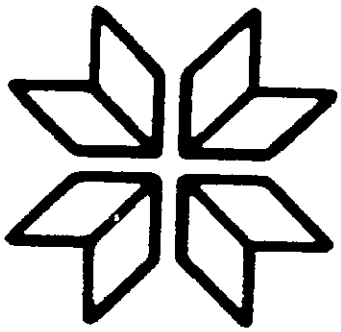
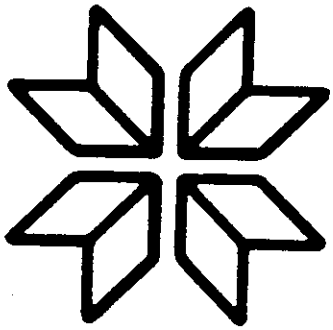
REPORT OF THE
NEW YORK STATE
JUDICIAL COMMISSION ON MINORITIES



VOLUME TWO
THE PUBLIC AND THE COURTS
APRIL, 1991

REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES



VOLUME TWO
THE PUBLIC AND THE COURTS
APRIL, 1991

TABLE OF CONTENTS

LIST OF TABLES

VOLUME II: THE PUBLIC AND THE COURTS

INTRODUCTION

Reduced to their essence, the numerous complaints, testimony and comments received by the Commission reflect the perception that minorities are stripped of their human dignity, their individuality and their identity in their encounters with the court system. Many minorities feel that those in authority do not treat them with consideration. To the courts, minorities are "those people."

To understand the basis of this perception, the Commission traced the step of a minority person's involvement with the court system. In doing so, the Commission found that at critical junctures of minority involvement with the court system, there exist circumstances which support the perception, and in some instances, the reality, that minorities are stripped of their dignity. That stripping process begins when, in many instances, minorities must enter court facilities which are unfit for human visitation. It continues with the way in which their cases are often processed and decided.

Accordingly, Chapter 1 of Volume II describes public perceptions of the treatment of minorities in the courts. It also describes the physical condition of many of the courts used most frequently by minorities, discusses the treatment of minorities in the courts and presents information on the utilization of the courts by minorities. Chapter 2 explores the adequacy and availability of legal representation for minorities. Chapter 3 presents the Commission's evidence on pretrial processing and criminal penalties. Chapter 4 treats the issue of whether minority and similarly situated white plaintiffs receive equal judgments in civil actions. Chapter 5 details the findings of the Commission's inquiry into the

shortcomings of the interpretation services made available to minority court users. Chapter 6 examines the question of whether minorities are underrepresented on juries. Finally, Chapter 7 discusses the special legal problems faced by Indian Nations in New York State.

CHAPTER ONE

PERCEPTION, COURT FACILITIES, TREATMENT AND UTILIZATION

CHAPTER 1

PERCEPTION, COURT FACILITIES, TREATMENT AND UTILIZATION

Chapter Overview

This chapter discusses the first aspect of the Commission's mandate: the general public perception that justice is not equally meted out to minorities in state courts, the experience of biased treatment by those minority persons who use the courts, and underutilization of the courts by minorities.

As Hon. Franklin H. Williams, the late Chairman of this Commission, indicated to Chief Judge Sol Wachtler at the outset of this undertaking, "wounds" would have to be opened and would have to be healed.[1] The wounds are severe indeed -- inflicted by myriad, inextricably linked events, which the Commission does not purport to quantify. Some of the reasons for the perceptions of bias are not within the power or authority of the Chief Judge to change. These include matters of past history, societal ills and areas within the purview of the Executive and Legislative branches of the government of the State of New York, or, in some instances, within the purview of municipalities. The Commission recognizes and endorses the on-going efforts of the Chief Judge to rectify certain of the factors contributing to the perceptions of bias -- especially his longstanding efforts to achieve minimally decent court facilities[2] and to maximize the numbers of judges to contend with the explosive

---

[1] 1 New York State Judicial Commission on Minorities, New York City Public Hearing 5-6 (June 29, 1988) (statement of Hon. Franklin H. Williams) [hereinafter New York City Hearing].

