forma pauperis* (IFP) standards are met, many counties are not able to provide sufficient information about IFP petitions.[39]

Attorneys in rural counties noted that judges rarely awarded attorney's fees. This placed an unreasonable burden on the financially dependent spouse, especially when the primary wage earner intentionally delayed and complicated the case. The economically dependent spouse could be forced into poverty, and without an attorney, he or she could not fight back in court.[40] Urban attorneys believed that attorney's fees awards could act as a carrot, to spur settlement of a case, or as a stick, to thwart unnecessary litigation.[41]

Private attorneys and legal aid attorneys agreed that legal aid organizations simply do not have the financial resources to represent all low-income litigants, and the pro bono funding is too limited to meet the needs of the remaining clients.

Courthouses in rural counties are not easily accessible by public transportation, creating hardship for people without cars.[42] In addition, most courthouses are open only during business hours, which can mean missing work to perform court business—a prospect that low-income litigants can ill afford.[43] Practitioners in five rural counties also reported that their court systems did not provide childcare for litigants. The cost of private childcare during court hearings generally falls upon the custodial parent, most often the mother, who is usually the economically dependent spouse.[44]

Litigant Interviews

The litigants surveyed reported a wide variation in the litigation costs in family law. Some said they could not afford the filing fees, or that they refrained from filing certain pleadings because they could not afford the costs. Only 33 percent said they had received information about fee reductions or waivers based on income. A small number of litigants filed appeals. More said they could not afford to appeal, and one said the cost of the transcript was too expensive. One litigant reported the cost of litigation compelled her to settle her case before she otherwise would have.

Only one litigant reported that the court had evening or weekend hours of operation, and that was just for the filing of pleadings. Most litigants missed work to attend court hearings. Approximately half of the litigants reported receiving information about the availability of childcare; the others did not. Of those who needed this service, only a few reported that it was available when needed.

County Surveys

Elk, Indiana, and Beaver counties reported that their local legal aid programs provided no representation for indigent litigants in family law cases. Philadelphia, Perry, and Delaware counties reported that their legal aid programs provided representation for all types of family law cases. The remainder of the counties said that their legal aid programs represented litigants in only one or two types of domestic relations cases, with Dauphin County's program limited to assisting only in the preparation of custody complaints.[45]

Of the responding counties, only Allegheny, Philadelphia, and Dauphin Counties provided childcare for litigants. This service was provided in all three counties at no cost. [46]

Most counties reported that no court services were available during non-business hours. However, Perry/Juniata, Bucks, Allegheny, and Philadelphia[47] provided for emergency protection from abuse services outside regular business hours. Delaware County indicated the availability of some services, but did not provide a breakdown of these services. Allegheny and Philadelphia counties reported some evening hours for support and pretrial matters.[48]

Most counties reported charging special fees to litigants for master's or mediation services. A divorce master in Perry/Juniata counties cost $740. Mediators in Bradford charged $90 per hour; a half-day master's trial in Lancaster County cost $475. Delaware and Bucks counties reported no charges for these services,[49] and Philadelphia County reported no charges for any services except those of divorce master.[50]

LOW-INCOME LITIGANTS ENCOUNTER PROCEDURAL OBSTACLES THAT IMPEDE THEIR ABILITY TO LITIGATE THEIR FAMILY LAW CASES.

Multiple hearings, drawn out over months or years, can place undue economic and emotional burdens on litigants who have insufficient resources to fully litigate their cases. Procedural inconsistencies and confusion within the family court system make it difficult for low-income litigants to proceed; wealthier litigants suffer no such consequences because they are often represented by attorneys who fully understand court procedures and use them to the clients' advantage.

Public hearing testimony

Pennsylvania's family court system is unquestionably overloaded and under-funded. It attempts to manage its enormous caseload by scheduling multiple hearings over many months, resulting in delays that prove costly to an economically dependent spouse.[51]

A fully-contested divorce, including related support and custody issues, can result in 15 different hearings before 15 different individuals.[52] The time delays expose family law litigants to lengthy emotional conflict and a greater risk of psychological injury.[53]

Delays also increase the cost of litigation. Even when hourly legal rates are modest, total fees soon become overwhelming as delays and court inefficiencies unreasonably extend the proceedings.[54] Witnesses testified that many economically dependent women are forced to settle their claims for less than their potential awards because they no longer have the financial resources to pursue their cases.[55] An experienced family law practitioner noted that the lengthy delay between the filing of the support complaint and the issuance of the support order is not completely rectified by the entry of a retroactive support award.[56] Delays and multiple support hearings result in lost wages, increased childcare expenses and large legal fees, which are not recovered by an award of arrears.[57]

At least one practitioner and several litigants reported that fragmented hearings also severely impact wealthier female litigants who are, nevertheless, the economically dependent spouses.[58] The independent spouse, usually the husband, can manipulate the legal system to delay hearings, stall discovery, and hide assets. Women in these situations need a rapid court process in which they are awarded attorney's fees on an interim basis; such awards are necessary if the women intend to pursue discovery and locate assets.[59] Wives in more affluent households who are not awarded attorney's fees may be unable to afford representation, leaving them to appear *pro se* before formidable legal opponents.

Complex court procedures are especially confusing to persons seeking access to the legal system without representation. Practitioners stressed the dramatic disparity in procedures from county to county.[60] One attorney drew a correlation between these problems and the issues facing litigants. If attorneys, despite their legal training and experience, have difficulty deciphering court rules and procedures in the various counties, how can unsophisticated *pro se* litigants navigate a complex system that is unfamiliar to them?[61]

According to Mary Cushing Doherty, a Montgomery County attorney who has practiced in the area of family law for 25 years, Pennsylvania's Domestic Relations Procedural Rules Committee attempted to address the disparity in county rules of procedure in what is known as "Recommendation 55" in 2000. The committee's effort was met with a storm of protest, however, from the judiciary, family law practitioners, and Domestic Relations Department personnel.[62] In response, the committee issued a revised Recommendation 55. The clear purpose of each version of Recommendation 55 is "to make it easier for the public to gain access to the Family Court system and to assure that family matters are concluded fairly and expeditiously."[63]

Recommendation 55 has not yet resulted in new rules and they are not likely to be issued soon, according to Doherty, because concerns continue to be expressed about them by the judiciary and many lawyers. Doherty explained that one of the major roadblocks is that "Individual counties do not wish to change procedures that they find satisfactory in their specific counties. Yet the differences county to county only frustrate clients of modest means and the lawyers who try to serve them. One is not able to navigate the system unless they are a local attorney who knows the local rules, procedures, and courtesies."[64] The revised Recommendation 55 suggests consolidated intake for support and custody matters and an ability to settle a custody case at the same time as the support case is settled. Doherty urged this Court to support efforts such as Recommendation 55 that would lend a great deal of assistance to lower-income family court litigants, the majority of whom are women and minorities.

Roundtable Discussions

Family law disputes can result in a long series of court proceedings. Separate hearings are usually held for support, custody, bifurcation of a case, equitable distribution, and other issues, inconveniencing all litigants but especially affecting lower-income litigants.[65]

Resolution of a single issue is often fragmented into several hearings. Centre County attorney Caren Bloom discussed a case that took 16 days over a two-year period.[66] Delays occur when courts fail to allot sufficient time for a hearing, or, especially in counties with no separate family division, when other civil cases receive priority scheduling. The practitioners questioned why other civil cases are heard in one continuous interval until completion, while a custody case is bumped and rescheduled so that the civil trial may proceed.[67]

Frequent continuances can create an economic crisis for a litigant with marginal finances.[68] In addition, continuances delay the ultimate resolution of the case, which can result in financial problems for the dependent spouse.[69] Multiple hearings also may bring a variety of judges and factfinders to preside over aspects of one case; this may also occur in court systems that rotate judges routinely from case to case. This practice places a burden upon litigants, who may be required to testify many times regarding the same facts. As a result, the economically dependent party incurs attorney's fees and misses work in order to testify about matters that may already be on the record, or may even have been resolved.[70]

Attorneys complained of the "cattle call" method of scheduling cases, which poses a serious problem for an economically dependent litigant who must appear with everyone else at 9:00 a.m. but not does get into court until 3:00 p.m., which again is a costly prospect.[71] "Cattle calls" favor parties with representation because cases involving attorneys are usually called first.[72] The unrepresented litigant, who is the least financially able to miss work, is forced to wait the longest. Sometimes there are unwritten rules that allow attorneys to estimate when their cases will be heard, such as the assignment of numbers to cases in Philadelphia, but individuals appearing *pro se* are not privy to this information.[73]

Litigant Interviews

Litigants reported a range of one to 20 visits to the courthouse before finalization of their family law litigation, with the entire process lasting from one to three years. The time from first filing to first hearing ranged from three days to 18 months.

County Survey

The counties were asked to calculate the average amount of time between the filing of a complaint and the initial hearing for divorce, custody, and support. Four counties, including Allegheny, provided no response. The other counties' responses ranged from 30 days to four months, depending on the type of case.[74]

The counties without separate family divisions were asked if family law cases were assigned to a particular judge. Four counties said they were not, and that all judges heard some family law cases. (Some counties had only one or two judges). In the counties with more judges, such as Lancaster and Delaware, the family law cases were assigned to certain judges, but not to all judges.[75]

THE MISAPPLICATION OF SOME OF PENNSYLVANIA'S SUBSTANTIVE FAMILY LAWS CAN HAVE A PARTICULARLY NEGATIVE IMPACT UPON LOW-INCOME LITIGANTS' LEGAL RIGHTS AND REMEDIES.

Alimony

While the Pennsylvania Divorce Code permits the award of alimony, witnesses reported that many judges were reluctant to award alimony in an adequate amount or for a sufficient duration.

Public Hearing Testimony

Attorney Carol Mills McCarthy, who provided written testimony in Pittsburgh, said substantial numbers of women were left with little income and almost no resources by the time their divorces were finalized, while men, who tended to have higher incomes, were permitted by the court to retain greater control over the family's economic resources and assets.[76] McCarthy said the term "economically dependent spouse" might appear to be gender-neutral, but, in practice, applied primarily to women, who were commonly the parent at home raising the children and managing the family. When the economically dependent spouse faced a divorce after years of less than full-time employment, she typically found herself at a disadvantage in attempting to earn an income that approached what she would have earned while employed on a full-time basis throughout the marriage. Alimony is designed to fill this gap, but in the opinion of McCarthy and other attorneys who testified at the public hearings, alimony is simply not awarded fairly or consistently.[77]

While the Pennsylvania Divorce Code permits the award of alimony,[78] witnesses reported that many judges were reluctant to award alimony in an adequate amount or for a sufficient duration. Bloom, an attorney at Mid-Penn Legal Services, testified that alimony was rarely awarded in at least one rural county. When it was granted, it was "rehabilitative" in nature and lasted for two to three years at best, until the woman could "get on her feet."[79] She described a case in which a husband earned more than $100,000 per year while his wife was a homemaker with a small, in-home typing business from which she earned less than $20,000 per year. Reasoning that the income from her typing service rendered her self-sufficient, the judge decided that alimony was unnecessary.[80]

Public hearing witnesses testified that family courts often failed to take into account the reality that, even after divorce, husbands are able to recover financially at a much quicker pace than wives because of the greater opportunities afforded to them in the workplace, especially when they are not custodial parents. A wife who has been out of the work force and who also has the primary responsibility for the children has a difficult time finding work that will pay her sufficiently, let alone a job that will allow the flexibility necessary for carrying out her parenting responsibilities.[81]

In her written testimony, referenced previously, Attorney Doherty commented upon a recent case, *Mascaro vs. Mascaro*, 803 A.2d 1186 (Pa. 2002), in which the Supreme Court of Pennsylvania held that the support guidelines' formula of income sharing was applicable to economically dependent spouses married to high-income spouses, without the burden of proving budgetary need.[82]

Doherty explained that previously, if the combined income of husband and wife exceeded the monthly net of, for example, $15,000 per month, the dependent spouse had to prove actual need to establish the support award. This was in contrast to the families with monthly net income of $15,000 or less, in which case the two spouses' net incomes were compared, and the higher income spouse (after deduction for child support), would pay 30 percent of the excess income to the dependent spouse. Doherty stated that, essentially, the Supreme Court of Pennsylvania in *Mascaro* said that the high income spouse should enjoy the income-sharing model of the support rules.[83] She suggested that a similar rationale should be applied for spouses requesting alimony, reflecting the reality that, because of their years spent as home managers and child nurturers, they have earned their entitlement to an alimony award sufficient in both amount and duration.[84]

Doherty noted that proposed changes in the areas of prenuptial agreements, anticipatory distribution of assets pending litigation, clarification of valuation of retirement assets, and other legislative reforms which would help dependent spouses and *pro se* litigants were introduced to the Legislature in Senate Bill 1084, which is currently pending. To the disappointment of many attorneys who worked on it, Doherty stated, Senate Bill 1084 did not include proposals on statutory reform of alimony provisions. She indicated, however, that another alimony proposal is being drafted, so the Legislature is considering not only reform of the equitable distribution and divorce provisions, but also reform of the alimony statute. The alimony reforms should provide more uniformity in the awards of alimony in the "typical case" and mandate

judicial consideration for deviation, so judges would have to justify why the "guidelines" were not being followed.[85]

Doherty concluded: "Whether the reform comes through legislation or rule change, the promulgation of alimony guidelines, similar to those currently in effect for spousal support, would provide meaningful and uniform substantive guidance to judicial officers who are responsible for calculating alimony awards."[86]

In terms of the unique needs of women and racial minorities, Doherty also commented that under the current system, the general statutory guidelines for alimony are often resolved at the divorce master's hearing.[87] In counties of medium to large size, Doherty explained, divorce masters handle all of the negotiations, and sometimes conduct the only hearing of record. Only clients of economic means can afford to appeal the master's recommendation, according to Doherty. In the small counties, while judges will handle the alimony decisions, standards differ from county to county. In some counties, the judges are loath to issue alimony. Alimony guidelines will benefit people of means, and will benefit men who may have suffered from an unduly high alimony award. Yet, Doherty stated, it is the clients who cannot afford attorney advocacy and the appeals process who currently suffer most from the lack of uniformity and lack of clear guidelines.[88]

Roundtable discussions

An attorney from a central Pennsylvania rural county observed that the economically dependent spouse's age and possible disability were the only factors used to determine whether alimony would be granted; earning potential became relevant only after that initial determination was made.[89] Other attorneys indicated that the court's primary concern was not the stay-at-home spouse's contribution to the marriage, but whether she had any possibility of supporting herself. One attorney said: "If you can support yourself, no matter what your husband makes, you're not going to get alimony."[90] Additionally, an experienced attorney practicing primarily in Montgomery County observed that while judges were now far less critical of marital misconduct than they had been in the past, they continued to assess a woman who had had an extramarital affair more harshly than they would a man.[91]

In a roundtable discussion in Philadelphia, attorneys compared alimony standards and practices from six counties and found each county to be different. In Bucks County, the litigants, attorneys, and master jointly attempt to reach an agreement. In Montgomery County, attorneys meet privately with the master and argue their client's cases informally; litigants there do not see the master unless several negotiation sessions fail, after which a hearing is conducted.[92] An attorney stated that alimony was rarely awarded in Chester or Delaware counties, and that enforcement was difficult in Delaware County. In Chester County, the master's report was generally not received for one year.[93] Other attorneys asserted it was difficult to receive an alimony award in Montgomery County; cases brought before the master there are not transcribed, so any case appealed from a master's recommendation must be retried in its entirety.[94]

Roundtable participants in State College agreed that the vagueness of the alimony factors set forth in the Divorce Code allows judges complete flexibility in making alimony determinations.[95] Because there are no consistent indicators to predict whether and to what degree an alimony award would be entered, practitioners at the various roundtables said litigants make a costly gamble when they seek alimony. If there were uniformity or guidelines, litigants could make informed decisions about the appropriateness of a request for alimony, which would lead to reduced attorney's fees, and a reduction of the courts' expenditure of time on meritless cases.[96] Similarly, the delays and inconsistencies in these cases lead to increased attorney's fees, litigation time, and expense, all of which have a detrimental impact on the economically dependent spouse, and, ironically, exacerbate her need for alimony.[97]

County surveys

Respondents were asked in the county survey which factors judges use to determine the length and amount of alimony awards. Seven counties cited the factors set forth in the Pennsylvania Divorce Code at 23 Pa. Cons. Stat. Ann. § 3701(b). Three counties failed to respond or said "unknown." Perry/Juniata specified "need, positions, skills, encouragement to self-sufficiency," while Beaver County specified "length of marriage and the extent to which…the economically dependent spouse [usually the wife] has had an opportunity to develop her earning capacity. The economically independent spouse will have had the entire marriage to develop his."[98] Only Beaver County responded to the question concerning the percentage of alimony claims granted by the court each year, reporting that 25 percent of all claims were for five years or less, with another 25 percent terminable upon the payor's retirement or attainment of age 62–65; the remainder of the awards fell into other categories.[99]

Ten of 12 counties reported that alimony awards were enforceable through a mechanism or procedure, usually similar to a support enforcement proceeding. Two counties did not respond to the question about enforcement.[100]

Custody

Public hearing testimony

Kevin Sheahan, of the National Congress of Fathers and Children, testifying at the Harrisburg hearing, said that even though Pennsylvania custody law is gender-neutral on its face and promotes substantial involvement of non-custodial parents, custody is still awarded to mothers 80 percent of the time, relegating fathers to limited partial custody or nominal visitation.[101] Other witnesses agreed that mothers are awarded custody significantly more often than are fathers.[102]

But some witnesses testified that, while judicial resolution of economic issues involving family breakups tended to disadvantage women, custody determinations by family courts were generally gender-neutral. In her written testimony, McCarthy said: "At least in Western Pennsylvania, I see all levels of the court trying with all sincerity to act in the best interest of the children. This might result in many more women being awarded custody than men statistically. However, the underlying fact that needs to be analyzed is not simply the gender issue but what the parties did during the marriage. If the status quo of the marriage was that the wife was the primary caregiver, a court will give that fact significant weight. This occurs not because there is a bias that mothers are better parents, but it is what the family felt that the children needed and, therefore, what the children are used to. The children should not have their lives disrupted for gender equality."[103]

Several speakers testified that, in custody cases, women were held to higher standards than men. For instance, it was reported that women with criminal records or drug or alcohol abuse problems were judged more harshly than men with the same issues, perhaps because this behavior was considered "unladylike."[104] Others testified that, because men tend to enjoy higher standards of living than women, judges favored them. According to one attorney, even when a mother was the primary caretaker for many years, the judge's custody decisions were greatly influenced by a father's greater financial ability to send his children to sports camps or buy a bigger house in a better school district.[105] Ardoline, a legal services attorney, said

in State College that she discouraged her female custody clients from testifying about their husbands' failure to pay child support, as at least one judge would infer from such testimony that the mother was financially unable to care for her children.[106]

When the issue of domestic violence was raised in custody cases, witnesses reported that some judges considered this a tactical maneuver. As discussed in detail in the chapter on domestic violence, some judges do not recognize the serious impact domestic violence has on children, and fail to give this issue the consideration required under the custody statute.[107] The chapter also contains an extensive discussion of the misapplication of the federal and state statutes in the area of domestic violence. When judges fail to remove defendants' weapons, for example, this misapplication of the law can result in a failure to protect survivors of abuse. Procedural inequities, such as the demand for payment of court costs prior to permitting the filing of domestic violence petitions with the court,[108] can also result in breakdowns of the protection from abuse system.

In her testimony, Attorney Doherty expressed concern with the lack of streamlined procedures to permit the custodial parent to seek court intervention in the event of contempt of the custody order.[109] Since parties who can afford an attorney can easily file a petition, Doherty wrote: "This puts the parents who are of lower income at a disadvantage, typically the dependent mother or litigants who have lower economic means, often racial minorities."[110] Doherty pointed to the PASCES system currently in place in the Commonwealth whereby support is collected efficiently and simply through a statewide support collection system. Doherty considered the PASCES system an example of a litigant-friendly system that favors the dependent spouse. She would like to see a citizen-friendly system in the custody contempt arena as well.