[2] S. Wachtler and J. Bellacosa, Justice Degraded: A Proposal to Solve the Court Facilities Crisis (Dec. 3, 1985) [hereinafter Justice Degraded].

caseload caused by the drug crisis.[3] Nevertheless, the Commission calls upon the Chief Judge to take additional steps to rectify the widely held perception that the courts of the State of New York are racially biased.

Aside from the factors that influence general public beliefs, the perception of many minority users of the New York State court system may be best understood from the perspective of the minority litigant who experiences a series of unfolding events. The minority litigant, especially in the so-called "ghetto courts" of the City of New York, namely, the Family, Criminal, Civil and Housing Courts, first encounters dilapidated, crowded and ill-maintained court facilities. This is his or her first glimpse of the judicial process, and as Chief Judge Wachtler aptly put it, deteriorated courthouse facilities "bear witness, not to justice delivered, but to the perception of justice denied, or worse, justice degraded."[4]

This initial perception of "justice degraded" may be fortified by any number of the multiple factors confronting the minority litigant that contribute to his or her perception that the system is racially biased. Due to economic circumstances, the litigant may believe that he or she does not stand on equal footing with his or her adversaries.[5] The litigant next may encounter so-called "informational barriers" -- barriers created by the virtual absence of information explaining where to go or what to do in order to negotiate the system. The inability to read or communicate in English may compound this difficulty.

Next, the minority litigant may be faced with a virtually all-white courtroom -- all-white except for similarly situated parties, such as defendants facing prosecution in the

---

[3] 1990 S. Wachtler, The State of the Judiciary 16-18 (hereinafter State of the Judiciary).

[4] Justice Degraded, supra note 2, at 1.

[5] The issue of legal representation is treated separately in ch. 2.

criminal courts or tenants facing eviction in the housing courts. With some frequency, the minority litigant then may face discourteous treatment by court personnel that may reflect racial bias. With lesser frequency, the litigant may be subjected to behavior that reflects racial insensitivity by courtroom personnel, attorneys or judges.

The minority litigant then may be faced with a disposition of his or her case that is bewildering because of the speed with which his or her fate was decided -- the phenomenon known as "assembly line justice" in the "ghetto courts." In sum, from the moment the litigant enters the courthouse, he or she may be confronted with myriad circumstances that undermine the notion that the courts mete out fair and equal treatment for all.

Section I of this chapter discusses the general public perceptions of bias in the courts of the State of New York and some factors that may contribute to their existence. Section II describes the deplorable physical conditions of the "ghetto courts" and the impact these conditions have on minority litigants. Section III then treats the perception held by litigants of the courts through the temporal scenario described above -- the lack of information relating to use of the system, the "snapshot" glimpse of the racial make-up of persons in the courtroom and, finally, the treatment of minorities in the courtroom. It also describes the "assembly line justice" issue, although the questions of disparate case outcomes in criminal and civil matters are treated elsewhere in this report.[6] Finally, Section IV of this chapter discusses the issue of minority underutilization of the courts of this state to seek redress for legal wrongs.

---

[6] See chs. 3 and 4, respectively.

I. THE GENERAL PUBLIC PERCEPTION OF BIAS

Recent public opinion polls on the perceptions of bias in the state courts suggest that Blacks in particular believe they are mistreated in the courts of the state. The Commission believes that these studies -- which did not identify actual users of the court among their respondents -- may very well be conservative estimates of the problem of general public perception. As a 1978 study sponsored by the National Center for State Courts shows, confidence in state or local courts was greater among those reporting no state court experience than among those reporting any state court experience.[7]

The first study of the perception of bias in the New York State court system, which the Chief Judge already has acknowledged, presents "graphic evidence" of a widespread perception of bias toward minorities.[8] The study was conducted on January 10-12, 1988 -- virtually contemporaneously with the formation of the Commission.[9] This New York Times/WCBS-TV News poll was taken in conjunction with a poll relating to the Howard Beach cases. It surveyed 479 white and 396 black adults residing in New York City.[10] In response to the question, "Do you think the judges and courts in New York City generally treat both whites and blacks fairly, or do they favor one race over the other?" the results were as follows:

---

[7] National Center for State Courts, The Public Image of Courts 19 (1978) (Table II.2) [hereinafter National Center Report].

[8] Wachtler Names Commission to Study Bias in Court System, N.Y.L.J., Jan. 22, 1988, at 1, col. 3 (quoting Hon. Sol Wachtler).

[9] Meislin, New Yorkers Say Race Relations Have Worsened in the Last Year, N.Y. Times, Jan. 19, 1988, at A1, col. 2.

[10] Id.

"Treat both fairly"	White	45%[11]
	Black	28%
"Favor whites"	White	21%
	Black	47%
"Favor blacks"	White	8%
	Black	1%

In February 1988, Newsday polled 759 black adult New Yorkers and found that 40% of the respondents believed that the courts consistently mistreat Blacks.[12] Also in 1988, the New York Law Journal, in conjunction with a survey of public attitudes regarding the Tawana Brawley matter, polled 402 people in New York City with the hypothetical question, "Suppose two people -- one white, one black -- are convicted of identical crimes. Whom do you think will get the lighter sentence?" Seventy-one percent of Blacks, in contrast with 31% of Whites, responded that the white offender would get the lighter sentence.[13]

More recently, on May 18-20, 1990, the Daily News/Eyewitness News sampled 670 adult New Yorkers, including 213 Blacks, in connection with several race-related issues -- including the jury verdicts of Bensonhurst defendants Keith Mondello and Joseph Fama and a dispute regarding black boycotts of Korean grocery stores -- to ask whether the court system, among other people or institutions, had helped make race relations in the city better

---

[11] Id.

[12] Friedman, Racism is No. 1 Concern, Newsday, Apr. 4, 1988, at 5 (N.Y. ed.) (LEXIS, Nexis library, Papers file). The question posed was, "How often do you think blacks in New York are mistreated by [the courts]--all the time, most of the time, sometimes, hardly ever or never?" Forty-three percent of the respondents reported that blacks were "sometimes" mistreated, and 9% stated that they were "hardly ever or never" mistreated. Drury, Trials 7 Triumphs "I Just Lock Up the Bad Guys," Newsday, Apr. 12, 1988, at 9 (N.Y. ed.) (LEXIS, Nexis Library, Papers file).

[13] Kaplan, Brawley Charges Fictitious? Law Journal Poll in City on Criminal-Justice System, N.Y.L.J., May 24, 1988, at 1, col. 3, at 4, col. 3. The study concluded that the Tawana Brawley case "has helped to arouse racial tensions in the city and the Law Journal Poll reflects that polarization." Id. at 1, col. 3.

or worse.[14] Overall, 42% of the respondents reported that the courts had made the situation worse; 29% stated that the courts had little effect or that they did not know; and 29% said that the courts had made race relations better.[15]

Other surveys of the perception of racial bias suggest that the courts of the State of New York suffer the same criticisms as those levied against courts in other jurisdictions. A 1977 study of the legal needs of the public, undertaken by the American Bar Association's Special Committee to Survey Legal Needs and the American Bar Foundation, found that mistrust of the courts was significantly greater among Blacks and Hispanics than among white respondents residing in the continental United States.[16] Thus, Blacks and Hispanics were less likely than Whites to agree with the statement, "If you were accused of a crime, you could expect to get a fair trial," and with the statement, "Judges are generally honest and fair in deciding each case."[17] Blacks and Hispanics were more likely to agree with the proposition that the legal system is "set up to deal with problems involving large sums of money and not with the kinds of legal problems the ordinary person has."[18]

Another study conducted by the National Center for State Courts surveyed a national random sample of 1,931 adults, who were asked whether or not a series of potential court

---

[14] Nagourney, Dinkins Gets a Thumbs Up, Daily News, May 21, 1990, at 15, cols. 4-5.

[15] Id. There was a virtual identity in answers given by white and black respondents. Therefore, inasmuch as the margin of error for the total sample was plus or minus 4.5 percentage points (six points for Whites and eight points for Blacks), the differences in answers between white and black respondents could not be said to be statistically significant.