Roundtable discussions

On the issue of domestic violence and custody cases, an attorney in Philadelphia reported that she was chastised by a judge for discussing domestic violence in the context of a custody case. The judge referred to her argument as a "slick point."[111] Another attorney told of a judge insisting that the parties in a divorce case stay in a room together until they reached a custody agreement, even though the case involved domestic violence.[112] Other judges were reported to have confused a parent's financial resources with his or her parenting abilities. One attorney spoke of a judge who told a *pro se* litigant that if she couldn't afford to pay court fees, then she couldn't

afford to have custody of her child.[113] Other attorneys said that some judges routinely made custody determinations based on the parties' incomes and their respective abilities to pay court fees. Some attorneys said judges urged *pro se* litigants to resolve their custody problems personally, and punished those who did not reach settlements in their cases.[114]

Litigant surveys

A litigant noted that the judge initially refused to consider her allegations of domestic violence in the context of her custody case.[115]

County Surveys

None of the counties responded to a survey question concerning the percentage of fathers who were awarded primary physical custody in contested custody actions, nor did any respond to the survey's request for breakdowns by race and gender of the outcome of plaintiffs' requests for physical custody for 2000–01.[116]

Support and Equitable Distribution

Public Hearing Testimony

Public hearing witnesses testified that entry of a support order did not remedy the economic consequences resulting from the delay between the filing of a support complaint and resolution of the case. Although the law requires the issuance of an award for support arrears retroactive to the date of the filing of the complaint, payments as small as $15 per month may be allowed even though the arrearages may have reached hundreds or even thousands of dollars. The token payments fail to compensate the litigant who has gone for so long without any support, and who has incurred attorney's fees, and lost wages, often while attending multiple support proceedings.[117] Further, some courts rarely award interest, attorney's fees, or penalties, particularly in support contempt cases, although these rights and remedies are permitted by statute.[118]

Witnesses expressed concerns about possible double standards in the enforcement of child support proceedings. Attorney Elizabeth Bennett, testifying in Philadelphia, said that when low-income African American men are incarcerated for failing to pay support while wealthy white men use their financial resources to avoid harsh legal remedies, it "ultimately hurts the structure of black families by diminishing the role of fathers by taking away dollars from their children and putting it back in the hands of

the government."[119] Witnesses viewed the disparate treatment of similarly situated obligors as evidence of racial bias.[120]

Attorney Ardoline, in State College, described an incident in which a family judge simply refused to apply the support law and instead counted Supplemental Security Income and food stamps as income in calculating a child support obligation. Ardoline said the judge routinely imposed his own values instead of applying the law, citing, for example, his belief that welfare recipients were able to pay support if they spent money in ways that met with his personal disapproval.[121]

County Surveys

When asked whether, and how often, judges grant advances on equitable distribution or a preliminary award of costs and fees, Delaware County said "no" and Elk County said it was very rare. The remainder of the counties said such advances are granted, but nowhere in more than 10 percent of the cases; three counties reported advances in 5 percent or less of the divorce cases. Six counties said they did not know the answer, or did not keep track of the information.[122]

JUDICIAL ATTITUDES IN FAMILY COURT CAN REFLECT BIAS AGAINST WOMEN, MINORITIES, AND THE INDIGENT.

The Committee received numerous complaints about reportedly biased conduct directed toward women, minorities, and indigent witnesses and litigants appearing before the family court system. At the State College public hearing, for example, Attorney Bloom reported that some judges were impatient with female litigants whom they viewed as emotional, and frequently interrupted witnesses and other parties who were female. She further stated that she believed this judicial conduct became more noticeable in cases where the women had low incomes.[123] At other times, witnesses said, bias is exhibited in judicial remarks exhibiting cultural stereotypes. Bloom related a case in which a judge told an imprisoned domestic violence defendant, brought before him to litigate a custody case, that the couple should be married, the man should be working, and the woman should be home caring for the children.[124] A full discussion of the issue of biased conduct as reported and expressed by participants in the judicial system is set forth in other chapters of this report.

INCONSISTENCIES IN THE APPLICATION OF THE LAW, COUPLED WITH INADEQUATE REPRESENTATION AND FACILITIES AND CULTURAL BIASES, CAN HAVE A DISPROPORTIONATELY NEGATIVE IMPACT UPON MINORITY AND FEMALE LITIGANTS IN CHILD DEPENDENCY PROCEEDINGS.

Inadequate representation in dependency court proceedings has a disproportionately negative effect upon low-income litigants, just as it does in the domestic relations division of the family court system. In both cases, the low-income litigants are often women and minorities. Inadequate facilities can create barriers for litigants attempting to access the legal system. A lack of personnel within the system can lead to multiple and fragmented hearings. The misapplication of procedural and substantive laws, and the imposition of cultural biases and stereotypes, can have a harmful impact upon these litigants.

Juvenile Law Center Report

The Juvenile Law Center concluded that, while the quality of representation varied from attorney to attorney, most attorneys were not following the Juvenile Act's requirements for guardians ad litem (GALs), and were not adequately representing the children involved in dependency proceedings.

In 2001 the Juvenile Law Center[125] (JLC) issued the report, *Promises Kept, Promises Broken: An Analysis of Children's Right to Counsel in Dependency Proceedings in Pennsylvania*. The report discussed the quality of representation received by the approximately 22,000 Pennsylvania children who are annually involved in dependency proceedings.[126] The children are guaranteed the right to an attorney, pursuant to Pennsylvania's Juvenile Act.[127] The report was based upon a survey of over 400 dependency attorneys in all but two of Pennsylvania's 67 counties, with additional information from JLC's own on-site visits to 16 juvenile courts throughout the Commonwealth.[128]

The JLC concluded that, while the quality of representation varied from attorney to attorney, most attorneys were not following the Juvenile Act's requirements for guardians *ad litem* (GALs), and were not adequately representing the children involved in dependency proceedings.[129] The survey results indicated that more than half of the lawyers were not meeting with their clients until moments before the adjudicatory hearings, nor were they

conducting independent investigations in the cases.[130] According to the report: "Many attorneys we met believed that it was the sole responsibility of the county agency to conduct factual investigations."[131] Two-thirds of the attorneys in the survey indicated that they did not regularly meet with witnesses before hearings, and a significant number of attorneys admitted their failure to interview their clients and other necessary parties such as parents and foster parents.[132]

The JLC also concluded that many courts were not conducting full, factual hearings before rendering dependency and placement decisions. Attorneys reported that more than 70 percent of adjudicatory hearings took less than 30 minutes; several reported hearings lasting no more than five minutes,[133] often because the court was relying primarily on stipulations of counsel. This was particularly troubling, the JLC concluded, "since it is unlikely that such hearings fully explore the child's needs and interests. Indeed, the Superior Court has held that it is improper for a court to accept the stipulation of parties regarding an adjudication of dependency without making an independent determination."[134]

The Juvenile Act now imposes requirements on county child welfare agencies to make reports and recommendations available to GALs prior to hearings.[135] The county agencies also must notify GALs of any plans to relocate the child or to modify custody or visitation arrangements; an explanation for the changes must accompany the notification.[136] Fewer than one-third of the lawyers, however, said they were always notified prior to placement changes, and only slightly more than one-third said they were always notified prior to a case conference. More than two-thirds of the attorneys reported not receiving their clients' medical and psychological records, and one-third to one-half of the attorneys reported not receiving the agency social workers' reports.[137] "Given that the survey also shows that many lawyers are not meeting with or interviewing their clients prior to adjudicatory hearings," the report says, "It is especially crucial that attorneys receive the agency social worker's report and all other relevant records about the child if they are to develop any understanding of their client."[138]

The JLC found that GALs were provided with little incentive or assistance to perform their jobs in a competent manner. Only 10 percent received training at the time of their initial appointments as GALs. [139] Many attorneys had large caseloads; in Philadelphia, some members of the Public Defenders Child Advocacy Unit had more than 500 open cases.[140] No attorneys were paid more than $70 per hour.[141] Over two-thirds had no access to investigators, which the JLC concluded was related to the low rates of pay received by the GALs. [142] While half of the attorneys believed that their low rate of remuneration did not affect the quality of their representation, the JLC disagreed.

"Because these attorneys are largely ignorant of the extent to which they are failing to provide high quality representation, they simply do not recognize the financial strain they would feel if they actually tried to meet the requirements of…[the Juvenile] Act…It will be interesting to see whether these attorneys begin to feel that financial strain as they struggle to meet their statutory mandate on a limited budget."[143]

Philadelphia Public Interest Bar Report

The Report by Philadelphia's Public Interest Bar and Advocacy Community on Dependent Court Resources and the Need For Judges, published in February 2001, assessed Philadelphia's dependency court system, concluding that: "The judges, lawyers and litigants are not accorded the respect that they and the issues they bring to the Court deserve. Nor are the resources that are needed for the proper administration of justice available to this Court. Thousands of families appear before the Philadelphia Family Court each year, and the system fails many of them."[144]

The report detailed the lack of staff, courtrooms, attorneys, and resources necessary to appropriately adjudicate the more than 4,000 dependency petitions filed annually.[145] These deficiencies led to unreasonable delays, with entire daily court lists postponed, often without prior notice to the attorneys or litigants.[146] Hearings have been held without court reporters, leaving no record of the proceedings.[147] Hearings have been held without a judge or master presiding in the courtroom, based solely upon stipulations of counsel.[148]

"The rates of compensation and size of attorney caseloads in Philadelphia have left a generation of children and their parents with often inadequate assistance of counsel in some of the most important events of their troubled lives."

—Report by the Philadelphia Public Interest Bar and Advocacy Committee on Dependent Court Resources and the Need for Judges

The report found that the lack of judges created long court lists; sometimes more than 30 cases per judge were scheduled, creating foreshortened hearings and hasty consideration of the complex issues involved in each case. [149] While "one judge, one family" is the goal in dependency court, the lack of judicial staff fosters an ever-changing slate of judges, resulting in a lack of continuity and efficiency in the disposition of each case.[150]

The report found that Philadelphia dependency lawyers were paid so poorly that it was difficult to attract attorneys to accept these cases. "The rates of compensation and size of attorney caseloads in Philadelphia have left a generation of children and their parents with often inadequate assistance of counsel in some of the most important events of their troubled lives."[151] Such low fees "present a real threat to the safety of children and the preservation of families in Philadelphia. Any system that unrealistically limits the amount of work by advocates on behalf of children and parents damages the protection afforded these people…The current flat fee system does little more than ask counsel to show up in court. It provides for little or no client contact or preparation. It does not recognize that cases are often extremely delicate and complex. It does not acknowledge that many of these cases become more demanding the longer they are in the system."[152]

The report recognized that these shortcomings have wide consequences. "We note that neither the bar nor the judiciary would tolerate inadequate lawyer practice, non-record proceedings and questionable satisfaction of due process protections in any other area of practice. Dependency proceedings, which have profound effects on the lives of children and families, should not be treated any differently."[153] These inadequate practices and procedures also have a negative impact on the parties' perceptions of justice, leading to their "eroded confidence in the authority and wisdom of the Court process."[154]

Allegheny County Roundtable Discussion

In 2002, the Committee conducted a roundtable discussion concerning dependency practices and procedures in Allegheny County. Attending the discussion were 20 professionals, including juvenile court judges, the Allegheny County Juvenile Court System director, child advocate attorneys, and the Children, Youth and Family Services (CYFS) director and caseworkers.[155] As a result of this session, the Dependency Work Group Report of Focus Group Discussion was prepared in May 2002, which set forth the findings and recommendations of the participants.

Although African Americans make up only 12 to 13 percent of the Allegheny County population, they account for 60 percent of the families involved in civil juvenile proceedings and 80 percent of all dependency proceedings.[156] While it was beyond the scope of the discussion group to reach conclusions about this statistical disparity, several participants nevertheless expressed the opinion that racial motivations were at least partly responsible for the overrepresentation of African American families in dependency proceedings.[157]

No one at the roundtable could recall a recommendation for a white child to be placed with an African American family, although it has not been uncommon for African American children to be placed with white foster families or adoptive families.[158] Some participants also noted that biracial or multi-racial children who "looked" African American were categorized and treated as such, without regard for their multi-ethnic heritage.[159] Members of the discussion group regarded both of these issues as indicators of racial discrimination.[160]

These professionals believed that the race, gender, or cultural values of a participant in the juvenile justice system often had an impact on the outcome of a dependency case, regardless of whether the participant was the child or family in question, the CYFS caseworker, the legal advocate, or the judge. Incorrect assumptions about other ethnic or racial groups were often based on cultural stereotypes or a lack of cultural awareness; stereotypes often led to incorrect assumptions about people's behavior, based on conscious or unconscious assumptions that one's own cultural norms are "correct" or "superior" to others' norms. The example discussed by many participants concerned adoption, a positive white cultural norm that is viewed in a different light by many in the African American community. Participants indicated that, although many African Americans strongly believe in the appropriateness of caring for, and becoming the guardian for one's kin, many in the community do not believe it is appropriate to adopt those children, thereby terminating the rights of biological parents who are also their kin.[161]

These professionals believed that the race, gender, or cultural values of a participant in the juvenile justice system often had an impact on the outcome of a dependency case, regardless of whether the participant was the child or family in question, the CYFS caseworker, the legal advocate, or the judge.

A troubling issue was raised at the roundtable concerning the African American community's perceived reluctance to adopt children, coupled with the system's willingness to place these children into white families. "When you bring more children of color into the system, then refuse to acknowledge that adoption is not necessarily something of high value with communities of color, the result is many more children than adoptive families available and a systemic placement of children of color within white families…[This] raises the question of racial prejudice…"[162]

It was further reported that decision-makers in dependency cases were often influenced by the erroneous stereotype that corporal punishment was a "normal" method to discipline children in African American families. Participants said that some decision-makers would therefore not regard such acts as child abuse, even though the same behavior in white families could be viewed as abuse. The roundtable participants believed that this attitude places African American children at risk because they do not receive the same degree of protection as similarly situated white children. Speakers pointed out that the belief serves to discriminate against the abused African American child, although the stereotype itself is incorrect. There is no evidence that African American families accept or use corporal punishment more often than white families.[163]

The discussion group noted that racial and cultural bias within the dependency system often grows out of racial and cultural bias in other social systems. The most obvious example concerned the criminal justice system, where, as discussed in the chapter on sentencing disparities in the criminal justice system, minorities are disproportionately arrested and incarcerated. A criminal conviction could later impede a person's attempt to adopt a child or become a foster parent. The roundtable participants were concerned that current laws and regulations could, for example, preclude a person convicted of harassment at age 18 from caring for a child. Exacerbating the situation are statutory provisions requiring the

reporting of all criminal convictions, along with Department of Public Welfare (DPW) regulations that deny counties reimbursement for foster care payments to persons with criminal backgrounds. Alexis Samolski, assistant county solicitor in Allegheny County, explained: "Now they are 60 years old and they want to adopt their grandchild, and they have this offense that creeps back up at them, and they're amazed because they can't understand what the big deal is."[164]

Many discussion group participants expressed a belief that the juvenile justice system treated white families differently from African American families, especially with regard to the system's tolerance for drug and alcohol addictions. James Rieland, director of the Allegheny County Juvenile Court, explained that certain forms of addiction "bring certain people to the attention of the system, when other addictive behaviors…don't bring people to the attention of the system…Crack addiction is looked at very differently than a legally gotten prescription from a doctor treating some suburban person or somebody who's addicted to martinis after work."[165] Crack conjures up criminal behavior, Rieland continued, while martinis conjure up suburbia. "I think it might look very differently if those people were coming before us with very similar facts of abusing their kids."[166]

Discussion group members noted other subtle forms of differential treatment, including a perceived willingness to remove children from homes in minority-occupied public housing when similar incidents in white, single-dwelling neighborhoods did not result in the filing of dependency petitions.[167] Speakers shared the belief that more resources were directed toward keeping white families intact than toward keeping minority families intact.[168] Because most representatives of the dependency system, from caseworkers through attorneys, were white, the participants said, minority litigants often concluded that the system did not understand or reflect their own cultural values and identities.[169]

The discussion group also addressed the issue of gender as it related to seeking justice within the juvenile dependency system. They noted that Juvenile Court shared the general societal assumption that mothers were the natural caretakers of children.[170] The assumption often complicated the efforts of both mothers and fathers to seek appropriate outcomes in placement and services for their families.

The general consensus of the participants was that the dependency system made little effort to identify or include fathers—and especially African American fathers—in family services plans.[171] In the few cases where the father was identified and included, however, he often had to meet less stringent standards than a mother in order to achieve visitation or custody. A mother, on the other hand, sometimes faced enormous hurdles in seeking reunification with her child. Alicia Melnick, case manager for the Court Appointed Special Advocate Program, explained: "Mom has all these [family service plan] rules, and a lot of times…there will be 10 goals for mom to maintain, and dad's goal is to maintain contact with CYF or maintain visitation with the child…Fairness-wise, mom has to jump through all these hoops, do all the things to maintain visitation…where dad is just being given visitation because [he is there]."[172]

Public Hearing Testimony

> *"I have seen the same type of abuse, the same sort of neglect in a housing project…and in an African American home resulting in children being removed or a petition being filed, [but] when the same thing happens in a white suburban home, then nothing happens at all."*
>
> —Attorney Scott Hollander

Among those testifying at the Pittsburgh public hearing was Scott Hollander, executive director of Legal Aid for Children (KidsVoice), which represents approximately 5,500 children per year in abuse and neglect cases in Allegheny County. Hollander discussed the disproportionate number of African American families in the dependency system, and also raised the issue of cultural stereotypes and attitudes. With regard to corporal punishment, Hollander said he was aware "from looking at the literature that child abuse is not predominantly African American. It cuts across all classes and races." [173] He noted that CYFS caseworkers are affected by their own cultural attitudes in making decisions about which families should be considered for dependency placements. "Clearly that person's awareness, their cultural experiences come to bear on the children and families they work with…I have seen the same type of abuse, the same sort of neglect in a housing project…and in an African American home resulting in children being removed or a petition being filed, [but] when the same thing happens in a white suburban home, then nothing happens at all."[174]

Jon Petulla, director of Human Services and Children and Youth Services in Erie, testified at the Erie public hearing. He elaborated upon a model system adopted by his agency to strive for cultural awareness and diversity in all aspects of the juvenile justice system. This system is set forth in detail under the Best Practices section of this chapter.

County Survey

Rates for court-appointed dependency counsel varied between $40 per hour and $75 per hour. Allegheny County reported a flat fee of $500 for a full day's hearing, and $250 for a half-day. Philadelphia County did not respond.[175]

Gender and racial breakdowns for children involved in dependency litigation in 2000–01 were provided by Indiana, Lancaster, and Bucks counties and, to a lesser degree, Philadelphia and Delaware counties.[176] This information is summarized in Table 1 of the county survey attached in Appendix Vol. III.

The counties reported a total of 34 judges hearing dependency cases. Of these, 70 percent were male and 30 percent were female. The counties reported a total of one African American male judge and 23 white male judges; three African American female judges and seven white female judges.[177] Similarly, 65 percent of the non-judicial decision makers hearing dependency cases were male and 35 percent were female. Of that group, one decision-maker was a Latino male and 10 were white males; two were Latina females and four were white females.[178]

OTHER TASK FORCE FINDINGS

Findings in Pennsylvania on family law issues echo findings by other state task forces. The Committee reviewed reports produced by about 20 other state task forces. Each report addressed from its own perspective the gender, ethnic, racial, and economic issues relating to family law, although many task forces agreed that the dissolution of marriage contributed to the "feminization of poverty."[179] Several reports focused upon substantive and procedural family law issues and their effect upon litigants, while others concentrated upon the obstacles that prevented litigants from fully accessing the judicial system.

WASHINGTON STATE

The Washington State Task Force on Gender and Justice in the Courts concluded in its final report that substantive and procedural family laws were not the problem. Instead, the task force focused its attention on how "gender-based cultural myths and stereotypes about the roles of men and women" affected the application of those laws.[180] The task force identified such "myths" as:

- Women have equal access to jobs and equal earning power;
- Spousal support awards are equivalent to welfare and will result in a spouse's refusal to seek employment; and
- Attractive young women will remarry so there is no need to provide for their futures.

The task force concluded that such assumptions worked to the detriment of the economically dependent spouse, who was most often female.

The task force found that alimony, when ordered, was often of limited duration and was generally available only to women from long-term marriages. It concluded that marital property distribution awards put women at a disadvantage when the court failed to consider the unequal earning capacities of the spouses. The task force found that child support awards were inadequate, and that mothers often settled for less than their legal entitlement because of the father's threats concerning child custody.

MASSACHUSETTS

In 1989, The Gender Bias Study of the Court System in Massachusetts acknowledged that both husbands and wives felt the negative economic consequences of divorce. But the task force concluded that, as a result of gender bias, wives were hurt the most. Based upon surveys, public hearings, interviews, focus groups, and analysis of court records and statistics, the task force identified several overriding issues with an especially harmful effect upon women. These areas included the lack of access to legal counsel and the inaccuracy of financial data provided to the economically dependent spouse.

The task force found that *pro se* litigants encountered many more difficulties than those litigants represented by counsel. The task force also concluded that the court's reluctance to award attorney's fees contributed to the significant number of *pro se*, usually female, litigants.

The task force also found that alimony was not often awarded, especially when a child support order was in effect. When an alimony award was entered, it did not appropriately account for the dependent spouse's lost career opportunities and their impact on the spouse's future earning potential. A dependent spouse, most often female, usually saw her standard of living decline after a divorce, while the man's standard of living was found to increase.

The task force's analysis of custody cases led to the finding that, "more frequently, gender stereotypes mean that mothers are held to a higher standard than fathers, and that the interests of fathers are given more weight than the interests of mothers and children."[181] These stereotypes included expectations that mothers would not become employed, would not date or cohabit, and would not even temporarily leave the children.

While mothers were more often awarded custody than were fathers, the task force explained the phenomenon as the result of the parents' agreement, or as a continuation of the mother's role as primary caretaker. The task force found that fathers succeeded in gaining primary or shared custody in 70 percent of the cases in which they pursued custody.

NEW YORK

Two New York reports addressed family law concerns: The Report of the New York State Judicial Commission on Minorities, Volume Two: The Public and the Courts, published in 1991, and The Report of the New York Task Force on Women in the Courts, published in 1986–1987.[182] The Judicial Commission report focused upon issues surrounding minority access to the courts, while the New York Task Force report discussed how women were affected by substantive family laws and the application of those laws.

The Judicial Commission report discussed the dilapidated state of the family law courts in New York, both in New York City and in other areas of the state. It found that, "in the family courts ... people mill around like cattle because there's no place for them and they don't know what's going on. The judges don't have enough time to give any one case. There is no place to talk to a client. Sometimes the restrooms are locked."[183] Often there was little or no information available to litigants about how to negotiate their way through the court system. People were perplexed by simple issues such as where to sign in for their case, and by complex issues such as how to file a pleading. The commission recognized the difficulties that navigating the court system posed for people with limited education or with a limited command of English.

The commission found that race was often a factor in the outcome of child abuse and neglect cases. Through analysis of the results from surveys and reports from other state agencies, the final report concluded that the legal system sometimes afforded more protection to white children than to minority children.

The commission highlighted six perceived barriers that minorities must overcome when they enter the legal system: psychological, economic, informational, linguistic, cultural, and geographical. With regard to the economic factors, the commission found that court sessions that occurred only during weekday work hours forced low-income litigants to incur childcare costs which they could ill afford. The commission also determined that the family court's too-crowded daily case schedules led to frequent delays, continuances, and multiple hearings, which made it difficult for low-income litigants to arrange work schedules, and frequently caused them to miss many days of work.

The Task Force on Women in the Courts also found that family courts were inadequately maintained. "Resources allocated to the family court are perceived to be unfairly low when compared to the resources of other courts,"[184] the report said, adding that family courts were "the stepchild of the court system, the last to get what is needed and the first to have it taken away."[185]

The task force studied the impact of substantive family laws upon women, and made findings similar to those of the other task forces cited previously. It concluded that, regardless of the substantive issues, "a judge's refusal to award adequate or timely counsel and expert fees [raised] critical barriers to women's receiving adequate representation in matrimonial cases."[186] Inability to afford representation made it difficult or impossible for women to enforce child support awards or other court orders, obtain marital asset information, litigate claims, and file appeals.

TEXAS

The Gender Bias Task Force of Texas: Final Report, published in 1994, included a chapter on the accessibility of the court system. The task force concluded that low-income litigants were often denied access to the judicial system because of their financial status and that low-income litigants' needs for legal services far outweighed the available legal resources. The task force concluded that women were disproportionately affected by this lack of legal resources, because women were far more likely than men to live in poverty.

In the chapter of the report discussing substantive family law issues, the task force found that when women were divorced, judicial property division awards did not adequately compensate for the differences in many women's lesser earning capacity. The task force determined that temporary spousal support awards,[187] separately or in conjunction with low- or non-existent counsel fee awards, forced economically dependent spouses into settling on unfavorable terms the division of marital assets portions of their cases.

CALIFORNIA

California published its report on racial and gender bias, entitled Achieving Equal Justice for Women and Men in the California Courts, in 1996. The section of the report devoted to family law issues addressed substantive and procedural problems as well as the barriers to litigants' access to the courts. Through public hearings, roundtable discussions, and a judicial survey, the task force concluded that family law "is an area in which gender bias is rampant in the courts; probably because this is an area in which judges have the greatest discretion and where biases are the strongest."[188]

The results of the task force's judicial survey showed that "judges rate the family law assignments as their lowest preference by a wide margin."[189] The task force linked the judges' preferences to the low priority accorded to women's and children's issues, and to the time constraints, inadequate staffing, and pressure to move calendars that "augment the stress inherent in hearing matters of great emotional import...resulting in judicial burnout among family law judges."[190]

The task force found that in many courthouses there were too few judges, too few courtrooms, and too frequent delays in hearing family law cases. The task force also determined that there was little coordination between the various sections of the court administering family law issues.

The task force also found litigants encountering many obstacles in the family court system. The litigants received inadequate information concerning their substantive and procedural rights, and were given insufficient assistance by court personnel. The task force concluded that the effects were felt most acutely by low-income litigants and by those who were primary caretakers of children, both of whom were usually women. The problems were further exacerbated by the lack of adequate legal representation for many low- and moderate-income litigants.

With regard to substantive areas of the law, the task force concluded that child support awards and attorney's fee awards were insufficient, and that both effects had the greatest negative impact upon low-income, often female litigants. The task force found that custody decisions—to the detriment of both fathers and mothers—were often influenced by judicial biases concerning proper gender roles.

OREGON

The Oregon Gender Fairness Task Force Report, published in 1998, addressed the extent to which gender affected litigants' abilities to pursue their substantive family law rights. The results of their surveys indicated that both men and women perceived bias against them in areas of family law. Men perceived that they were discriminated against in custody cases, although statistics from Oregon court records indicated that men were awarded primary custody as often as women when the men pursued custody through the final hearing. Women more often perceived bias against them in economic matters, asserting, for example, that, with regard to spousal support, their services as homemakers were not sufficiently

valued and that they received inadequate spousal support—both in amount and duration—to enable them to achieve financial independence. The task force received similar testimony concerning equitable distribution awards, which led to its conclusion that, "Even when a woman is given the larger half of the property, the award is not sufficient to offset the long-term disparity in income or potential for income."[191]

The task force found that the wealth of a litigant had an effect upon the outcome of his or her domestic relations case. The poorer a litigant, the worse he or she fared in court. The task force also determined that ethnic and racial minorities encountered additional obstacles in family court, including language barriers, mistrust of the police, and fears concerning deportation, evidencing a "general pattern in which women of color are reluctant to use the courts or even to consult with a lawyer."[192]

CONCLUSION

Pennsylvania's family and dependency court systems are currently fraught with obstacles that a person must overcome if he or she is to gain access to the courts and to secure appropriate familial and economic remedies. Keeping in mind the fact that most litigants in the family and dependency systems are low-income, the courts must take steps to become more accessible for all, not just the wealthy few. Family and dependency court procedures must be changed to ensure that justice is "dispensed in a fair, timely and cost-effective manner so that the trauma experienced by Mom, Dad and the kids is not exacerbated by repetitious and unnecessary court events." [193] Substantive and procedural laws must be applied in an even-handed, consistent and appropriate manner. As the Washington State Task Force declared in its own final report: "While the judicial system cannot end poverty for women and children, it can, through understanding, avoid contributing to it."[194] Cultural biases must not be permitted to stand in the way of equal justice for all litigants, regardless of race, gender, or financial resources. The best practices section below, and the recommendations that follow, are designed to promote and implement these goals.

BEST PRACTICES

ERIE COUNTY

Erie County's Office of Children and Youth (OCY) has implemented a program to ensure that the children of Erie County receive care in safe, abuse-free, multi-ethnic environments. To further this goal, the OCY has developed culturally focused policies and procedures for its child welfare staff, including the development of a code of ethics and a cultural competency policy, which are the cornerstones of its ongoing plan to promote a culturally diverse workplace. This five-year plan includes the following:

- A commitment to recruit, retain, and promote a diverse staff, which includes women, people of color, and people with multilingual capabilities;
- Ongoing orientation and training activities about cultural diversity for all staff, with special sensitivity training for new employees;
- A commitment to take appropriate steps to ensure that the community views the office as a place of comfort and assistance;
- The restructuring of the OCY to promote increased cooperation and teamwork among all levels, units, and service providers;
- A physical work environment that reflects cultural diversity; and
- The implementation of regular forums for all levels of staff to address and resolve issues that arise.

The OCY has established several underlying principles upon which its clinical practice is grounded. These include the following:

- The recognition that it is the OCY's responsibility to provide culturally competent services that incorporate equality and non-discriminatory behavior;
- Staffing patterns that reflect the ethnic and racial makeup of the client population in order to ensure the delivery of culturally competent services. Job descriptions, duties, and responsibilities must also reflect culturally competent practices;
- The acknowledgement of the impact of ethnicity and culture on behavior, taking these factors into account when working with both employees and client families of various ethnic and racial backgrounds or lifestyles;

- The necessity of annual education and training to enhance the staff's understanding of cultural competency;
- Sanctioning and mandating the incorporation of cultural knowledge in both practice and policymaking; and
- Hiring and maintaining a diverse staff.

MONTGOMERY COUNTY

As set forth in more detail in the chapter on Gender Bias in Jury Selection, Montgomery County operates a model childcare program for the benefit of parents who must appear in court, including family court. Created in 1995, the Court Care Center is the Commonwealth's first drop-in courthouse childcare center to operate with a full-time professional childcare staff, fully licensed by the Pennsylvania Department of Public Welfare.

RECOMMENDATIONS

TO THE SUPREME COURT OF PENNSYLVANIA

The Committee recommends that the Court:

1. Establish a statewide uniform family law system, with procedural rules governing the management, processing, and procedures for family law cases from inception through conclusion.[195]
2. Establish uniform requirements for courts regarding family and dependency cases, including a system for the dissemination of public information in oral, written, and telephonic form about the availability of interpreters, court procedures for all areas of family law, substantive and procedural laws and rights, the availability of *in forma pauperis* status, the availability of *pro bono* counsel, and other appropriate legal and social services.
3. Order the reallocation of existing judicial resources to increase the proportion of judges assigned to hear family law cases.
4. Require opinions from the trial judge, master, or hearing officer that explain the basis for decisions concerning custody, alimony, child support, and equitable distribution.
5. Direct court administrators to establish a scheduling system that provides judges with sufficient time necessary to hear family cases. To the extent possible, cases should be completed in one scheduled hearing and decisions should be rendered in a timely fashion, in order to avoid repeated court appearances by the parties.
6. Establish a more effective and less expensive system for litigants to enforce support, custody, and alimony orders.
7. Require court-appointed attorneys and court personnel appearing in dependency court to attend training sessions.[196]
8. Establish guidelines for maximum caseloads for guardians *ad litem* and court-appointed attorneys in dependency cases, and for adequate compensation to permit guardians *ad litem* and court-appointed attorneys to perform their jobs in a competent manner.
9. Establish clear procedures for processing bias complaints against family law masters.[197]

TO THE LEGISLATURE

The Committee recommends that the Legislature:

1. Allocate sufficient funds to study and develop a Family Court Reform Model System effectuating the proposed statewide family law system set forth in *Recommendations for the Pennsylvania Supreme Court,* Number 2.
2. Allocate sufficient funds so that courts can physically accommodate all family and dependency litigants.
3. Allocate sufficient funds for legal aid and other *pro bono* organizations to adequately address the needs of low-income family law litigants.
4. Modify the alimony section of the Divorce Code to further define the appropriate circumstances under which alimony should be awarded, and to provide meaningful and uniform guidelines regarding the amount and duration of the alimony award.
5. Allocate additional court funds to hire personnel necessary to process family and dependency cases.

TO BAR ASSOCIATIONS

The Committee recommends that bar associations:

1. Work with the Supreme Court and citizen groups to establish educational programs for the general public on substantive and procedural rights and responsibilities in family and dependency law.

TO COURT ADMINISTRATORS AND MANAGERS

The Committee recommends that court administrators and managers:

1. Study and recommend to the Court appropriate changes in local family law and juvenile court facilities to establish a family and juvenile court infrastructure of sufficient size for effective, safe, and efficient accommodation of all family law litigants, witnesses, and related personnel.[198]
2. Study methods of enhancing the dependency system in each county and submit proposals for federal funds to implement these improvements, as permitted pursuant to the Federal Strengthening Abuse and Neglect Courts Act of 2000, Public Law 106-314.

3. Study and recommend to the Court standards for all family and dependency court cases that address the following procedural issues:
   - the timely advance notice to all parties concerning scheduling changes;
   - the accurate and complete transcription of all proceedings;
   - the presence of a judge, hearing officer, or master for every hearing;
   - the allocation of sufficient time for full presentation of evidence and examination of witnesses at every hearing; and
   - the allocation of sufficient time for the hearing of all cases scheduled on any given day.
4. Establish a system to disseminate information between the family and juvenile sections of each court in a timely and appropriate manner, in order to facilitate consolidation of dependency, custody and/or support issues, as may be appropriate.

TO THE DEPARTMENT OF PUBLIC WELFARE, AND CHILDREN, YOUTH AND FAMILY SERVICES PROGRAMS

The Committee recommends that the Department of Public Welfare and Children, Youth and Family Services Programs:

1. Establish and improve ongoing training for all appropriate social services personnel, similar to that required for court-appointed attorneys and court personnel who are involved in dependency proceedings.[199]
2. Develop methods of enhancing the delivery of services in each county and submit proposals for funding of those improvements, pursuant to the Federal Strengthening Abuse and Neglect Courts Act of 2000, Public Law 106-314.

ENDNOTES

[1] The Report of the Pennsylvania Bar Association Task Force on Family Court Reform (2000), Introduction to Recommendation 55, Family Court Rules, p. 1.

[2] Transcript from Philadelphia Roundtable Discussion on Family Law Matters: Gender and Racial Bias, p. 3 [hereinafter Philadelphia Roundtable on Family Law]; Dependency Work Group Report of Focus Group, p. 1 [hereinafter Dependency Work Group Report]

[3] Pittsburgh Roundtable on Family Law, *supra* at 3; Report by Philadelphia Bar Association's Public Interest Bar and Advocacy Community on Dependent Court Resources and the Need For Judges (2001), p. 8 [hereinafter Public Interest Report].

[4] Testimony of Pennsylvania State Representative Lita Cohen, Harrisburg Public Hearing Transcript, p. 62 [hereinafter Cohen Testimony].

[5] Philadelphia Roundtable on Family Law, *supra* at 8.

[6] Transcript from Philadelphia Roundtable on Substantive and Procedural Barriers for Women and Racial Minorities in Family Court, p. 3, attached in Appendix Vol. III [hereinafter Philadelphia Roundtable on Substance and Procedure].

[7] Testimony of Rebecca Ardoline, State College Public Hearing Transcript, p. 72 [hereinafter Ardoline Testimony].

[8] Precise statistics are not collected on the percentage of low income litigants in family court who are females or minorities, but the consensus of all of the attorneys and litigants who testified on those issues before the Committee is that women and minorities are a large percentage of family law litigants and a majority of the low-income litigants who are unrepresented in family court proceedings.

[9] Cohen Testimony, *supra* at 65.

[10] *Id.*

[11] Testimony of Elizabeth Bennett, Philadelphia Public Hearing Transcript, p. 333 [hereinafter Bennett Testimony].

[12] Testimony of Caren Bloom, State College Public Hearing Transcript, pp. 85–86 [hereinafter Bloom Testimony].

[13] Ardoline Testimony, *supra* at 81–82.

[14] *Id.* at 80–81.

[15] Testimony of Carolee Medico-Olenginski, Wilkes-Barre Public Hearing Transcript, p. 264 [hereinafter Medico-Olenginski Testimony].

[16] *Id.* at 265.

[17] Ardoline Testimony, *supra* at 74.

[18] Philadelphia Roundtable on Substance and Procedure, *supra* at 3.

[19] *Id.* at 2.

[20] *Id.* at 4.

[21] Transcript from State College Roundtable on Substantive and Procedural Barriers for Women and Racial Minorities in Family Court, p. 2, attached in Appendix Vol. III [hereinafter State College Roundtable].

[22] Philadelphia Roundtable on Family Law, *supra* at 7.

[23] *Id.*

[24] State College Roundtable, *supra* at 20.

[25] Philadelphia Roundtable on Family Law, *supra* at 3.

[26] *Id.* at 8.

[27] State College Roundtable, *supra* at 19.

[28] *Id.* at 3.

[29] Philadelphia Roundtable on Substance and Procedure, *supra* at 3.

[30] *See* litigant surveys and summary in Appendix Vol. III.

[31] Pennsylvania Supreme Court Committee on Race and Gender Bias Family Law Work Group Survey Analysis of Pennsylvania Courts (2002), response to Section IV Table 7, p. 16, attached in Appendix Vol. III [hereinafter Survey of Pennsylvania Courts].

[32] *Id*. at response to Section IV, Table 8, p. 17.

[33] *Id*. at response to Section IV, Table 56, p. 61.

[34] *Id*. at response to Section I, Table 23, p. 34; response to Section I, Table 44, p. 54.

[35] Ardoline Testimony, *supra* at 84.

[36] *Id*. at 78.

[37] State College Roundtable, *supra* at 11; Philadelphia Roundtable on Family Law, *supra* at 4.

[38] State College Roundtable, *supra* at 22.

[39] Philadelphia Roundtable on Family Law, *supra* at 4.

[40] State College Roundtable, *supra* at 22.

[41] Philadelphia Roundtable on Substance and Procedure, *supra* at 5.

[42] Philadelphia Roundtable on Family Law, *supra* at 4.

[43] *Id*.

[44] State College Roundtable, *supra* at 19; Philadelphia Roundtable on Family Law, *supra* at 4.

[45] Survey of Pennsylvania Courts, *supra* at response to Section IV, Table 9, p. 18.

[46] *Id*. at response to Section I, Table 43, p. 53.

[47] The Family Division is not open after regular business hours. Rather, Philadelphia County has an emergency PFA filing site in another division of the Common Pleas Court.

[48] Survey of Pennsylvania Courts, *supra* at response to Section I, Table 42, p. 52.

[49] *Id*. at response to Section I, Table 38, p. 48.

[50] *Id*.

[51] Written Testimony of Carol Mills McCarthy, Pittsburgh Public Hearing, p. 4 [hereinafter McCarthy Written Testimony].

[52] Bennett Testimony, *supra* at 325.

[53] Testimony of Mary Colonna, Erie Public Hearing Transcript, p. 174 [hereinafter Colonna Testimony].

[54] *Id*.

[55] Testimony of Carl Romanelli, Wilkes-Barre Public Hearing Transcript, pp. 190–191 [hereinafter Romanelli Testimony].

[56] McCarthy Written Testimony, *supra* at 4.