[16] B. Curran, The Legal Needs of the Public - The Final Report of a National Survey 33, 250-54 (1977) [hereinafter Curran].

[17] Id. at 251.

[18] Id. at 252.

problems could be regarded as a "serious problem that occurs often."[19] In the survey, 49% of black, and 34% of Hispanic, but only 15% of white, respondents perceived "courts that do not treat blacks as well as whites" to be "a serious problem that occurs often." Similarly, nearly a quarter of Blacks (23%) and Hispanics (24%), but only a tenth of Whites (10%), perceived "judges who are biased and unfair" to be "a serious problem that occurs often." The survey concluded, "[t]o the extent that there is dissatisfaction with the courts on the part of the public, it is far greater among minorities than among the population as a whole."[20]

Because of the number of already existing surveys of public perceptions of bias in the courts and the high degree of agreement among surveys, and because the Commission held public hearings and received many anecdotal reports that buttressed these findings, the Commission did not deem it necessary to measure empirically general public perception of bias in the courts of this state. One black judge noted:

> Minorities all too often state that although the judiciary in theory, and the legal structure, appear[] to be rooted in fairness and justice, the execution and operation of these laws is [fraught] with hidden racism and hidden injustices.
>
> * * *
>
> Translated and reported throughout the community by mouth to mouth, this translate[s] and spells out to them racism. Whether or not . . . there's data to support it is immaterial if, indeed, a large segment of the population believes it.[21]

The studies cited above demonstrate the strongly held perception, especially among black New Yorkers, that justice is not color-blind.

---

[19] National Center Report, supra note 7, at 36, 87 (Table IV.9).

[20] Id. at 36.

[21] 3 New York City Hearing, supra note 1, at 523 (June 30, 1988) (testimony of Hon. Joseph B. Williams).

Although the Commission does not extrapolate the findings of the studies of general public perception of bias in the courts of New York beyond the specific questions posed in these studies and the responses received, it concludes, based on these studies and on information from the electronic town meetings sponsored by the New York State Martin Luther King, Jr. Commission, and on its own extensive public hearings (discussed below), that the general public perception of bias held especially by Blacks and, as shown in some studies, by Hispanics, may be shared in varying degrees by Asian Americans and Native Americans. During the Commission's tenure, two "electronic town meetings" were held by the New York State Martin Luther King, Jr. Commission and led to findings that have bearing on the issue of general public perceptions of bias. The information gleaned from the meetings must be judged against the backdrop of contemporaneous events and the admittedly nonrepresentative samples.

The first such meeting was held on October 20, 1988, in Dutchess County -- at a site chosen because the Tawana Brawley case was venued there and, moreover, on a date some two weeks after the State Attorney General had filed disciplinary complaints against attorneys representing Ms. Brawley.[22] The second was held on January 25, 1989, in Westchester County during an on-going controversy regarding federal court-ordered housing desegregation.[23]

---

[22]The Michael Rowan Group, Inc., Summary of Findings - The Dutchess County Electronic Town Meeting, October 20, 1988 and The Leadership Panel Discussion at the Eleanor Roosevelt Center at Val-Kill, October 21, 1988, unpaginated insert (Nov. 1988) [hereinafter Dutchess Meeting]; Fox, Review of the Highlights of 1988, N.Y.L.J., Dec. 30, 1988, at 1, col. 3, at 2, col. 4 [hereinafter Highlights].

[23]The Michael Rowan Group, Inc., Final Report - The Westchester County Electronic Town Meeting and Leadership Conference on Housing and Race Relations - January 25th and 26th, 1989 (Feb. 1989) [hereinafter Westchester Meeting]. See, Spallone v. United States, 110 S. Ct. 625 (1990) (describing litigation history); Highlights, supra note 22, at 2, col. 4.

At the Dutchess County meeting, there were 205 participants: 21% Black and 76% White.[24] Attendees were asked to rate the chances of black people "living in this area" receiving fair treatment in the criminal justice system.[25] An aggregate of 63% of Whites rated the chances as "excellent" or "pretty good"; no Blacks rated the chances as "excellent" and only 9% rated them as "pretty good."