[57] *Id*.

[58] Medico-Olenginski Testimony, *supra* at 257.

[59] Testimony of Scott Hollander, Pittsburgh Public Hearing Transcript, pp. 326–328 [hereinafter Hollander Testimony].

[60] Philadelphia Roundtable on Substance and Procedure, *supra* at 3–4. Additionally, this issue was addressed by the PBA Task Force on Family Court Reform, Recommendation 55, which acknowledges the need for statewide unified family court rules.

[61] Philadelphia Roundtable on Substance and Procedure, *supra* at 4.

[62] Written Testimony of Mary Cushing Doherty, Philadelphia Public Hearing, p. 3 [hereinafter Doherty Written Testimony].

[63] *Id*. at 1.

[64] *Id*. at 3.

[65] Written Testimony of Caren Bloom, State College Public Hearing, p. 10 [hereinafter Bloom Written Testimony].

[66] *Id*. at 7.

[67] *Id*.

[68] *Id.* at 4.
[69] *Id.* at 5.
[70] *Id.*; Philadelphia Roundtable on Substance and Procedure, *supra* at 5.
[71] Philadelphia Roundtable on Family Law, *supra* at 5.
[72] *Id.* at 1, 5.
[73] *Id.* at 4.
[74] Survey of Pennsylvania Courts, *supra* at response to Section I, Table 33, p. 43.
[75] *Id.* at response to Section II, Table 45, p. 55.
[76] McCarthy Written Testimony, *supra* at 4.
[77] *Id.*; *see* also Bloom Testimony, *supra* at 154.
[78] 23 Pa. Cons. Stat. Ann. § 3701.
[79] Bloom Testimony, *supra* at 153–154.
[80] *Id.* at 156.
[81] *Id.* at 185.
[82] Doherty Written Testimony, *supra* at 3.
[83] *Id.* at 3–4.
[84] *Id.*
[85] *Id.* at 4.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 4–5.
[89] State College Roundtable, *supra* at 9.
[90] *Id.*
[91] Philadelphia Roundtable on Substance and Procedure, *supra* at 3.
[92] *Id.* at 3–4.
[93] *Id.* at 5.
[94] *Id.*
[95] State College Roundtable, *supra* at 13.
[96] Philadelphia Roundtable on Substance and Procedure, *supra* at 7.
[97] *Id.*
[98] Survey of Pennsylvania Courts, *supra* at response to Section V, Table 12, p. 21.
[99] *Id.* at 29.
[100] *Id.* at response to Section V, Table 14, p. 25.
[101] Testimony of Kevin Sheahan, Harrisburg Public Hearing Transcript, pp. 103–104.
[102] Hollander Testimony, *supra* at 52.
[103] McCarthy Written Testimony, *supra* at 2.
[104] Ardoline Testimony, *supra* at 76–77.
[105] Hollander Testimony, *supra* at 47–48.
[106] Ardoline Testimony, *supra* at 77–78.
[107] Bloom Testimony, *supra* at 156.
[108] Ardoline Testimony, *supra* at 76–77.
[109] Doherty Written Testimony, *supra* at 2.
[110] *Id.*
[111] Philadelphia Roundtable on Family Law, *supra* at 6.
[112] *Id.*
[113] *Id.* at 5.

[114] *Id*. at 6.

[115] *See* litigant surveys and summary, attached at Appendix Vol. III.

[116] *Id*. at 29.

[117] McCarthy Written Testimony,*supra* at 4.

[118] Doherty Written Testimony,*supra* at 7, referencing 23 Pa. Cons. Stat. Ann. § 3703.

[119] Bennett Testimony, *supra* at 330.

[120] *Id*. at 330–331; Medico-Olenginski Testimony, *supra* at 260–261; Romanelli Testimony, *supra* at 189–190.

[121] Ardoline Testimony, *supra* at 75–76.

[122] Survey of Pennsylvania Courts, *supra* at response to Section V, Table 13, p. 23.

[123] Bloom Testimony,*supra* at 153.

[124] Bloom Written Testimony,*supra* at 1–2.

[125] Founded in 1975, the Juvenile Law Center is a non-profit public interest law firm that advances the rights and well-being of children in jeopardy. The law firm represents and advocates on behalf of children in both the delinquency and dependency systems. *Promises Kept, Promises Broken: An Analysis of Children's Right to Counsel in Dependency Proceedings in PA, 2001* (Juvenile Law Center, Philadelphia, PA), [hereinafter Juvenile Law Center, *Promises,* 2001].

[126] Id. at 2, citing Martha C. Bergsten and Martha Wade Steketee, *Pennsylvania KIDS COUNT Partnership, The State of the Child in Pennsylvania: A 1999 Pennsylvania Guide to Child Well-Being in Pennsylvania*, p. 16 (1999).

[127] 42 Pa. Cons. Stat. Ann. § 6337 (2000).

[128] Cameron County reported that, in violation of the Juvenile Act requirements, it did not appoint a guardian *ad litem* unless the child specifically requested an attorney. Lancaster County could not identify which attorneys represented children in dependency proceedings, so no surveys were sent to attorneys from that county; Juvenile Law Center, *Promises,* 2001, *supra* at 24.

[129] Act 18 of 2000, which amended the Juvenile Act, 42 Pa. Cons. Stat. Ann. § 6301, established the guardian *ad litem* position and the required conduct of attorneys undertaking representation of children for whom dependency petitions had been filed. These requirements are set forth at 42 Pa. Cons. Stat. Ann. § 6311 (2000).

[130] Juvenile Law Center, *Promises,* 2001, *supra* at 24.

[131] *Id*. at 28.

[132] *Id*. at 29.

[133] *Id*. at 34–35.

[134] *Id*. at 34, *citing In the Interest of Michael Y,* 365 Pa. Super. 488, 530 A. 2d 115 (1987).

[135] 42 Pa Cons. Stat. § 6311 (2000).

[136] *Id*.

[137] *Id*. at 30.

[138] Juvenile Law Center, *Promises*, 2001, *supra* at 32.

[139] *Id*. at 40.

[140] *Id*. at 42, n. 32.

[141] *Id*. at 42.

[142] *Id*. at 28.

[143] *Id*. at 42.

[144] Public Interest Report, *supra* at 1.

[145] *Id*. at 2, as reported in the National Center for Juvenile Justice, Pennsylvania Court Improvement Project Final Report, August 4, 1998, p. 49 [hereinafter NCJJ Court Improvement Report].

[146] Public Interest Report, *supra* at 3.

[147] *Id*.

[148] *Id. citing* NCJJ Court Improvement Project at 62, nn. 69–70.

[149] *Id.* at 4.

[150] *Id.*

[151] *Id.*

[152] *Id.* at 5.

[153] *Id.* at 8.

[154] *Id.* at 6.

[155] A complete list of those attending the roundtable discussions can be found in the transcripts of the discussions in Appendix Vol. III.

[156] Dependency Work Group Report, *supra* at 4. It was also noted that Latinos and other ethnic minority groups made up a relatively insignificant portion of the Allegheny County population, and thus a correspondingly extremely small portion of the dependency population. Hollander Testimony, *supra* at 51.

[157] Dependency Work Group Report, *supra* at 4–5.

[158] *Id.* at 6.

[159] *Id.* at 7.

[160] *Id.*

[161] *Id.* at 6; Pittsburgh Dependency Roundtable Transcript, pp. 23, 59 [hereinafter Pittsburgh Dependency Roundtable].

[162] Pittsburgh Dependency Roundtable, *supra* at 6–7.

[163] *Id.* at 5.

[164] *Id.* at 42.

[165] *Id.* at 48.

[166] *Id.* at 49.

[167] Dependency Work Group Report, *supra* at 9.

[168] Pittsburgh Dependency Roundtable, *supra* at 45.

[169] *Id.* at 8–9.

[170] A Children and Youth Family Services case is opened only in a mother's name, regardless of whether the father is caring for the children. Dependency Work Group Report, *supra* at 10.

[171] *Id.*

[172] Pittsburgh Dependency Roundtable Transcript, *supra* at 68.

[173] Hollander Testimony, *supra* at 48.

[174] *Id.* at 49.

[175] Survey of Pennsylvania Courts, *supra* at response to Section I, Table 39, p. 49.

[176] *Id.* at response to Section I, Table 52, p. 59.

[177] *Id.* at response to Section I, Table 54, p. 60.

[178] *Id.* at response to Section I, Table 55, p. 60.

[179] Oregon Gender Fairness Task Force Report (1998), pp. 46–47 [hereinafter Oregon Report]; Final Report of the Washington State Task Force on Gender and Justice in the Courts (1989), pp. 49–55 [hereinafter Washington State Report]; Gender Bias Study of the Court System in Massachusetts (1989), p. 19 [hereinafter Massachusetts Gender Bias Study]; The Gender Bias Task Force of Texas: Final Report (1994), pp. 45–48 [hereinafter Texas Report].

[180] Washington State Report, *supra* at 55.

[181] Massachusetts Gender Bias Study, *supra* at 59.

[182] Report of the New York State Judicial Commission on Minorities, Volume Two: The Public and the Courts (1991) [hereinafter New York State Judicial Commission]; Report of the New York Task Force on Women in the Courts, Fordham Urban Law Journal, Volume XV, No.1 (1986–1987) [hereinafter New York Task Force Report].

[183] New York State Judicial Commission, *supra* at 35.

[184] New York Task Force Report, *supra* at 99.

[185] *Id*. at 98.

[186] *Id*. at 69.

[187] As of the date of the issuance of this report, Texas did not permit the entry of an award for alimony. Texas Report, *supra* at 45.

[188] Achieving Equal Justice for Women and Men in the California Courts: Final Report (1996), p. 7.

[189] *Id*. at 9.

[190] *Id*.

[191] Oregon Report, *supra* at 52.

[192] *Id*. at 56.

[193] Cohen Testimony, *supra* at 63.

[194] Washington State Report, *supra* at 55.

[195] Under this system, the Committee recommends the adoption of the following procedures/requirements:

a. the establishment of one judge/adjudication unit per family;

b. a uniform case management system that evaluates and assigns cases based upon their complexity, and provides for continuing periodic review to assess ongoing needs, scheduling, and other relevant issues; and

c. the implementation of training for all affected personnel concerning the requirements and responsibilities under this new system.

We note that on December 17, 2002, the Supreme Court of Pennsylvania announced a pilot program to ease and expedite family court matters.

[196] The training should include the following topics:

a. their responsibilities under the Juvenile Act;

b. the special issues surrounding children as clients and witnesses;

c. the availability of social services and other institutions and agencies designed to meet the needs of dependent children and their families; and

d. the interplay between the relevant state, federal, Department of Public Welfare and Children, and Youth and Family Services laws and regulations.

[197] Master are not covered in the judicial discipline system established by the 1993 Constitutional Amendment.

[198] These facilities should reflect the same status and dignity granted to other legal facilities in that county. In establishing the facilities, planners should take into consideration the needs of the family law populace, including accessibility to public and other transportation, hours of availability and need for on-site childcare.

[199] The training should include these topics:

a. their requirements and responsibilities under the Juvenile Act;

b. the special issues surrounding children as clients and witnesses;

c. the availability of legal programs and other social services designed to meet the needs of dependent children and their families;

d. the interplay between the relevant state, federal, Department of Public Welfare and Children, and Youth and Family Services laws and regulations; and

e. diversity and cultural sensitivity training, including race, ethnicity, gender, and socioeconomic class issues.

13 RACIAL, ETHNIC, AND GENDER BIAS IN THE JUVENILE JUSTICE SYSTEM

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INTRODUCTION

Race and gender bias are not two sides of the same coin, particularly not with respect to the juvenile justice system. The origin, nature, and scope of racial disparities in the juvenile justice system are different from the disparities experienced by females. For minorities, the problem is principally one of overrepresentation—that is, while minorities represent a fraction of the total population of 10 to 17 year olds in the country, they comprise a substantially greater number of youths arrested, adjudicated delinquent, committed to secure placements, or transferred to adult court.[1]

In contrast, females have always been a small part of the delinquent population in this country, far outnumbered by their male counterparts.[2] While the past 10 years have seen a marked increase in arrest rates for young females, they account for only about 27 percent of the total arrests for delinquency, and only about 10 percent of commitments.[3] For females, disparities are reflected in the lack of gender-based solutions to female delinquency, inadequate resources in general to meet the needs of young female offenders, and continuing cultural and sexual stereotyping that permits juvenile justice interventions for behaviors that, in boys, would receive scant attention.

FOCUS OF INQUIRY

In its study of the juvenile justice system, the Committee identified two primary areas of concern: the marked overrepresentation of minorities within the system and the lack of adequate resources available for females.

Specifically, the Committee considered whether racial or ethnic background influences decision-making within the juvenile justice system, and at what stage between the initial arrest and final disposition the most marked racial discrepancies begin to appear. The Committee also sought to determine the causes of the increased involvement of young females in the system and to assess the treatment of females once they are in the juvenile system.

In addition to these two areas of inquiry, the co-chairs of the Committee's on Juvenile Justice have also undertaken a statewide assessment of indigent defense for juvenile offenders. Through the use of both a written survey and site visits to approximately one-third of Pennsylvania's 67 counties, the assessment will examine the quality of representation for alleged and adjudicated delinquent youth throughout Pennsylvania. The assessment teams will meet with key juvenile justice stakeholders in the selected counties and, where possible, meet with youth as well. In evaluating the quality of representation of indigent youth, the assessment will highlight best practices in the Commonwealth, identify areas of greatest concern, and make recommendations for reform. The final report of the assessment will be released separately in summer 2003.

RESEARCH METHODOLOGY

In support of its investigation, the Committee examined both national and state online databases, as well as research reports prepared by national and state public and private agencies and organizations. The Committee reviewed testimony regarding the juvenile justice system obtained from the public hearings convened throughout the Commonwealth. On behalf of the Committee, the Juvenile Law Center conducted telephone interviews with selected "stakeholders" in the Pennsylvania justice system,[4] and the co-chair of the Work Group conducted in-person interviews with other stakeholders.[5] The Juvenile Law Center staff also made a visit to a juvenile facility on behalf of the Committee and spoke with young women residing there.[6]

NATIONAL DATA

MINORITY OVERREPRESENTATION

Research suggests that differences in incidence rates cannot explain minority overrepresentation in arrest, conviction, and incarceration rates.

The overrepresentation of minorities in the juvenile justice system has been a matter of national concern for at least the past 15 years. In 1988, Congress responded to overwhelming evidence that minority youth were disproportionately confined in juvenile correctional facilities by amending the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA).[7] Specifically, the amended law required states participating in the Formula Grants Program[8] to address the overrepresentation of minority youth confined in secure detention, secure confinement, jails, and lockups. Overrepresentation was considered to exist where the proportion of minority youth confined in these facilities exceeded the proportion of minority youth in the general population.[9] In 1992, Congress elevated the disproportionate minority confinement (DMC) issue to a "core requirement," meaning that 25 percent of each state's Formula Grants allocation was contingent upon compliance with this requirement.[10] This remains the law today.

More recent national data confirms the persistence of significant racial and ethnic disparities in rates of confinement for juvenile offenders. In 1997, minorities were approximately one-third of the juvenile population nationwide, but nearly two-thirds of the detained and committed population in secure juvenile facilities.[11] For African American juveniles, the disparities were the greatest. Although African American juveniles made up approximately 15 percent of the male population ages 10 to 17 nationwide, they represented 26 percent of the juveniles arrested and 45 percent of the juveniles detained.[12] Similarly, while African American juveniles accounted for about 33 percent of adjudicated cases, they represented 40 percent of the juveniles in secure residential placement.[13] The *Juvenile Offenders and Victims: 1999 National Report* showed that 41 percent of felony charges processed by the juvenile justice system involved African American youth, but 67 percent of such cases that were transferred from the juvenile court to the adult criminal justice system involved African American youth.[14] While public attention has tended to focus on the overrepresentation of minorities in confinement, it is clear that the problem affects the entire juvenile justice system, from arrest through detention, diversion or referral, adjudication, disposition, and prosecution as an adult.

The causes of overrepresentation are not so easily identified. Scholars caution that it is not simply that minorities commit more crimes than white youth: Research suggests that differences in incidence rates cannot explain minority overrepresentation in arrest, conviction, and incarceration rates.[15] For example, there is substantial evidence that minority youth are treated differently from white youth in the juvenile justice system. In one published review of the available research, approximately two-thirds of the studies showed that racial and/or ethnic status influenced decision-making within the juvenile justice system.[16] Moreover, the report found that when these racial/ethnic biases occur, they can be found throughout the juvenile justice system.[17] It has also been shown, however, that the disparity is greatest at the entry points to the system—at intake and detention—and that when racial/ethnic differences are found, they tend to accumulate as the youths make their way through the system.[18]

Importantly, the national data cited here pertain primarily to the overrepresentation of African American youth in the juvenile justice system. National research with respect to the overrepresentation of Latino youth is less widely available. Since many data systems fail to disaggregate ethnicity from race, Latino youth are often counted as white.[19] Nevertheless, research that has been conducted demonstrates that Latino youth are similarly overrepresented in the juvenile justice system.[20] Specifically, studies show that, in many states, Latino youth are overrepresented in detention, adult jails, and prisons, and are treated more harshly than white youth even when charged with the same crime.[21] Similarly, data from 1993 show that, in every offense category, the average length of incarceration was longer for Latino youth than for any other racial or ethnic group.[22] Additionally, research suggests that cultural differences between Latino youth and justice system personnel may foster misunderstandings that can lead to inappropriate or harsher treatment.[23]

Overall, however, current means for collecting and accessing data on Latino youth are inadequate, suggesting that the extent to which minority populations are overrepresented in the juvenile justice system is generally underreported.

FEMALES IN THE JUVENILE JUSTICE SYSTEM

Females are the fastest growing segment of the juvenile justice population, even as the juvenile crime rate overall has dropped consistently every year since 1994.

Females are the fastest growing segment of the juvenile justice population, even as the juvenile crime rate overall has dropped consistently every year since 1994. While all juvenile arrest rates decreased during this time period—particularly arrest rates for violent crimes—the data for arrest, detention and commitment show a significant increase in the number and percentage of females involved in the juvenile justice system.[24] Indeed, between 1990 and 1999, arrests of females increased more (or decreased less) than male arrests in all categories of offenses, except drug offenses.[25]

A comparison of the gender differences in percentage of change in arrest rates for various offenses from 1981–1997 is depicted in Tables 1 through 4 set forth below:

TABLE 1
Property Crime Arrest Rate Change

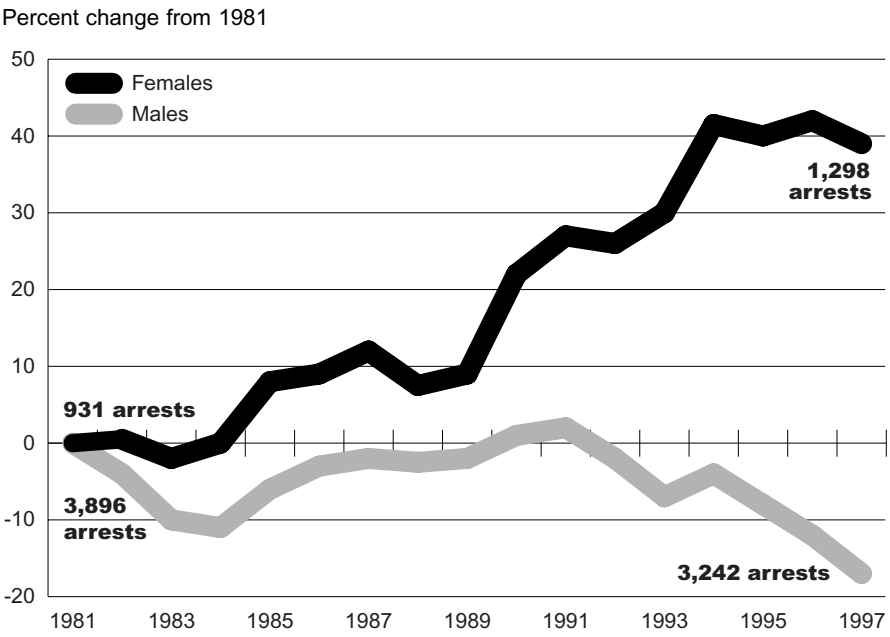


TABLE 2
Weapons Arrest Rate Change

Percent change from 1981

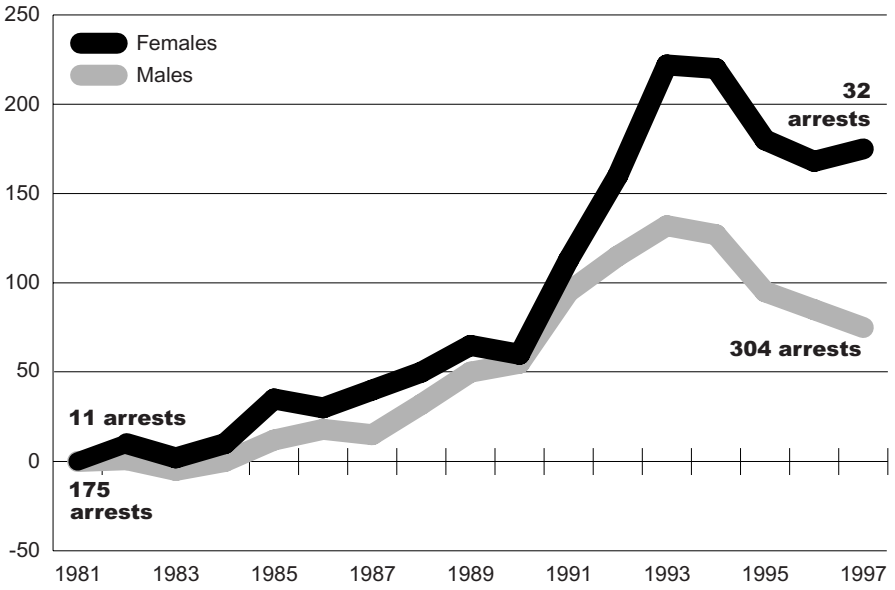


TABLE 3
Simple Assault Arrest Rate Change

Percent change from 1981

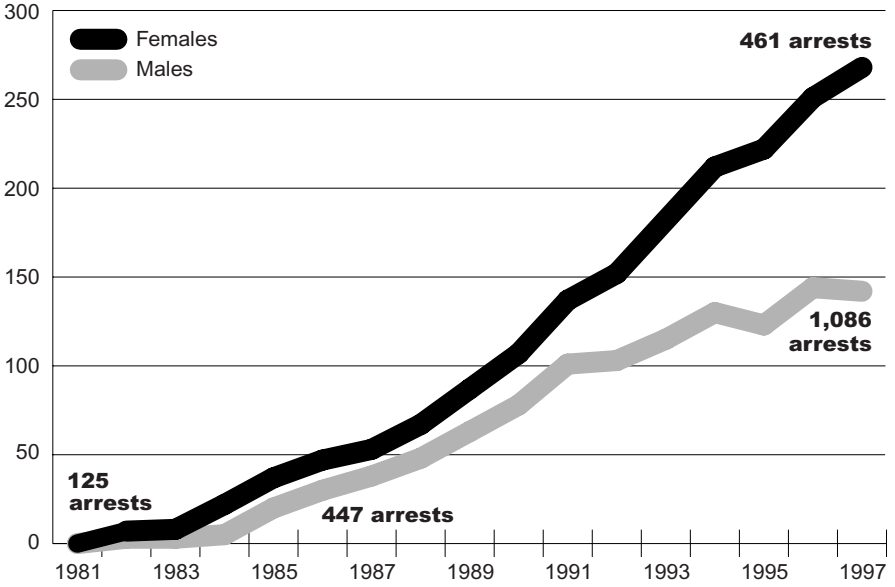
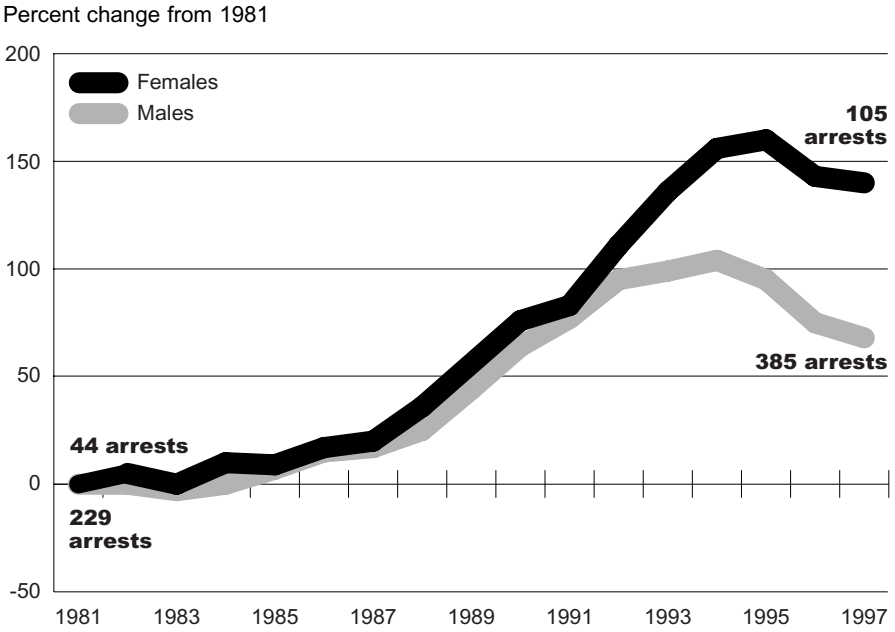


TABLE 4
Aggravated Assault Arrest Rate Change



Overall, delinquency cases involving females increased by 83 percent between 1988 and 1997, and the increase affected all racial groups: white (up 74 percent); African American (up 106 percent); and other races (up 102 percent).[26] Preliminary studies suggest that the reason for the increase is not only that females are committing more crimes, but also that responses to their behavior have changed, resulting in more females than ever before attracting the attention of law enforcement officials.[27] Such changes include the re-labeling of females' family conflicts as criminal assaults, changes in police practices regarding domestic violence and related assaultive behavior, gender bias in the processing of misdemeanor cases, and a systemic failure to appreciate the unique developmental issues faced by young females.[28]

Research also indicates that the nature and causes of female delinquency are different from the nature and causes of male delinquency. Young females are developmentally different from males and their involvement in delinquency is often associated with familial and social conflicts. Females in the delinquency system often have histories of physical, emotional, and sexual abuse, family disruption and turmoil, physical and mental disorders, academic failure, and a greater tendency than males to succumb to the pressures of domination by older males.[29]

THE PENNSYLVANIA PICTURE

African American youths account for approximately 11 percent of the population ages 10 to 17 in Pennsylvania.[30] Latino youths account for 3.7 percent.[31] The Commonwealth recorded 41,898 delinquency dispositions in 2000, of which white youths accounted for 55.7 percent, African American youths accounted for 33 percent and Latino youths accounted for 6.6 percent.[32] Selected dispositions by race and ethnicity in 2000 are set forth in the following Table 5:

TABLE 5

	African American	White	Latino
Percent of Total Population of PA	11%	n/a	3.7%
Percent of Total Number of Delinquency Dispositions	33%	55.7%	6.6%
Percent of All Youth Placed in Residential Placement at Disposition	39.5%	47.4%	10.2%
Percent of All Youth Placed in the Most Secure Public and Private Residential Facilities	51.3% (private) 39.2% (public)	36% (private) 41% (public)	n/a
Percent of All Youth Receiving Probation at Disposition	33.1%	55.7%	7.6%
Percent of All Youth Offered Consent Decrees	24.7%	66.9%	4.1%
Percent of All Youth Transferred to Criminal Court	37.7%	53.6%	6.6%

Source: Pennsylvania Juvenile Court Dispositions 2000; Puzzanchera, et al, Easy Access to Juvenile Populations Online (2002)

Selected data on specific offense categories by race and ethnicity in 1998 is set forth in Table 6 below:

TABLE 6

	African American	White	Latino
Homicide Charges	42.2 %	51.1%	2.2 %
Violent Sex Offenses	47.8%	45.2 %	3.9%
Robbery Offenses	65.2 %	24.2 %	8.4%
Aggravated Assault Charges	55.5 %	36.4 %	4.8 %
Burglary Charges	18.9 %	73.1 %	2.8 %
Arson Arrests	21.5 %	65.8 %	9.5 %
Felony Drug Charges	55.8 %	26.2 %	16.1 %
School-Based Weapons Arrests	37.2 %	52.1 %	7.7 %
Non-School-Based Weapons Arrests	56.7 %	35.7 %	4.1 %

Source: Pennsylvania Juvenile Justice Data Book, 1998

In 2000, females accounted for 20 percent of all delinquency dispositions in Pennsylvania, somewhat less than the national average, with African American females representing approximately 33 percent of all female delinquency dispositions.[33] Females, however, represented only 9 percent of all delinquency cases in 1992, and 17 percent of all delinquency cases in 1996.[34] Females were underrepresented in placements, accounting for 11 percent of all placements in 2000; they were also underrepresented in probation dispositions, accounting for only 16 percent of the total.[35] Selected data on specific offense categories by gender in 2000 are set forth in Table 7 below:

TABLE 7

Offense	Percentage Of Females
Aggravated Assault Charges	29.1
Simple Assault Charges	15.6
Homicides	15.6
Larceny-Theft	18.6
Fraud	25.1
School-Related Weapons Arrest	23.4
Obstruction of Justice	23.7
Disorderly Conduct	22.4
Non-Payment of Fines	33.3
Other Public Order Offenses	21.8

Source: Pennsylvania Juvenile Justice Data Book, 2000

By contrast, females accounted for 9.5 percent of arrests for robbery, and 8.3 percent of arrests for burglary.[36]

STAKEHOLDER INTERVIEWS

The statistics cited above make it clear that minorities are disproportionately involved at all stages of the juvenile justice system, compared to their actual representation among the youth population ages 10 to 17 in Pennsylvania. It is also clear that Pennsylvania, like the country at large, has recently experienced a significant increase in the percentage of females referred to the juvenile justice system. In discussing these findings with selected stakeholders throughout Pennsylvania, the Committee heard certain themes emerge with respect to each population.

FEMALES

Among all juvenile justice professionals interviewed, there was nearly unanimous agreement that programs for females were inadequate both in terms of quantity and quality.

The steady influx of females into the juvenile justice system over the past several years and the implications of that influx provoked two common responses among people interviewed. First, the individuals interviewed lamented the lack of adequate programs for the growing number of young female offenders; and second, many respondents described girls as more "complicated" than boys.

"It doesn't take much for a girl to get whisked through the system and end up in a secure facility. Some girls are in a secure facility without a felony adjudication."

—Larry Demooy

Among all juvenile justice professionals interviewed, there was nearly unanimous agreement that programs for females were inadequate both in terms of quantity and quality. A frequent complaint concerned the lack of either community-based or more secure placements for females. Honorable Kimberly Clark, of Allegheny County, objected to the Commonwealth's failure to provide females with non-secure programs and drug and alcohol programs.[37] Larry Demooy, director of juvenile probation in Delaware County, remarked: "It doesn't take much for a girl to get whisked through the system and end up in a secure facility. Some girls are in a secure facility without a felony adjudication."[38]

There is also widespread recognition that facility programming for the juvenile justice system, at both the county and state level, does not sufficiently take into account gender differences and gender-based needs. Georgene Siroky, a public defender in Allegheny County, referred to juvenile girls in the system as "round pegs hammered into square holes."[39] John Delaney, assistant district attorney in Philadelphia's juvenile unit, concurred, noting that the juvenile justice system uses a masculine model.[40] Judge Clark criticized a Youth Development Center (YDC) Program for girls in Danville for failing to address the particular health needs of African American females.[41]

With respect to the second theme that girls are more complicated, girls' emotionality was frequently cited as an obstacle to working with them. Many would concur with Demooy's understanding that "underlying many of the female referrals are substance abuse, mental health and family problems … Few female delinquents are straight delinquents."[42] Honorable J. Lawrence Stengel, of rural Lancaster County, noted that while offenders in the juvenile justice system generally have emotional and mental health problems, this trend was particularly observable among the girls currently entering the system.[43] Judge Stengel expressed concern with the system's failure to adequately address girls' mental health needs.[44] Karen Schill, an administrator at the Bucks County Juvenile Detention Center, said that, in general, girls were harder to place, and "the ones who are more difficult are held a lot longer in the ... detention center."[45] Judge Clark acknowledged that girls were more frequently held in secure detention because of their greater propensity to run away, and cited the lack of alternatives short of locking them up.[46]

At least two of the probation officers interviewed called for a more sensitive approach to girls' extensive emotional histories. The answer, in Demooy's view, is to create specialized caseloads, identifying individuals who wanted to work with girls, and creating different programs.[47] Similarly, while another probation officer, Denise Ray, acknowledged that there may be "some truth" to girls being too emotional, she indicated that "agencies and professionals have to learn the best way to work with them. They have to know the personal characteristics of girls; how to interact with them. They have to know what works, what strategies to use, and what programs to implement."[48]

The issue of pregnancy was also raised by several juvenile justice professionals. "Girls get pregnant and are therefore more complicated," said Steve Custer, chief juvenile probation officer in Montgomery County.[49] Sister Rita Murillo, another public defender in Allegheny County, said young women get pregnant "to avoid being sent to boot camp."[50] Delaney noted that the more divergent a young woman was from "normal"—i.e., pregnancy, low I.Q., serious mental health issues—the longer it took to resolve the case.[51]

In addition to interviewing judges, probation officers, and other professionals in the juvenile justice system, a group of female juveniles themselves were interviewed. The interviews were conducted at a community-based shelter facility for young women who were held either to await trial or to await placement after having been adjudicated delinquent. A representative of the local public defender's office had been meeting with the residents approximately twice a month to talk about recent developments in their cases, and to give them an opportunity to ask questions. Asked to comment on their perceptions of the system, the young women expressed views with several common themes:

- The young women believed that their probation officers did not pay enough attention to them.
- They believed they had no say or involvement in decisions made about their future or future placement.
- They believed that once they had been in detention for an extended period of time, they were not given the opportunity to prove themselves or show that their behavior had improved.
- They objected to the large number of out-of-state placements and wondered why they had to go so far away from home.

The desire to prove themselves, or explain themselves, was a recurrent wish. One young woman explained that she had violated probation because of problems at home, but that her probation officer "wasn't interested in why." Another complained that past negative events in her file constantly "came back to haunt her," and she wanted her probation officer to focus on recent and current events in her life, including improvements and positive developments, rather than on her offenses or mistakes.

The young women suggested that placements be made available specifically for those who have trouble getting along with their families, with a focus on improving family relations. Feeling someone was on their side at home,

they said, would prevent secure placements, as well as probation violations. The issue of home and family was prominent, as the young women also suggested shorter eligibility periods for home passes when they were placed elsewhere.

Finally, the young women objected to their lack of input or involvement in decision-making in their cases. Describing their cases as "out of control," they complained that neither probation officers nor judges listened to them. They said that judges and probation officers talk about their cases, but not to the young women directly.

MINORITY YOUTH

There was general agreement among stakeholders in counties with significant minority populations that minorities were disproportionately represented in their juvenile justice systems.[52] There was little agreement, however, on the cause of this phenomenon. Additionally, even in counties where the overrepresentation of minority youth in the system was widely recognized, there were virtually no mechanisms in place to address or limit it.[53]

While no single explanation was offered, respondents repeatedly pointed to three particular factors as likely contributors to the disparities: poverty, family instability, and different police and intake practices in urban counties, as compared with rural and suburban counties.[54]

Economic disparities among youth, combined with limited family involvement or family support, were frequently cited as leading to more pre-trial detention for minority youth. Asked about releasing youth before their trials, judges and probation officers alike acknowledged that they were reluctant to do so unless they were certain that a family member would assume responsibility for supervising the youth at home and in the community, and for making sure that the youth would return to court for trial. One judge said that if the family was willing to impose structure, the court would be more inclined to send the child home; if the family was not involved in the child's life, then the court felt it had no alternative but to become involved.[55] A probation officer noted that even the absence of a telephone in the home could lead to pre-trial detention, since alternative modes of supervision such as electronic monitoring would then be unworkable.[56] Another judge referenced the overlap between dependency and delinquency, commenting that when the child's home appeared unsuitable as a place for him to return, placement was more likely.[57]

Finally, some respondents expressed the opinion that youths who were able to afford private counsel were more successful at avoiding placement than youths represented by court-appointed counsel—an economic disadvantage more likely to affect minority youths than non-minority youths.[58]

Variations in police arrest and intake practices, based upon the location of the police, were also deemed to account for disparities in the treatment of minority youth. For example, in one large county with both urban and suburban areas and multiple police districts serving each, suburban police reportedly were more likely to release youth pre-trial than drive them a substantial distance to the county detention center.[59] In other suburban or more rural counties, with smaller concentrations of minority youth, police and probation officers divert[60] substantially higher percentages of cases than are diverted in larger urban counties.[61]

Finally, while there was no consensus about the reason for overrepresentation, respondents in counties with significant minority populations readily agreed that more minority personnel were needed throughout the juvenile justice system.[62]

PUBLIC HEARING TESTIMONY

During the public hearings it conducted around the Commonwealth, the Committee received testimony from prominent individuals in Pennsylvania's juvenile justice system. Those testifying presented statistical data, shared personal experiences, and offered suggestions to remedy racial and gender bias in the treatment of juveniles in Pennsylvania courts. Several dominant themes were expressed throughout the public hearings.

THE NEED FOR MORE ATTORNEYS, PARTICULARLY MINORITY ATTORNEYS

The testimony evidenced a strong consensus that there is a need for more attorneys, specifically minorities, in the juvenile court system. Ellen Greenlee, the director of the Philadelphia Defender Association, testified that because of a disproportionately large volume of cases and a lack of adequate funding, her office is "asking a small number of [attorneys] to do too much work."[63] This problem is exacerbated by the fact that the attorneys are underpaid, which makes minority recruitment and retention very difficult.[64] The director testified that the lack of funding not only hurts recruitment efforts, but seriously impedes the ability of public defenders and court-appointed counsel to represent their indigent clients adequately.[65]

Scott Hollander, the executive director of Allegheny County's Legal Aid For Children (KidsVoice), agreed with the need to hire more minority attorneys, and spoke of the same stumbling blocks, such as low salaries and burdensome caseloads, that were mentioned at other hearings. He testified that qualified African American attorneys have opportunities to obtain higher-paying positions in the private sector, making it difficult for non-profit agencies like KidsVoice to recruit them.[66]

Michael Muth, the chief public defender for Monroe County, reported that his county tends to fund the district attorney's office before the public defender's office. He noted that each of Pennsylvania's 67 counties sets its own salaries for both offices.[67] While each county is different, he said they all offer very low starting salaries, especially for pubic defenders.[68] He recalled a judge and former county commissioner informing him that there was no political capital to be gained by giving public defenders money. Directing money to the district attorney was perceived as fighting crime, the judge told him, but funding the public defender's office was perceived as helping "scumbags" get off.[69] Muth urged counties to reduce the

disparity in salaries between public defenders and district attorney's offices, and to offer a salary track with more substantial salary increases.[70] He observed that if public defenders and district attorneys are not paid appropriate wages, they cannot effectively represent their communities.[71]

Muth also testified that only one attorney is employed in his county's juvenile court division. That attorney is a recent law graduate and is responsible for handling hundreds of cases, well in excess of the maximum yearly caseload recommended by the National Advisory Council.[72] Muth observed that when a public defender is overworked, underpaid, or does not receive regular training on new issues, a defendant's right to counsel is meaningless.[73]

Other testimony supported the view that there is an urgent need for more attorneys in the juvenile justice system to ensure that juvenile defendants across the Commonwealth are adequately represented.

LACK OF FACILITIES AND PROGRAMS FOR FEMALE JUVENILES

Honorable Mark Ciavarella, of Luzerne County, testified at the Wilkes-Barre hearing that the lack of adequate facilities for young women led to disparate treatment between males and females during sentencing and placement.