At the Westchester County meeting, several questions were posed at the request of this Commission.[26] Participants were representative of the county's racial population--Whites comprised 73% of the 200 persons attending; Blacks, 16%; Hispanics, 9%; and Asian Americans, 1%.[27] However, other characteristics of the participants skewed the sample.[28] Among the respondents, 51% believed that treatment by the criminal justice system in Westchester County was better for Whites; 29% believed it was equal for all, and 20% believed it was better for minorities.[29] Thirty-eight percent of respondents believed that if a white person and a minority person were to be involved as plaintiffs "in comparable civil cases," the white litigant would receive greater compensation; 32% believed the white and minority person would receive the same award; 13% believed that the minority would

---

[24] Dutchess Meeting, supra note 22, Analysis of the Findings 4, Data Narrative 2. There was overrepresentation of blacks at the meeting, who comprised some 8% of the county's population--overrepresentation which was said to be desirable so that the findings from blacks would have statistical significance. Moreover, there was overrepresentation of higher income households and college graduates in the sample of respondents. Id., Analysis of the Findings at 4-5.

[25] Id., Analysis of the Findings 14, Data Narrative 15.

[26] Letter to Tom Cooper from Edna Wells Handy (Jan. 26, 1989).

[27] Westchester Meeting, supra note 23, Analysis of the Findings: Town Meeting 7, Town Meeting Questionnaire and Response Totals 1.

[28] Over half the attendees were from Yonkers, which holds 22% of the county's population. Moreover, higher income and education groups were overrepresented. Finally, the age of the participants was older than that representative of the county. Id., Analysis of the Findings: Town Meeting 7, Town Meeting Questionnaire and Response Totals 1.

[29] Id., Town Meeting Questionnaire and Response Totals 6.

receive more; and 16% were unsure.[30] Moreover, 50% of the attendees at the Westchester meeting believed that a white defendant would receive a lesser sentence than a minority defendant in comparable criminal cases; 28% believed that the white and minority would receive the same sentence; 16% believed the minority would receive a lesser sentence and 6% were unsure.[31]

Numerous hearing participants also spoke to the issue of general public perception. A black witness stated:

> I think we must bear in mind that most African-Americans live in communities from which a large percentage of the state's prison population comes. . . . As you know, close to 81 percent of the state's nearly 42,000 prisoners are black and Hispanics who come mainly from the state's urban communities. This reality hangs like a cloud over the heads of blacks and Hispanics. It's a subtle reminder always of the likely outcome of their involvement with the court.[32]

This spectre of involuntary involvement with the court system leads to a "negative" perception.[33] An Asian-American witness representing an association of Chinese, Japanese, Korean and other Asian-American ethnic groups testified that the phrase, "not a Chinaman's chance," reflects the perception among many Asian Americans.[34] Finally, an Hispanic witness stated that the perception of equal justice did not enjoy widespread support in his community.[35]

---

[30] Id., Town Meeting Questionnaire and Response Totals 8.

[31] Id.

[32] New York State Judicial Commission on Minorities, Albany Public Hearing 53-54 (April 28, 1988) (testimony of Alice Green) [hereinafter Albany Hearing].

[33] 3 New York City Hearing, supra note 1, at 522-24 (June 30, 1988) (testimony of Hon. Joseph B. Williams).

[34] New York State Judicial Commission on Minorities, Public Hearing 212, 214 (Jul. 26, 1988) (New York City) (testimony of Charles Wang) [hereinafter New York City Hearing II].

[35] New York State Judicial Commission on Minorities, Buffalo Public Hearing 96 (May 26, 1988) (testimony of Paul Volcey) [hereinafter Buffalo Hearing].