The witnesses reiterated the Committee's finding that the juvenile justice system has had an influx of female juveniles over the past several years. One cited key findings of a national juvenile court statistics report suggesting that delinquency caseloads for female juveniles rose 83 percent between 1988 and 1997, a much faster pace than the 39 percent increase in cases for males.[74] Honorable Kathryn Lewis, of Philadelphia County, noted the disparity in the treatment of offenders in male and female juvenile rehabilitation facilities. She testified that she was told that there are no good programs for young women because they are "too difficult to handle."[75] She expressed concern about the lack of regional facilities in which to place young women, observing that the effect of such a deficiency is that a 14-year-old girl from Pennsylvania was likely to be sent to a facility in Texas at a cost of $200,000 per year.[76]

Honorable Mark Ciavarella, of Luzerne County, testified at the Wilkes-Barre hearing that the lack of adequate facilities for young women led to disparate treatment between males and females during sentencing and placement.[77] He testified that until recently in Luzerne County, if a male and a female juvenile appeared before him for the same offense, he had no choice but to send the female to an institution that would not release her for 90 days, and the male to an institution where he could be released within 30 days.[78] He indicated that because the demand for placement is so high, program administrators have the luxury of picking the "best" juveniles to fill their programs, which often shuts out the "hard-to-handle" females from good rehabilitation programs.[79] Other testimony confirmed that throughout the Commonwealth, many females are being held in detention facilities and community-based shelters for longer periods of time than males, and that many of them are being held simply because there are no placement facilities or programs for them.[80]

OVERREPRESENTATION OF MALE JUVENILES IN THE SYSTEM

Despite the significant increase in female cases, however, witnesses testified that males are still overrepresented in juvenile court.[81] At the Erie public hearing, Thomas Gamble, professor of criminal justice at Mercyhurst College, testified that in Erie County, arrests of male juveniles outpaced the arrests of female juveniles by a factor of three to one.[82] Assuming a relatively equal proportion of males and females in the Erie County juvenile population, Gamble concluded that this represents a clear example of the disproportionate juvenile male involvement in the Erie County juvenile justice system.[83]

OVERREPRESENTATION OF MINORITIES IN THE SYSTEM

Gamble also provided statistical evidence of minority overrepresentation in the Erie County juvenile justice system. He testified that while white juveniles account for 90 percent of the population, they were 84 percent of the 1999 juvenile arrests in Erie County. Conversely, African American juveniles accounted for 15 percent of the 1999 juvenile arrests but less than 10 percent of the juvenile population.[84] When examined as a percentage of the total population, Gamble testified, African American juveniles were almost twice as likely as white juveniles to face arrest.

Another study established that minority youth are overrepresented among juvenile detainees in Pennsylvania. Daniel Elby, chief executive officer of Alternative Rehabilitation Communities, Inc., testified in Harrisburg about the organization's study of the apparent racial disparity in the proportion of minority juvenile detainees. The investigation was based on the detention disparities in the 14 Pennsylvania counties with the highest minority

populations. He testified that while minority juveniles between the ages of 10 and 17 represented only 12 percent of the population in these counties, 75 percent of the juveniles confined in secure detention correctional facilities were minorities.[85] He indicated that the study found that minority juveniles, particularly African Americans and Latinos, were more often formally processed in the juvenile justice system than whites. The study also found that African American and Latino juveniles were more likely to be detained in public, secure facilities, while whites were more likely to be placed in private group homes and to receive drug and alcohol outpatient treatment. In terms of the basis for detentions, he testified that it was more likely for minority juveniles than whites to be detained for drug possession and crimes involving physical harm to another person.[86]

Similarly, Malik Aziz, executive director of The Ex-Offenders Program in Philadelphia, testified that African American juveniles made up 15 percent of the under-18 population, but were 33 percent of the juveniles sent to, formally processed by, and convicted in court.[87] Aziz also testified that minority juveniles stood a better chance of being caught committing crimes, as special investigative units such as drug-busting task forces made most of their arrests in inner-city neighborhoods. He observed that African American juveniles notice at an early age how the system reacts to them. Once placed in the criminal justice system, they feel they cannot get a fair shake because of the color of their skin, Aziz testified.[88]

Other testimony confirmed that juvenile minorities are overrepresented in detention facilities, but suggested that the justice system was not to blame. Gamble testified in Erie that African American juveniles made up only 7.7 percent of the population ages 10–17 in Erie County but accounted for 31 percent of all admissions to detention centers. This was four times higher than would be expected based upon their proportion of the population. Evidence for disproportionate African American involvement in juvenile detention is clear, he concluded, but the question remains as to whether non-racial factors may account for the disproportionality.[89]

TREATMENT AND REHABILITATION OF JUVENILES

The statistical data notwithstanding, witnesses testified that Pennsylvania has made efforts to prevent minority juveniles from entering the juvenile justice system. The data suggests that while disparate decision-making or bias may exist within the Commonwealth, some progress has been made towards reducing minority overrepresentation at key processing points. Witnesses agreed, however, that there is still a long road ahead.[90]

Several witnesses testified about the lack of community facilities in which juveniles can constructively spend their free time, especially in inner cities. There was an overwhelming concern for the lack of rehabilitation opportunities and ways to positively assimilate juveniles back into society, in order to prevent them from becoming repeat offenders. Testimony revealed the success of a youth program in Harrisburg that accepted at-risk juveniles who had been formally involved in the juvenile justice system. An evaluation showed that, of those who attended the program on a regular basis, there was only a 25 percent re-arrest rate. Of those who did not attend the program regularly, approximately 50 percent re-entered the system.[91]

Judge Ciavarella testified that it is not just the juvenile who needs rehabilitation; there must also be changes in the home environment. Juveniles may show progress and begin to improve while residing in an institution, but they tend to regress quickly when they are sent home if nothing has been done to improve the environment.[92] He testified that intensive family therapy has reduced the re-entry rate in Luzerne County from 60 percent to 13 percent.[93]

Other witnesses testified to the need for rehabilitation centers in cities with high concentrations of juvenile delinquents. As Judge Ciavarella observed, the problem with sending a juvenile away is that "There is no opportunity for family counseling, and it is the family who has to deal with the juvenile once they return home."[94]

OTHER TASK FORCE FINDINGS

The Committee reviewed many of the reports prepared by other state task forces on the issue of juvenile justice. The theme shared by many states, which is reflective of the nation as a whole, is that minority juveniles are overrepresented in the juvenile justice system.

A sampling of the findings follows.

CALIFORNIA

The final report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts was published in January 1997. One chapter specifically referenced juvenile law issues and found, after reviewing both statistical and anecdotal evidence, that the California juvenile courts were more likely to detain poor children of color than their white counterparts.[95] In the juvenile justice system, minorities accounted for the largest number of incarcerated offenders, even though whites accounted for roughly 75 percent of all juveniles arrested.[96] The report concluded that disparate treatment in juvenile court and decisions sometimes informed by bias could lead to higher detention rates and higher out-of-home placement rates for minority juveniles.[97]

MASSACHUSETTS

The Gender Bias Study of the Court System in Massachusetts was published in 1989. Focusing only on gender disparities in the juvenile justice system, the report made several key findings relating to the special needs and circumstances of female offenders.[98] In the Massachusetts juvenile justice system, status offenders such as runaways were serviced by the Department of Social Services (DSS) and delinquent offenders by the Department of Youth Services (DYS).[99] Although there were serious problems with the programs for male and female juveniles, girls were disadvantaged to a greater extent than boys in the area of DSS and DYS placement and service, the report concluded from statistical evidence, testimony, and surveys.[100]

Testimony indicated that service providers viewed females as more difficult to handle than males. Thus, even though in certain age categories more females than males required services, providers offered fewer programs for females. Judges, in turn, committed a disproportionately high percentage of

females to DYS in hopes that the females could be secured, stabilized, and provided with services not available from DSS. They based commitment either on contempt charges in Children in Need of Services (CHINS) cases or on detention for a minor delinquency offense. Unfortunately, the evidence indicated that females often did not receive the services they needed at that point either, because the majority of the programs offered by DYS were male-oriented. In essence, females were being detained to a greater extent than their actions merited in the hope that they could be helped, yet at no point were services sufficient to give them the help they required. Testimony from the representatives of DYS revealed that the department was attempting to address the lack of female-oriented programs and facilities.[101]

The report recommended that training for judges and probation officers should address possible paternalistic and protective attitudes that may cause them to place females in more protective settings than were warranted. At the same time, the report suggested that the system was perhaps underestimating males' need for protection.[102] The report also urged DSS to recognize the needs of its female clients such as drug counseling and parenting assistance, and to provide programs that met those needs.

OHIO

The Report of the Ohio Commission on Racial Fairness was issued in 1999. The Department of Youth Services (DYS) provided the commission with statistical data for fiscal years 1996 and 1997 regarding the race distribution of felony and non-felony commitments.[103] Along with gathering its own data, the commission relied on the results of a study conducted by Bowling Green State University (BGSU). The report, entitled *Race and Juvenile Justice in Ohio: The Overrepresentation and Disproportionate Confinement of African-American and Hispanic Youth*, focused on Ohio data and statistics regarding minority youth participation in the criminal justice system.[104]

DYS reported that, for fiscal year 1997, 46.9 percent of the confined population was white, while 53.2 percent of the population at DYS consisted of minorities.[105] Because Ohio's total minority youth population was 14.3 percent, this data illustrated the substantial overrepresentation of minorities in the juvenile justice system.[106]

After analyzing the Ohio statistics, the BGSU study recommended an examination of city crime patterns, patrol manpower allocation assignments, and police decisions to arrest or release in order to determine why more minority youth were arrested than white youth. The study recommended that the state develop a uniform policy with respect to records of informal sanction processes ranging from school discipline to unofficial handling of referrals to juvenile court. The study also recommended that Ohio either develop model community-based alternative pre-adjudicatory release and monitoring programs, or adapt existing programs such as electronically monitored house arrest. Finally, the study suggested that Ohio consider amending the state statutory or local operating policies, specifically related to guardian issues, which indirectly place minority youth at greater risk for detention.[107]

NEW JERSEY

The New Jersey Supreme Court Task Force on Minority Concerns issued a final report in June 1992. The task force made specific findings as to the nature and extent to which minority youth charged with juvenile delinquency were treated differently than non-minority youth, and developed recommendations for corrective action. The task force identified five major areas of concern. First, the task force expressed concern that the judiciary had not provided sufficient information to the minority community about the operation of the juvenile justice system and the steps the judiciary was taking to eliminate practices that were unfair to minority juveniles. Second, the task force found an overrepresentation of minorities at all stages of juvenile delinquency cases. Third, the task force identified a shortage of available services for juvenile delinquents, and an unequal distribution of those services between minority and non-minority youth charged with delinquency, as well as between communities with large minority populations and communities with small minority populations. Fourth, the task force cited a lack of programs offering alternatives to the incarceration of minority juveniles. Finally, the task force found some judges and court staff to be insensitive to racial and ethnic differences, leading to their failure to treat minority juveniles fairly and compassionately.[108]

The task force found overwhelming evidence that the structure of the juvenile justice system led to unjustifiable disparities in the treatment of similarly situated juveniles of different races and ethnic groups. While the actual amount of disparity that occurred within the individual components of the juvenile justice system remained unclear, there was no doubt that some disparate treatment of minority youth occurred in each component of the juvenile justice system.[109]

The task force recommended that the Supreme Court of New Jersey set goals to reduce the number of minority juveniles incarcerated and to ensure that judicial decisions involving minorities were fair.[110] The task force also recommended that the judiciary play a lead role in the development of additional community alternatives that would provide adequate levels of supervision for juveniles for whom family supervision was lacking.[111]

CONNECTICUT

To assess the disparities in how juvenile justice systems handled minority juvenile offenders, the Connecticut Juvenile Justice Advisory Committee (JJAC) commissioned a research team to conduct a comprehensive and independent study to determine the extent to which minorities were overrepresented in Connecticut's juvenile justice system. In May 1995, Connecticut's Office of Policy Management released their report, entitled *An Assessment of Minority Overrepresentation in Connecticut's Juvenile Justice System*. The report documented a disproportionate representation of African American and Latino juveniles at three key points in the juvenile justice system: arrest, detention, and commitment to the state-run secure residential juvenile facility.[112]

Although the report showed that minority youth have an increasingly greater chance of overrepresentation as they progress through the juvenile justice system, overrepresentation at various stages was reduced when certain social, offender, and offense variables were considered. A lack of pre-adjudication placement options short of secure detention for youth also influenced overrepresentation. While the Juvenile Justice Committee recognized that minority overrepresentation existed in Connecticut's juvenile system, it concluded that this disparity was as likely to be traced to socioeconomic factors as racial or ethnic identification.[113]

In 1995, Connecticut passed legislation that addressed the need for graduated sanctions as part of its commitment to ensure and exhaust all appropriate efforts to keep a child in the community. The legislation mandated that 14-year-olds and 15-year-olds accused of the most serious crimes be tried as adults. Judges and prosecutors were granted more pre-trial options as alternatives to detention, including community-based treatment. The legislation also gave juvenile officials the authority to send young offenders to substance abuse programs, and created early intervention programs in an attempt to modify the juvenile's behavior.

CONCLUSION

The overrepresentation of minority youth in the juvenile justice system is well documented in Pennsylvania. Equally well established is the growth in the involvement of female juvenile offenders in the system over the past 10 years.

Causes for each of these phenomena are not clear but the evidence strongly suggests the following:

- Racial and/or ethnic status influences decision-making within the juvenile justice system, and when bias does occur, it is found at all stages of the process.
- Females are brought into the juvenile justice system in greater numbers, in part because of a change in law enforcement's responses to their behavior, and in part because of long-standing attitudes among juvenile justice professionals that reflect less tolerance for certain behaviors among girls than boys. Family and social conflicts are often associated with female involvement in the juvenile justice system, which is not the case for males. Once in the system, females have few facilities available to them, and those that exist are ill-equipped to treat the underlying causes of delinquency.

RECOMMENDATIONS

The following recommendations are designed to address the problems of both female and minority youth in the Pennsylvania juvenile justice system.

TO THE SUPREME COURT OF PENNSYLVANIA

The Committee recommends that the Court:

1. Include programs on the impact of race, ethnicity, and gender disparities in the juvenile justice system at training sessions for attorneys who practice in juvenile court, judges, and court personnel, including probation officers.
2. Establish guidelines for maximum caseloads for public defenders and district attorneys in juvenile court, consistent with the National Advisory Commission standards.
3. Direct county juvenile court judges, juvenile court administrators, and probation staff to work together with the Pennsylvania Commission on Crime and Delinquency (PCCD) to develop risk assessment instruments[114] for secure detention. Such instruments have been effective in other jurisdictions around the country in reducing disproportionate minority confinement in secure detention facilities.

TO THE LEGISLATURE

The Committee recommends that the Legislature:

1. Allocate sufficient funds to the Court and/or the Juvenile Court Judges Commission to promote the establishment of specialized probation units to work specifically with female offenders, to promote the establishment of mentoring programs for youth returning from placement, and to promote effective aftercare probation services.

TO THE PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE

The Committee recommends that the Department of Public Welfare (DPW):

1. Assess the needs of female offenders in the juvenile justice system to determine specifically what resources and treatment options are necessary to meet their specialized needs.
2. In fulfilling its obligation to approve county children and youth budgets that are consistent with DPW regulations and "needs-based" budget guidelines, work with county children and youth agencies to ensure that current regulations providing for the use of community-based alternatives and resources, in-home services, and reduction of institutional placements effectively address the special needs of young women and minorities in the juvenile justice system. Limit the inappropriate use of secure detention for young women and minorities in the absence of suitable alternatives and resources, and, consistent with public safety, encourage the diversion of young women in particular, who are more frequently charged with status and other public order offenses, into the dependency system where that system can better serve their needs, or to other community-based resources.

TO COUNTY CHILDREN AND YOUTH AGENCIES/JUVENILE COURT ADMINISTRATORS

The Committee recommends that county children and youth agencies and juvenile court administrators:

1. Provide mentoring programs for juveniles returning from placement.
2. Ensure racial, ethnic, gender, and cultural diversity among their staffs.
3. Work closely with local school districts to promote successful transitions for adjudicated youth from placement back to their regular schools.
4. Work together to promote and develop an integrated system of care for at-risk and delinquent females and their families, based on their competencies and needs; to reevaluate risk and other assessment instruments for their gender, racial, and ethnic sensitivity; to recommend alternatives that more adequately identify the competencies and needs of at-risk and delinquent females; and promote and develop alternatives to institutional placement to help reduce the overrepresentation of minorities in public and private juvenile correctional facilities.

ENDNOTES

[1] Poe-Yamagata, E., and Jones, M., *And Justice for Some: Differential Treatment of Minority Youth in the Justice System,* pp. 1–3 (Washington, D.C.: Building Blocks for Youth, 2000) [hereinafter Poe-Yamagata and Jones].

[2] *Justice by Gender*: *The Lack of Appropriate Prevention, Diversion and Treatment for Girls in the Justice System*, p.1 (Washington, D.C.: American Bar Association and National Bar Association, 2001), attached in Appendix Vol. III [hereinafter Justice by Gender].

[3] Snyder, H., *Juvenile Arrests*, p. 4 (Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention, 2000).

[4] On behalf of the Committee, the Juvenile Law Center staff conducted telephone interviews with the following individuals:
Steve Custer, Chief Juvenile Probation Officer, Montgomery County
Sharon Giamporcaro, Montgomery County District Attorney's Office, Juvenile Division
Larry Demooy, Chief Juvenile Probation Office, Delaware County
Georgene Siroky, Public Defender's Office, Allegheny County
Sister Rita Murillo, Public Defender, Allegheny County
Marc Waileirtch, Public Defender, Allegheny County
Karen Schill, Juvenile Detention Center, Bucks County
John Delaney, Assistant District Attorney, Juvenile Unit, Philadelphia County
Denise Ray, Deputy Chief, Juvenile Probation, Philadelphia County

Notes from these interviews are attached in Appendix Vol. III.

[5] Work Group co-chair, Robert Listenbee, met and conducted personal interviews with the following individuals:
Honorable Kimberly Clark, Allegheny County
Honorable Elizabeth Kelly, Erie County
Honorable Thomas King Kistler, Centre County
Honorable J. Lawrence Stengel, Lancaster County
Stephen A. Zappala, Jr., District Attorney, Allegheny County
Karen Arnold, Assistant District Attorney, Centre County
Beth Vanstrom, Assistant District Attorney, Erie County
Donald Totaro, District Attorney, Lancaster County
Ken Brown, Assistant District Attorney, Lancaster County
Jeff Conrad, Supervising Attorney of Juvenile Court, Lancaster County
Cindy Murphy, Assistant Public Defender, Centre County
David Mueller, Chief Probation Officer, Lancaster County
Thomas Backenstoe, Chief Juvenile Probation Officer, Centre County

Notes from these interviews are attached in Appendix Vol. III.

[6] Juvenile Law Center staff visited Girls and Boys Town, a community-based detention service in Philadelphia for girls awaiting trial as delinquents, or awaiting placement after adjudication of delinquency. The Center staff met with female residents in a group.

[7] Pub. L. 93-415, 42 U.S.C. 5601 et seq.

[8] Section 5665 (a)(8) of the Juvenile Justice and Delinquency Prevention Act of 1974, *as amended*.

[9] Disproportionate Minority Confinement Technical Assistance Manual (Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention, 2000).

[10] Hamparian, D., and Leiber, M., *Disproportionate Confinement of Minority Juveniles in Secure Facilities: 1996 National Report,* pp. 1–4 (Champaign, IL: Community Research Associates, Inc., 1997) [hereinafter Hamparian and Leiber].

[11] Snyder, H., and Sickmund, M., *Juvenile Offenders and Victims: 1999 National Report,* p. 194 (Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention, 1999) [hereinafter Snyder and Sickmund].

[12] Snyder and Sickmund, *supra* at 192.

[13] *Id.*

[14] Snyder and Sickmund, *supra*; *see also* Strom, J., Smith, S., & Snyder, H., *Juvenile Felony Defendants in Criminal Court*, p. 3 (Washington, D.C.: Bureau of Justice Statistics, 1998).

[15] Snyder and Sickmund, *supra* at 193.

[16] Pope, C., and Feyerherm, W., *Minorities and the Juvenile Justice System*, p. 39 (Washington, D.C.: Office of Juvenile Justice and Delinquency, 1992) [hereinafter Pope and Feyerherm].

[17] Pope and Feyerherm, *supra* at 40.

[18] Poe-Yamagata and Jones, *supra* at 1.

[19] *Id.*

[20] Villarruel, Francisco A. et al., *Donde esta la Justicia? A Call to Action on Behalf of Latino and Latina Youth in the U.S. Justice System*, pp. 1–10 (Washington, D.C.: Building Blocks for Youth, 2002).

[21] *Id.* at 4–5.

[22] *Id.*

[23] *Id.* at 7.

[24] Justice by Gender, *supra* at 1.

[25] *Id.* at 2.

[26] Scahill, M., *Female Delinquency Cases, 1997*, p. 1 (Washington, D.C.: Office of Juvenile Justice and Delinquency, 2000).

[27] Justice by Gender, *supra* at 6–13.

[28] *Id.*

[29] Hamparian and Leiber, *supra* at 11–13.

[30] Pennsylvania Juvenile Court Dispositions 2001, p. 46 (Shippensburg, PA: Center for Juvenile Justice Training and Research, 2000) [hereinafter PA Juvenile Court Dispositions].

[31] Puzzanchera, C., Kang, W., Poole, R. and Wan, Y., *Easy Access to Juvenile Populations* Online (2002).

[32] PA Juvenile Court Dispositions, *supra* at 41–44.

[33] Female Juvenile Defenders: A Status of the States Report, p. 88 (Champaign, IL: Community Research Associates, 1998).

[34] PA Juvenile Court Dispositions, *supra* at 42.

[35] Pennsylvania Electronic Juvenile Justice Data Book 2002 <http://209.166.182.185/openpage.asp >.

[36] *Id.*

[37] Notes from Listenbee Interview of Honorable Kimberly Clark, p. 3 [hereinafter Clark Interview].

[38] Summary of Notes from Interviews by Juvenile Law Center, Interview of Larry Demooy, p. 2 [hereinafter Demooy Interview].

[39] Summary of Notes from Interviews by Juvenile Law Center, Interview of Georgene Siroky, p. 3.

[40] Summary of Notes from Interviews by Juvenile Law Center, Interview of John Delaney, p. 4 [hereinafter Delaney Interview].

[41] Clark Interview, *supra* at 3.

[42] Demooy Interview, *supra* at 2.

[43] Notes from Listenbee Interview of Honorable J. Lawrence Stengel, p. 6 [hereinafter Stengel Interview]

[44] *Id.*

[45] Summary of Notes from Interviews by Juvenile Law Center, Interview of Karen Schill, p. 3.

[46] Clark Interview, *supra* at 2.

[47] Demooy Interview, *supra* at 2.

[48] Summary of Notes from Interviews by Juvenile Law Center, Interview of Denise Ray, p. 4.

[49] Summary of Notes from Interviews by Juvenile Law Center, Interview of Steve Custer, p. 2.

[50] Summary of Notes from Interviews by Juvenile Law Center, Interview of Sister Rita Murillo, p. 3.

[51] Delaney Interview, *supra* at 3.

[52] Clark Interview, *supra* at 1; Stengel Interview, *supra* at 2–3.

[53] Notes from Listenbee Interview of David Mueller, p. 1, 7 [hereinafter Mueller Interview].

[54] Clark Interview, *supra* at 2; Stengel Interview, *supra* at 4; Notes from Listenbee Interview of Beth Vanstrom, pp. 2–4.

[55] Stengel Interview, *supra* at 5.

[56] Mueller Interview, *supra* at 2.

[57] Clark Interview, *supra* at 2.

[58] Mueller Interview, *supra* at 6.

[59] Clark Interview, *supra* at 2.

[60] "Diversion" is defined as releasing a child without referring the child to juvenile court for prosecution. Diversion is also accompanied by referral of a child and his or her family to resources within the community for supervision or assistance.

[61] *Id.*

[62] Clark Interview, *supra* at 5–6; Notes from Listenbee Interview of Honorable Elizabeth Kelly, p. 3; Mueller Interview, *supra* at 7.

[63] Testimony of Ellen Greenlee, Philadelphia Public Hearing Transcript, p. 296.

[64] *Id.*

[65] *Id.*

[66] Testimony of Scott Hollander, Pittsburgh Public Hearing Transcript, p. 50 [hereinafter Hollander Testimony].

[67] Testimony of Michael Muth, Wilkes-Barre Public Hearing Transcript, pp. 136–139.

[68] *Id.* at 139.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 147.

[73] *Id.* at 145.

[74] Testimony of Hunter Hurst, Pittsburgh Public Hearing transcript, p. 132 [hereinafter Hurst Testimony]; Sickmund, M., *Offenders in Juvenile Court 1997*, p. 4 (Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention, 2000).

[75] Testimony of Honorable Kathryn Lewis, Philadelphia Public Hearing Transcript, p. 33 [hereinafter Lewis Testimony].

[76] *Id.* at 33.

[77] Testimony of Honorable Mark Ciavarella, Wilkes-Barre Public Hearing Transcript, p. 221 [hereinafter Ciavarella Testimony].

[78] *Id.*

[79] *Id.* at 222.

[80] *Id.* at 220.

[81] Hurst Testimony, *supra* at 132.

[82] Testimony of Thomas Gamble, Erie Public Hearing Transcript, p. 105 [hereinafter Gamble Testimony].

[83] *Id.*

[84] *Id.* at 106–107.

[85] Testimony of Daniel Elby, Harrisburg Public Hearing Transcript, p. 71 [hereinafter Elby Testimony].

[86] *Id.* at 72.

[87] Testimony of Malik Aziz, Philadelphia Public Hearing Transcript, p. 229.

[88] *Id.* at 231.

[89] Gamble Testimony, *supra* at 110.

[90] Hurst Testimony, *supra* at 134.

[91] Elby Testimony, *supra* at 74–75.

[92] Ciavarella Testimony, *supra* at 224–226.

[93] *Id.* at 224.

[94] *Id.* at 225–226.

[95] Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts, January 1997, p. 167.

[96] *Id.* at 156.

[97] *Id.* at 166–167.

[98] The Massachusetts Gender Bias Study of the Court System, 1989, p. 6.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* at 8.

[103] The Report of the Ohio Commission on Racial Fairness, 1999, p. 49.

[104] *Id.* at 50.

[105] *Id.*

[106] *Id.* at 49.

[107] *Id.* at 53–55.

[108] The New Jersey Supreme Court Task Force on Minority Concerns, 1992, p. 144–145.

[109] *Id.* at 170–171.

[110] *Id.* at 23.

[111] *Id.* at 24.

[112] The Connecticut Office of Policy Management: An Assessment of Minority Overrepresentation in Connecticut's Juvenile Justice System, p. 60 (1995).

[113] *Id.* at 61.

[114] A "risk assessment tool" sets forth measures or criteria to identify risk factors in juveniles that make them appropriate or inappropriate candidates for secure detention. Such tools are typically used by intake workers and judges in the juvenile system to assist in making decisions on whether to hold or release juveniles before trial. It has been shown in other jurisdictions that such gatekeeping instruments reduce not only the overall population in juvenile facilities but in particular, the minority population in those facilities.

14 THE INTERSECTION OF RACIAL AND GENDER BIAS

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INTRODUCTION

State and federal task forces have been studying racial, ethnic, and gender bias in the American justice system since the early 1980s. The majority of these task forces divided their work into a study of either racial or gender bias, but most did not address both in a single report. In the past few years, however:

> "The concepts of gender and race have come to be understood as interactive rather than distinctive categories. While the phrase 'women and minorities' is oft repeated in law, participants in law are coming to understand that 'women' include those of all colors and that 'minorities' include those of both genders."[1]

The 1994 report prepared by the Multicultural Women Attorneys Network, *The Burdens of Both, The Privileges of Neither*, suggests that since "one's race, ethnicity or gender negatively impacts one's success and acceptance in the greater society, then certainly a combination of race, ethnicity and gender would be even more potent—and possibly more disadvantageous."[2]

Recent reports studying equality in the courts, such as the reports completed by the Third Circuit Task Force on Equal Treatment in the Courts and by state task forces in Oregon, California, and Florida, acknowledge that focusing on only race or only gender "may cause the experiences of women of color to drop out of the equation."[3] Moreover, scholarship in this area has created a growing awareness that bias towards women of color is experienced as "more than race or sex bias alone, and more than race plus sex."[4] Broadly speaking, at this "intersection" are located the multiple characteristics that affect a person's experiences in society and in the legal system—where,"for example, gender, race, ethnicity, age, disability, sexual orientation, and class—interrelate."[5] Legal scholars call this convergence "intersectionality."[6]

Originally, the concept of intersectionality was developed as a way to discuss the dilemma of women of color in bringing employment discrimination suits, because "Title VII required them to plead either race or sex discrimination."[7] This can create a situation where the double discrimination confronting women of color is not recognized by the courts. For example, in the case *DeGraffenreid v. General Motors*, 413 F. Supp. 142 (E.D. Mo. 1976), "the court refused to recognize the possibility of compound discrimination against black women and analyzed their claim using the employment of

white women as the historical base."[8] Conversely, in the process of recognizing race discrimination against an African American woman, claims of sex discrimination can be lost, as in *Moore v. Hughes Helicopter*, 708 F2d 475 (9th Cir. 1983). In *Hughes*, "the Court held that a black woman could not use statistics reflecting overall sex disparity…because she had not claimed discrimination as a woman but 'only as a black woman.'"[9] Thus, as noted by the Oregon Supreme Court/Oregon State Bar Report on Gender Fairness, this Catch-22 makes it necessary to examine previously unacknowledged relationships between characteristics that are commonly categorized separately—such as race, ethnicity, and gender—in order to understand how they may affect each other.[10]

There is also the danger of what the legal scholar Angela P. Harris calls "gender essentialism—the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience."[11] Furthermore, "[a] corollary to gender essentialism is 'racial essentialism'—the belief that there is a monolithic 'Black Experience,' or 'Chicano[12] Experience'"[13] that fails to take account of gendered ways cultures operate. Harris observes that in an "essentialist world" the experience of African American women, for example, will always be "forcibly fragmented" by those who are "only interested in race" or those who are "only interested in gender."[14]

A thorough discussion of intersectionality must therefore acknowledge "suppositions and stereotypes deeply embedded in American culture."[15] Such notions commonly include stereotypes of poor, minority, and ethnic women. But addressing intersectionality can also illuminate troublesome issues such as the historical rift between race and gender underlying feminism or "unconscious" racism. Unconscious racism and gendered thinking, as some scholars note, is inherent in the behavior of "feminist and civil rights thinkers" who have "treated black women in ways that deny both the unique compoundness of their situation and the centrality of their experiences to the larger classes of women and blacks."[16]

While legal scholars have been writing about intersectionality for some time, only a few fairness or equality task forces have addressed it directly. This is the case for a number of reasons, most of which have to do with the complexity of intersectionality and with staff and funding limits. The Third Circuit Task Force on Equal Treatment in the Courts was the first federal task force to address the "double bind of multiple discrimination often experienced by women of color."[17] To date, Florida is the only state with a judicial task force to conduct separate studies of women of color, and its original commission limited its scope of inquiry to minority women in the

judicial workforce.[18] The Oregon Supreme Court/Oregon State Task Force on Gender Fairness states that it was the first task force to specifically incorporate issues of intersectionality in its methods of study. It focused on the intersections of race and gender as well as intersections that have been less widely studied.[19] The report of the California Task Force on Racial & Ethnic Bias addressed intersectionality, but acknowledged that the study of racial and ethnic bias in the courts "involves complex issues, competing interests, and the necessity of striking a balance that all committee members can accept."[20]

The Committee found that statements gathered in Pennsylvania are remarkably similar to those gathered by race and gender task forces across the country, inasmuch as those who are in positions of privilege or power, or non-minorities, often have a very different perspective than women of color about whether inequality and bias exist.

At its inception, the Committee recognized the importance of addressing the intersectionality issue. Since it is one of the few judicial task forces to address both race and gender in a single report, it was able to synthesize some of its findings in a way that exposes the specific plight of women of color. Through its public hearings, roundtable discussions, focus groups, and surveys, the Committee sought comments from individuals across the Commonwealth on the ways in which gender and race intersect in the lives of women of color. Additionally, the Committee gathered information from other sources such as law reviews, articles, and the reports of other task forces. In this way, the Committee has been able to identify issues of intersectionality in reported incidents of bias that might otherwise have been understood as only a gender issue or only a racial issue, and to consider how the two are connected.

The Committee recognizes that the common practice of comparing or analogizing racism and sexism can marginalize the significance of race, and has made an attempt to avoid that distortion by locating and including the experience of women of color throughout its report.

Four principal themes emerged from the Committee's research on intersectionality. First, since much of the material gathered by the Committee was anecdotal, different patterns of perceptions emerged, depending upon who was commenting. The Committee found that

statements gathered in Pennsylvania are remarkably similar to those gathered by race and gender task forces across the country, inasmuch as those who are in positions of privilege or power, or non-minorities, often have a very different perspective than women of color about whether inequality and bias exist.[21] The relevance of race, gender, or race and gender "is not reported equally by those who fall within the category of 'majority' and those who fall within the rubric of 'minority.'"[22] Second, female attorneys of color face significant hurdles in the courts that are not encountered by either white women or minority male attorneys. Third, other female minorities, such as court employees and litigants who are women of color, feel devalued and ghettoized; and fourth, female litigants of color often face additional obstacles such as class, language, or cultural issues that exacerbate their difficulties in the courts. It is significant to note, with respect to this last point, that the majority of people living in poverty are women and children.[23] Their poverty, combined with gender and race, has a profound impact on their courtroom experiences and can affect the outcome of their cases.

DIFFERENCES IN PERCEPTIONS OF THE ROLE OF RACE AND GENDER

Commenting on the perceptions of bias towards minority women, the Third Circuit Task Force on Equal Treatment in the Courts noted:

> "As might be expected with anecdotal data, the focus groups and the public hearings produced much more dramatic differences of perception about the role of gender and race in the court system, particularly the role of race. On the one hand, in employee focus groups, many minority females spoke of the devaluation of women of color and expressed their skepticism about whether they are treated fairly. In questionnaire comments, white females, on the other hand, expressed their belief that, in the workplace, women of color are advantaged by their race."[24]

The Second Circuit Task Force Report, completed several years later, documented very similar questionnaire responses:

> "White and minority female attorneys and minority male attorneys report that members of their own group are more disadvantaged than other groups. White female attorneys, for instance, observe that they are more disadvantaged than minority male and minority female attorneys in private practice. Similarly, minority male and minority female attorneys report that they are more disadvantaged than white female attorneys."[25]

These differences in perception have been found repeatedly in surveys and questionnaires conducted by task forces across the country and by the organized bar.[26] In a 1999 interview, Philip S. Anderson, then President of the ABA, recounted that he was struck by how it is still difficult for many whites, particularly white males, to recognize that there is bias in the justice system. The inability to recognize bias is one of the primary reasons for this disparity in perceptions between women of color and non-minorities. Anderson recalled observing an open discussion among conference attendees during which "the white men said they saw no racial or gender bias in the justice system and the black women said they all had experienced it."[27] Although Anderson went on to say, "I came to the inescapable conclusion that if they saw it, it's there,"[28] this is not the same thing as recognizing these conditions independently of being told they exist.

Another significant reason for disparities in the perceptions of minority and non-minority women regarding bias in the justice system is the dynamic of power operating behind what Shelly Todd, a speaker at the Committee's public hearing in Harrisburg, called "white privilege." By this Todd means, "the privilege to acknowledge that you have [an] unearned privilege, but to ignore what it means."[29] A professor of psychology at The Pennsylvania State University who is also a woman of color spoke at the Committee's State College public hearing and suggested that "Judges who are white are not aware of how whiteness has influence in terms of how they're treating somebody else…It's only when you're in a predominantly non-white community, when that begins to stand out."[30] Further, there is nothing in the experience of minorities, especially minority women, to counter their perceptions of a fundamentally biased and unfair system. As reported by Jerome Mondesire, president of the Philadelphia NAACP:

> "These perceptions of unequal and biased treatment in all aspects of the justice system have been formed as a result of the personal experiences of African Americans as well as anecdotal accounts handed down throughout generations. The real lack of diversity with respect to the numbers of minority judges, prosecutors, court administrators, and chosen jurors only serves to reinforce these perceptions."[31]

On the other hand, anecdotal evidence gathered by the Committee indicates that white females do not always take the position that minority women are granted special privileges, nor are they ignorant of the plight of women of color. Susan Yohe, a white female attorney who spoke at the Pittsburgh public hearing, for example, noted that the most frequent complaint of minority female attorneys "is that they simply aren't accepted as intelligent

lawyers," and "that they have enormous difficulty [being] taken seriously."[32] She went on to say that when she compared the stories of minority female attorneys to her own, or to those of other white women, she realized that "their battle is far harder than ours."[33]

Additionally, although the Committee's focus groups on gender bias were not designed to include racial bias, participants in all geographic areas raised the subject on their own. In Erie, where there were no people of color in either the attorney or court personnel groups, which were composed entirely of white women, participants noticed, and commented on, the racial makeup of their groups. They went on to discuss the disrespectful treatment of minority attorneys and racial bias in the hiring of court personnel. In other parts of Pennsylvania with low minority populations, members of focus groups described biased treatment of African American attorneys and African American criminal defendants. The view of these (white) focus group participants was that racial bias is very likely to occur in areas where people see few minorities in official positions in courtrooms and where juries may contain few or no people of color.[34]

FEMALE ATTORNEYS OF COLOR ARE ESPECIALLY DISADVANTAGED

> *"There are more challenges for a host of reasons—lack of role models and mentors, and the lack of opportunities to participate on challenging cases or to work for significant clients."*
>
> —Attorney Charlene Shimada

The second intersectionality theme noted by the Committee is that female attorneys of color are especially disadvantaged. As was recognized by the ABA's Multicultural Women Attorneys Network, a joint project of the Commission on Women in the Profession and the Commission on Opportunities for Minorities in the Profession: "Multicultural female lawyers are considered the most visible and disadvantaged group within the legal profession." The network observed that multicultural female lawyers encounter "persistent and pervasive and unique barriers to career opportunity, growth, and advancement."[35] More recent studies indicate that this is still the case, revealing that 12 percent of all women and 2 percent of all men said that in the past five years judges had assumed they were not lawyers, but 9 percent of minority men and 33 percent of minority women reported having such an experience.[36] In California, "[A]n Asian American female attorney appearing before the judge hearing her case was asked not

only whether she was an attorney, but also whether she was licensed to practice in California." [37] Further, the 1994 report of the ABA Multicultural Women Attorney's Network notes that cultural differences can also be a problem for minority female attorneys:

> "Asian American women and Latinas acknowledged an additional handicap: Their cultural upbringing stresses hard work, harmony, and teamwork over the "blowing your own horn" method of gaining prominence. As one Asian American woman put it bluntly: 'Our culture's emphasis on education and being a good student often means one doesn't learn social, communication, and political skills ("street smarts") at home. To get ahead, one has to learn how to do what the boys do: Self-promote, socialize, build networks.'"[38]

Charlene Shimada, a partner at the San Francisco office of McCutchen, Doyle, Brown & Enersen and one of the first women of color to hold the title of managing partner, remarked in a recent article that attaining management posts can be especially difficult for minority women. "There are more challenges for a host of reasons—lack of role models and mentors, and the lack of opportunities to participate on challenging cases or to work for significant clients," Shimada said, further noting that law firms have a problem retaining women of color.[39] According to the report, *Miles to Go*, published by the ABA Commission on Opportunities for Minorities in the Profession (now the Commission on Racial and Ethnic Diversity in the Profession), "The attrition rate for minority women is higher than that for any other group."[40]

Information gathered by the Committee in focus groups conducted in various locations throughout the Commonwealth shows that Pennsylvania courtrooms can be a difficult place for female attorneys of color. For example, an African American female attorney stated in the Philadelphia focus group for attorneys:

> "[W]hat irks me is when white attorneys come up to me and they will have the audacity to say…'My, you're good at this.' [It's] saying I shouldn't be good and the way they do it, it's with the surprise like 'Oh, my God' and it's because I'm black and I'm female. They assume that we know nothing—that they know everything. And I've been practicing law for 20 years. And I still get it."[41]

Another Philadelphia focus group participant noted that even African American male judges will single out African American female attorneys for disparate treatment:

> "You're a black woman and if they can lord it up over anybody, it's you. And so there you are, you're standing in front of them and, if there's one person they can make kowtow to them it's going to be the black woman. Because in the hierarchy they can't do it to the white men and they can't do it to the white women, so who's left? There's you."[42]

The final report of the focus group discussions indicated that in a rural Pennsylvania county, "African American women report that they are such an oddity in some areas that people come to court just to see them. They report having more trouble than Caucasian women getting and retaining clients, because they are made to appear less credible in the courtroom by judges, court personnel, and opposing counsel, and that reputation gets around."[43]

The small number of minority women in positions of power may also exacerbate the problem. For example, Ted Darcus, executive director for the [Pennsylvania] Governor's Commission on African American Affairs, reported that there is "a lack of positive role models within the justice system [of the Commonwealth]. [African Americans] see few black judges, attorneys, and other employees in the justice system and even fewer black females."[44] There is also a dearth of minority women on the bench in Pennsylvania. According to the AOPC, there are 431 judges in the Commonwealth as of 2002 and only 19, or 4 percent of this number, are non-white women, including only two Latina women.[45] In Oregon, there were no women of color serving as active judges as recently as 1998. According to the Alliance for Justice, "[P]rogress has been made in appointing women and minorities to the federal bench. Of 825 federal district and circuit court judges, 82 are black, 36 Hispanic, seven Asian American, two American Indian and one Arab American…Another 124 are white women."[46] Significantly, no minority women are specifically identified among these numbers.