General History of Bias in Legal Processes: Perceptions Shaped by the Past

The vestiges of past discrimination in legal processes against Blacks, Hispanics, Asian Americans and Native Americans color--and perhaps in some instances dominate--their respective perceptions of their ability to achieve justice in the courts of the State of New York. The Hon. A. Leon Higginbotham, Jr., Chief Judge of the United States Court of Appeals for the Third Judicial Circuit, has written of the black experience:

> [F]or black Americans today . . . the early failure of the nation's founders and their constitutional heirs to share the legacy of freedom with black Americans is at least one factor in America's perpetual racial tensions.[36]

In a similar vein, at least one Chinese-American hearing participant before this Commission testified that the cumulative effects of the federal Chinese Exclusion Act of 1882[37] and legislation prohibiting Chinese from testifying against Whites in courts of law "result[ed in] a cowed [Chinese-American] community which was [stunted] in its growth phase and became very suspicious of the outside world," including the court system.[38]

Recounting past history necessarily opens wounds,[39] but to ignore the awareness in minority communities of past encounters with white-dominated governmental authorities is to ignore an important cause of any mistrust held by minorities of the courts of this state

---

[36] A. L. Higginbotham, Jr., In the Matter of Color - Race and The American Legal Process: The Colonial Period 6-7 (1980 ed.). Judge Higginbotham extensively described the system of slavery in Colonial New York. Id. at 100-150. Accord 2 New York City Hearing, supra note 1, at 348-352 (testimony of Michael Lloyd); id. (exh. 15) (written testimony of Michael Lloyd).

[37] See U.S. Commission on Civil Rights, Recent Activities Against Citizens and Residents of Asian Descent 7-8 (1987) (Clearinghouse Publication No. 88) (citing Ch. 126, 22 Stat. 58 (1882)) [hereinafter 1987 U.S. Commission Report].

[38] 4 New York City Hearing, supra note 1, at 731-32 (June 30, 1988) (testimony of Robert Wu).

[39] 1 Id. at 5-6 (statement of Hon. Franklin H. Williams).

and, concomitantly, a factor that may influence the attitudes of those who sit in judgment of them. As one black judge has written:

> What magic abolishes color in . . . [the] eyes [of white judges] and gives them instant objectivity and a license to analyze human foibles entirely divorced from the historical truth of racism? How, indeed, does one annul one's heritage and that of one's forefathers in this land or the land from which the family came?[40]

It is impossible to treat adequately in this chapter the respective histories of Blacks, Hispanics, Asian Americans and Native Americans. Nevertheless, brief capsule histories follow as background for the Commission's findings and recommendations made in this chapter.

A. Blacks. "[T]he weight of Black Americans' historical experience has been one of systematic exclusion."[41] At least one historian has theorized that there have been three major stages in Black-White relations in the United States:

> During the first, blacks were openly classified as property, and even those who were not held in legal slavery were generally regarded as having been placed on earth to do the bidding of white men. The Thirteenth Amendment technically ended that state of formal subjugation in 1865. The second stage promoted the colored man to the category of marginal human being . . . technically entitled to the same rights and protections [as the white man] . . . . Denied learning, denied all but the most primitive vocational training, denied access to the political and social institutions that functioned as a great ethnic melting pot for the European peoples who stocked American shores, the Negro hobbled into the twentieth century as a reviled scapegoat for the frustrated, a target for the sadistic, and an inconvenient reminder of past sins and current indifference. . . . Not until the Supreme Court acted in 1954 [in Brown v. Board of Education] did the nation acknowledge that it had been

---

[40] B. Wright, Black Robes, White Justice 13 (1987).

[41] J. Norgren & S. Nanda, American Cultural Pluralism and Law 29 (1988).

> blaming the black man for what it had done to him. His sentence to second-class citizenship had been commuted . . . .[42]

Indeed, this long history of racism, condoned by the American legal system, served as a yardstick by which at least one black attorney measured the progress of racial attitudes in the courts of the State of New York:

> I want to illustrate the several aspects of the justice system that manifest the systemic racism that still persists as the dark legacy of the legalized racism of our American heritage. It was only a mere 34 years ago in Brown v. Board of Education that the Supreme Court finally declared that discrimination based on race was illegal. It was also only 24 years ago that that same Supreme Court decided that a state prosecutor in Alabama was required by the due process and equal protection clause to address a black woman by the proper title and her full name -- and that was, Miss Mary Hamilton in Hamilton v. Alabama.[43]

What happened to Miss Mary Hamilton, who refused to be addressed by an Alabama attorney as simply "Mary" and was held in contempt of court, was later described by two United States Supreme Court justices as one of several "'relics of slavery.'"[44]

More recently, Blacks from other parts of the world, especially the Caribbean and Africa, have immigrated to New York State, especially the City of New York.

B. Hispanics. Hispanics are "congeries of groups, each with different legal, social, economic and political characteristics."[45] Most came to New York City after World War

---

[42] R. Kluger, Simple Justice 748 (1975) (citing Brown v. Board of Educ., 347 U.S. 483 (1954)) [hereinafter Simple Justice].

[43] New York City Hearing II, supra note 34, at 143 (testimony of Laura Blackburn) (citing Hamilton v. Alabama, 376 U.S. 650 (1964) (per curiam)); Brown v. Board of Educ., 347 U.S. 483 (1954).

[44] Bell v. Maryland, 378 U.S. 226, 249 n.4, (1964) (Douglas and Goldberg, JJ., concurring in part).

[45] N. Glazer, Politics of a Multiethnic Society, in The American Assembly, Ethnic Relations in America 134 (1982) [hereinafter Ethnic Relations].

II,[46] including Puerto Ricans, Dominicans, Ecuadorians, Colombians and Cubans.[47] They are the fastest-growing minority group in the country.[48] Although Puerto Ricans have been American citizens since the Spanish-American War, other Hispanic groups began to be subjected to immigration quotas in 1968.[49] Legislation seeking to control the flow of immigrants with undocumented status threatened the job status of many Hispanics.[50]

Moreover, language barriers pose significant hurdles for many Hispanics, including those in New York. As one Hispanic educator put it, "'Discrimination had entered our lives because of language . . . so language became an important symbol of civil rights denied.'"[51]

C. **Asian Americans.** It is difficult to generalize about past legal history of Asian Americans[52] for the reasons stated by the following witness before the Commission:

> Asians in New York State are from many backgrounds. It is not just a singular homogenous group like in the early years when Chinese was almost synonymous with Asians. We are now Chinese, Japanese, Kore[a]n, Indian, Asian-Indians . . . including . . . Pacific Islanders. We have almost twenty-something different groups.

* * *

---

[46] E. Mann & J. Salvo, Characteristics of New Hispanic Immigrants To New York City: A Comparison of Puerto Rican and Non-Puerto Rican Hispanics 1 (1984) [hereinafter New Hispanic Immigrants].

[47] T. Weyr, Hispanic U.S.A. - Breaking The Melting Pot 144 (1988) [hereinafter Hispanic U.S.A.].

[48] R. Weaver, The Impact of Ethnicity upon Urban America, in Ethnic Relations, supra note 45, at 82.

[49] Hispanic U.S.A., supra note 47, at 5, 21.

[50] Id. at 31-49.

[51] Id. at 55 (quoting former New York school chancellor Anthony Alvarado).

[52] In the 1980 census, the term "Asian and Pacific Islander" was defined as a "person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands." Directive No. 15. Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19269 (May 4, 1978).

> Even within a particular Asian ethnic group, [there] are the differences of generations . . . education, language and dialect, foreign-born, native-born. [There] are different stages [of] development, of the community as well as of individuals.[53]

The most populous Asian groups in New York counted at the 1980 census, were as follows: Chinese, Asian Indian, Korean, Filipino, Japanese and Vietnamese.[54] In New York, Chinese demographically comprise the oldest and largest recorded Asian-American population.[55]

What these diverse groups share in common, however, is the long-standing effects of federal law, which, until 1965, prohibited or severely restricted immigration to the United States.[56] Second, these diverse groups "share [a] history of discrimination, experienced either as a xenophobic response to newcomers or because of their race."[57] As a Chinese-American witness put it:

> [I]n the history of the Chinese community . . . and the Asian people, the legal system has a history of being very intimidating and outright racist.
>
> * * *
>
> California . . . had a case, People v. Hall, [which held that] Chinese could not testify. This is true with other minorities, and I want to emphasize this is a pattern.