Interviews conducted on behalf of the Committee by The Melior Group and V. Kramer & Associates show that judges in Pennsylvania have differing views regarding their abilities to change the racial and gender composition of court personnel.[47] As noted in the chapter in this report on the employment and appointment practices of the courts, most counties in Pennsylvania make no effort to recruit minorities or women for appointed positions such as arbitrators, conflict counsel, hearing officers, masters,

judicial clerks, and judicial staff.[48] At the attorney focus group session conducted in Pittsburgh, a participant stated: "I do see…the judges make an extensive effort to hire minority law clerks…[T]he problem is, once those law clerks do their time with the judge…they're not offered a job…The conclusion I've come to is they're just not taken seriously."[49]

FEMALE MINORITY COURT EMPLOYEES ENCOUNTER ADDITIONAL BIAS

The experience of minority women employed by the courts is also inherently problematic. In its 1991 report, the Florida Supreme Court Racial and Ethnic Bias Commission found that minority women comprised only 1 percent of Florida's judges, and only 6 percent of all judicial employees who worked in the state court system were minority women.[50] Further, virtually no minority females occupied upper-level positions or were in positions of authority. Those who were in supervisory positions reported that their authority was consistently undermined and they were generally "given less responsibility and discretion [than their non-minority and male counterparts] in supervision of their subordinates."[51] In particular, professional minority women, both employees and attorneys, reported that they were disproportionately assigned trivial or less desirable work.

Clerical employees in the Philadelphia courts expressed a similar sentiment that, because they are "black and female" there were no advancement structures or raises available to them.

The Report of the Third Circuit Task Force on Equal Treatment in the Courts found that women of color are rarely employed above the clerical staff level in the courts of the Third Circuit, which include all of the federal courts in the Commonwealth.[52] Furthermore, the Third Circuit Report notes that "even where women of color have advanced, and attained supervisory positions, these positions tend to be clerical rather than professional supervisory positions."[53] The task force also discovered a significant disparity in the salaries paid to white male employees and to African American female employees, although the report does note that "Some of this disparity may occur because minority females are more often in clerical positions, even in supervisory roles."[54]

Anecdotal evidence gathered by the Third Circuit Task Force revealed that court employees who are also women of color face problems that are similar to their professional peers. One court employee noted, for example,

that the historical "lack of role models or mentors in management" created an environment where "minorities were generally ignored or not directed towards promotions."[55] Overall, the minority employees in the federal system are primarily African American.[56] Yet, participants from all groups of employees expressed the belief that "women of color need more credentials than other groups of either gender to be hired or promoted."[57] During one of the Committee's focus group discussions for court personnel, clerical employees in the Philadelphia courts expressed a similar sentiment that, because they are "black and female" there were no advancement structures or raises available to them.[58] In part, that perception is based on being treated as incompetent or unskilled, and generally undervalued. The Court Personnel Report summary of the V. Kramer & Associates and Melior Group Final Report on Perceptions and Occurrences of Racial Bias in the Courtroom, states that, individually, African American court personnel experience bias primarily through slights and disrespect.[59] This is supported by the experience of a Philadelphia court reporter who noted, "I was in the courtroom with a trainee—a Caucasian woman…she had on jeans…I'm there in a suit, a little older…and the attorneys came over and addressed her like she was the reporter…and I was just the trainee…"[60] The report of V. Kramer & Associates and The Melior Group further reveals that judicial system employees are everyday observers of the courtrooms who witness what they see as routine, disadvantageous treatment of minority defendants. "*Indeed, the sharpest, most emotional reactions to race bias are expressed about the inequitable treatment of litigants and defendants*."(emphasis in original)[61]

FEMALE LITIGANTS OF COLOR OFTEN FACE ADDITIONAL DIFFICULTIES

Female litigants of color express a general feeling of distrust of the legal system. When combined with gender and race, economic status and class can have a profound effect on a litigant's courtroom experience and can affect the outcome of a case.[62] The professor of psychology who testified at the State College hearing stated this quite clearly:

> "I've come to the conclusion that I don't trust any judicial system to be fair to me as an African American or a woman. The distrust I have is based upon media exposure, professional readings and the experiences of friends and colleagues. My distrust is cultural. Despite how judicial personnel are trained to operate, I don't believe any individual can be truly objective unless they've been raised in a cultural vacuum over the past 300 years. The bedrock of our society is based on racism, classism, and sexism."[63]

Litigants report that courts do not understand their cultural backgrounds and that this leads to misunderstandings that may compromise their cases. Latin American and Arab women, for example, are said to be reluctant to report domestic violence because of their cultural and religious practices and beliefs.[64] As discussed in the chapter on domestic violence in this report, this can be an especially dangerous situation for women from particular ethnic backgrounds, as they may be ambivalent about seeking protection.[65] African American women can also be reluctant to report domestic violence or sexual assault because they believe that African American men are treated harshly and unfairly by law enforcement and the courts.

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Federal, state, and local task force studies document the effect stereotypical thinking has upon litigants, but find that judges seldom see their conduct as biased. Judges themselves offered during interviews with the Committee that "Some judges in domestic violence cases cannot understand why a woman does not leave a man, and cannot relate to her economic dependency. Some judges cannot understand different cultural norms that may be influencing women, or different kinds of family relationships, such as might be commonplace among Hispanics."[66] Several [judges] discussed the gap in experience and understanding between middle-class Caucasian judges and poor minority litigants. One judge characterized it as judges living in an "ivory tower" of upper-middle-class biases.[67] They commented on the difficulty in understanding people with multiple families and children, the lack of sensitivity to how hard it is for some litigants to earn even a modest amount of money or live on minimum wage, and the different standards they may have for what may be appropriate in their care of children.[68]

Poverty also exacerbates the problems women of color confront in the courts. An attorney, quoted in the report of the New York Task Force on Women in the Courts, noted:

> "As a Legal Services attorney, all my clients are poor and almost all are women…In court, and by other attorneys, my clients are *never* afforded the same respect as a typical litigant. When a client is on welfare, other attorneys seem to feel freer to attack a woman's personal choices (*i.e.,* to have children, to have multiple sexual partners, to not be married) as a way to attack [her] credibility and denigrate the client."[69]

Such experiences are also reported in Pennsylvania. One public hearing witness testified that it was impossible to "separate out the fact that when you have money, you can buy the best attorney you can afford…and when you look at the proportion [of the population] who has the money, it is not going to be women of color."[70] Furthermore:

> "Both those who had highly skilled legal representation and those who did not made the point that class and economic status are important issues in the courtroom. They point out that disrespectful treatment of women is more likely to occur when they are non-professional and poorer [sic]. The feeling of interviewees…is that it is more likely to be people of color and women who cannot afford representation than Caucasian males."[71]

The director of administration for the Pennsylvania Coalition Against Rape commented at the Erie public hearing on the particular experience of African American female litigants, especially in criminal matters:[72]

> "The value…placed on African American women in our culture is played out within the criminal justice system as well. She knows that rape laws were developed to protect Caucasian women, not all women. Knowing this, she is reluctant to report that she has been sexually assaulted for fear of further humiliation. She fears that no one will believe her, and even deeper is the fear that no one will care."[73]

Women with limited proficiency in English are especially affected as they face a language barrier as well as a gender and ethnic barrier:

> "It is especially difficult for women with language problems and/or disadvantages based on economics to feel confident as witnesses and litigants…Certainly, opposing counsel takes full advantage of the situation and often the judge does not place any limits on the scope of the situation."[74]

CONCLUSION

The purpose of addressing intersectionality is not to change views on gender and race but "to ensure a more accurate evaluation of gender fairness and racial fairness in the legal profession."[75] This means that "No significant and lasting progress in combating either [gender or racial bias] can be made until [the] interdependent aspect of their relationship is acknowledged, and until perspectives gained from considering their interaction are reflected in legal theory and public policy."[76] Towards this end, members of the Pennsylvania bar and bench, and participants in the legal system statewide, should re-examine conduct and assumptions that marginalize women of color, and work together to achieve equality for all participants in the courts of the Commonwealth.

RECOMMENDATIONS

TO THE SUPREME COURT OF PENNSYLVANIA

The Committee recommends that the Court:

1. Direct the AOPC to collect data and research on the status of women of color contrasted with white women and all men in the justice system, focusing on salary levels, hiring, and promotion practices.
2. Consistent with Recommendations for the Supreme Court of Pennsylvania in Chapter 8, ensure that selections for positions and pay scales for all court personnel are merit-based.

TO BAR ASSOCIATIONS

The Committee recommends that bar associations:

1. Conduct educational programs about the existence of cultural, racial, ethnic, and gender bias in the Pennsylvania justice system and the negative impact this bias has on women of color in the justice system in particular.
2. Appoint a special committee or division devoted to addressing the particular issues faced by women of color who are attorneys and judges. Establish a mentor or support network for these women.
3. Include more women of color in the planning of future conferences and reports on bias in the justice system.

TO LAW SCHOOLS

The Committee recommends that law schools:

1. Affirmatively recruit more women of color as students and faculty, and offer mentor networks for enrolled women of color.[77]
2. Provide opportunities for law faculty to become better informed about the effects of racial, ethnic, and gender bias in their teaching and in the legal education environment, and to consider ways of better educating students about the effects of bias in the legal decision-making process.

ENDNOTES

[1] Judith Resnick, *A Symposium on Finding a Path to Gender Equality: Legal and Policy Issues Raised by All-Female Public Education*, 14 N.Y.L. Sch. J. Hum. Rts. 230 (1997).

[2] *The Burdens of Both, The Privileges of Neither*, A Report of the Multicultural Women Attorneys Network, A Joint Project of the ABA Commission on Women in the Profession and The Commission on Opportunities for Minorities in the Profession, p. 6 (August 1994).

[3] Report of the Oregon Supreme Court/Oregon State Bar Task Force on Gender Fairness, p. 18 (1998) [hereinafter Oregon Report].

[4] Washington State Minority and Justice Commission, Annual Report, p. 58 (2001).

[5] Oregon Report, *supra* at 19.

[6] A bibliography of representative writings is attached in Appendix Vol. III.

[7] Lynn Hecht Schafran, *Women of Color in the Courts*, Trial Magazine, p. 21 (August 1999).

[8] Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, Chicago Law Forum, pp. 139, 148 (1989) [hereinafter Crenshaw].

[9] *Id*.

[10] Oregon Report, *supra* at 19.

[11] Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581, 585 (February 1990) [hereinafter Harris].

[12] "Chicano" is a term used by some to identify a person of Mexican-American heritage.

[13] Harris, *supra,* at 588.

[14] *Id*. at 589.

[15] Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 41 Duke L.J. 397 (1991) [hereinafter Caldwell].

[16] Crenshaw, *supra,* at 150.

[17] Report of the Third Circuit Task Force on Equal Treatment in the Courts, 42 Vill. L. Rev. 1355, 1539 (1997) [hereinafter Third Circuit Report].

[18] *Where the Injured Fly for Justice*, A Ten-Year Retrospect on the Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission, p. 32 (2000).

[19] Oregon focused on five specific intersections: "gender and race/ethnicity, gender and class, gender and age, gender and parental status and gender and sexual orientation." *See* Oregon Report, *supra* at 21.

[20] Final Report of the California Judicial Council Advisory Committee on Racial & Ethnic Bias in the Courts, p. 138 (1997) [hereinafter California Racial & Ethnic Bias Report].

[21] Resnick, *supra,* at 219.

[22] *Id*. at 229.

[23] Oregon Report, *supra* at 21.

[24] Third Circuit Report, s*upra* at 1378.

[25] Jay C. Carlisle, *Synopsis of the Report of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 19 Pace L. Rev. 431, 435 (1999).

[26] "Indeed, it is often said that perception is reality, and a survey of lawyers commissioned by the *ABA Journal* and the *National Bar Association Magazine* points up striking differences. The results show often conflicting perceptions for black and white lawyers, both on issues tearing at the heart of the profession and in the routine, nuts-and-bolts workings of the justice system." Terry Carter, *Divided Justice*, ABA Journal, pp. 42–43 (February 1999).

[27] *Id*. at 42.

[28] *Id*.

[29] Testimony of Shelly Todd, Harrisburg Public Hearing Transcript, pp. 156–157.

[30] Testimony of Beverley Vandiver, State College Public Hearing Transcript, p. 206 [hereinafter Vandiver Testimony].

[31] Testimony of Jerome Mondesire, Philadelphia Public Hearing Transcript, p. 48.

[32] Testimony of Susan Yohe, Pittsburgh Public Hearing Transcript, p. 228.

[33] *Id*.

[34] The Melior Group/V. Kramer & Associates, Final Report on Perceptions and Occurrences of Gender Bias in the Courtroom , pp. 14–15 (2001), attached in Appendix Vol. III [hereinafter Melior Group Gender Bias Report].

[35] Third Circuit Report, *supra* at 1539.

[36] Vicki C. Jackson, *What Judges Can Learn from Gender Bias Task Force Studies*, Judicature, Vol. 81, Number 1, p. 16 (July–August 1997).

[37] California Racial & Ethnic Bias Report, *supra* at 150.

[38] Hope Viner Samborn, *Higher Hurdles for Women*, ABA Journal, pp. 30–32 (September 2000).

[39] *Id*. at 32.

[40] *Miles to Go,* ABA Commission on Opportunities for Minorities in the Profession, (1998).

[41] The Melior Group/V. Kramer & Associates, Racial Roundtable Discussion, Philadelphia Attorney Transcript, p. 6, attached in Appendix Vol. III [hereinafter Melior Group Racial Philadelphia Attorney Transcript]. *See also* Joe R. Feagin & Melvin P. Sikes, *Living With Racism: The Black Middle Class Experience,* pp. 168–169 (Boston: Beacon Press, 1994) regarding the comments of a young African American lawyer working in an East Coast law firm on the presumptions of her co-workers:

> "They look at me as a young black, and they can't believe I'm an attorney. They still open their mouths like, 'Oh, that's who the new attorney is!' And then it's 'I didn't know you were a (pause) woman.' Well, my name is Judy, how many men named Judy do you know?…I've had more than a number of them submit reports to my office and then call to ask me if I understand. And my response to that is, 'I understand English. Did you write what you meant? Well then, yes, I understand.'"

[42] Melior Group Racial Philadelphia Attorney Transcript, *supra* at 32.

[43] The Melior Group/V. Kramer & Associates, Final Report on Perceptions and Occurrences of Gender Bias in the Courtroom, Attorneys Report, p. 3 (2001), attached in Appendix Vol. III; *see also* The Melior Group /V. Kramer & Associates, Racial Roundtable Discussion, Harrisburg Attorney Transcript, pp. 12–15, attached in Appendix Vol. III.

[44] Testimony of Ted Darcus, Harrisburg Public Hearing Transcript, p. 114.

[45] *See* Chapter 8 of this report, Employment and Appointment Practices of the Courts.

[46] Debra Baker, *Waiting and Wondering*, ABA Journal, p. 53 (February 1999).

[47] *See* Chapter 8 of this report, Employment and Appointment Practices of the Courts.

[48] *Id*.

[49] The Melior Group/V. Kramer & Associates, Racial Roundtable Discussion, Pittsburgh Attorney Transcript, p. 8, attached in Appendix Vol. III.

[50] *Where the Injured Fly for Justice,* Reforming Practices Which Impede the Dispensation of Justice to Minorities in Florida, Executive Summary: Reports & Recommendations of the Florida Supreme Court Racial & Ethnic Bias Commission, p. 15 (1990).

[51] *Id*. at 16.

[52] Third Circuit Report, *supra* at 1539.

[53] *Id.* at 1548.

[54] *Id.*

[55] *Id.* at 1552.

[56] *Id.* at 1557.

[57] *Id.*

[58] The Melior Group/V. Kramer & Associates, Racial Roundtable Discussion, Philadelphia Court Employees Transcript, p. 35, attached in Appendix Vol. III [hereinafter Melior Group Racial Philadelphia Court Employees Transcript].

[59] The Melior Group/V. Kramer & Associates, Final Report on Perceptions and Occurrences of Racial Bias in the Courtroom, Court Personnel, p. 1 (2001), attached in Appendix Vol. III [hereinafter Melior Group Racial Bias Court Personnel Report].

[60] Melior Group Racial Philadelphia Court Employees Transcript, *supra* at 6.

[61] Melior Group Racial Bias Court Personnel Report, *supra* at 1.

[62] *See* Chapter 9 of this report, Perceptions and Occurrences of Racial, Ethnic, and Gender Bias in the Courtroom.

[63] Vandiver Testimony, *supra* at 194–195.

[64] *See* Chapter 1 of this report, Litigants with Limited English Proficiency; *see also* Testimony of Caren Bloom, State College Public Hearing Transcript, p. 167.

[65] *See* Chapter 10 of this report, Domestic Violence.

[66] The Melior Group/V. Kramer & Associates, Final Report on Perceptions and Occurrences of Racial Bias in the Courtroom, p. 5 (2001), attached in Appendix Vol. III [hereinafter Melior Group Racial Bias Report].

[67] *Id; see also* Chapter 10 of this report, Domestic Violence.

[68] Melior Group Racial Bias Report, *supra* at 4–5.

[69] Report of the New York Task Force on Women in the Courts, 15 Fordham Urb. L.J. 123 [hereinafter New York Report].

[70] Vandiver Testimony, *supra* at 200.

[71] Melior Group Gender Bias Report, *supra* at 2.

[72] Testimony of Jacqueline Mae Johnson, Erie Public Hearing Transcript, pp. 56–57 [hereinafter Johnson Testimony]; *See also* Chapter 10 of this report, Domestic Violence, on the particular concerns of African American women about subjecting African American men to the justice system.

[73] Johnson Testimony, *supra* at 57.

[74] New York Report, *supra* at 123.

[75] Oregon Report, *supra* at 20.

[76] Caldwell, *supra,* at 372.

[77] The Committee understands that greater efforts must be undertaken to increase the declining number of men of color in law schools.