---

[53] New York City Hearing II, supra note 34, at 212 (testimony of Charles Wang). In addition to these groups listed by the witness, Asians include people of Bangladesh, Bhutan, Brunei, Burma, Cambodia, Hong Kong, Indonesia, Laos, Macao, Malaysia, Mongolia, Nepal, Pakistan, Papua New Guinea, Singapore, Sri Lanka, Taiwan, Thailand, and the Pacific Islands, including the indigenous people of Hawaii. Department of City Planning, Office of Immigrant Affairs and Population Analysis Division, Asians in New York City: A Demographic Summary 1 (Dec. 1986) [hereinafter New York City Report on Asian Americans].

[54] The 1980 census counted 328,000 Asians in New York, or 1.9% of the total New York State population. Gardner, Asian Americans: Growth, Change and Diversity, 40 Population Bulletin 11 (Oct. 1985) (Table 4).

[55] New York City Report on Asian Americans, supra note 53, at 2-3, 7.

[56] 1987 U.S. Commission Report, supra note 37, at 2.

[57] U.S. Commission on Civil Rights, The Economic Status of Americans of Asian Descent: An Exploratory Investigation 13-15 (October 1988) (Clearinghouse Publication No. 95).

* * *

> The immigration law was anti-Asian prior to 1965, and that [was] only changed recently .... The internment of Japanese Americans [during World War II] was something which affected not only Japanese Americans, but also affected the perception and experience of all Asian Americans because that was certainly one of the more outrageous examples of denial of civil liberties.[58]

D. Native Americans. Native Americans have a unique perspective of the state court system -- unique because, unlike other minority groups that seek inclusion, many of them desire judicial respect for their status as citizens of separate nations. For this reason, their history is treated below in Chapter 7.

Empirical Studies on Attitudes and Manifestations of Racism

> As early as 1909, the United States Supreme Court conceded that:
>
> Bias or prejudice is such an exclusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence.[59]

Nonetheless, a chronological review of major studies of racial attitudes -- primarily as they relate to Blacks--reveals an early emphasis on the pervasiveness of overt acts of racial bias. Only recently have commentators begun to recognize that "[p]rejudiced thinking and discrimination still exist, but the contemporary forms are more subtle, more indirect, and less overtly negative than are more traditional forms"[60] -- indeed, they may even be performed "unconsciously."[61] These so-called "microaggressions" have been defined as "'subtle, minor,

---

[58]5 New York City Hearing, supra note 1, at 970-71 (June 30, 1988) (testimony of Rockwell Chin).

[59]1 Id. at 38-39 (June 29, 1988) (testimony of Hon. Antonio Brandveen) (quoting Crawford v. United States, 212 U.S. 183, 196 (1909).

[60]S. Gaertner & J. Dovidio, The Aversive Form of Racism [hereinafter Aversive Racism] in, Prejudice, Discrimination, and Racism 61, 84 (J. Dovidio & S. Gaertner eds. 1986) [hereinafter Dovidio].

[61]Lawrence, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1986) [hereinafter Lawrence].

stunning, automatic assaults . . . by which whites stress blacks unremittingly and keep them on the defensive, as well as in a psychologically reduced condition."[62] One commentator has noted that although certain contemporary individuals may understand racial prejudice to be socially and morally unacceptable, there may simultaneously be "an expressed commitment to egalitarian ideals along with lingering negative beliefs and aversive feelings about blacks."[63]

To the extent that studies of racial bias focus on Blacks and not on other minority groups within this Commission's purview, the remarks of one Asian-American commentator are applicable here:

> [B]lack America's 400-year experience of sustained and brutal American racism does present a paradigm worth consideration. . . . To an extent not yet clear, color plays a significant role . . . with gradations in color roughly paralleling gradations of sustained racism inflicted upon a group. I have found it impossible to think about race and law without drawing heavily from the black experience.[64]

The first major studies of racism dealt with the problem in its most overt forms -- prejudice, violence and bigotry. Adorno et al., conducted studies designed to identify the personality correlates of racial and ethnic hatred. Racist propositions consistent with the type thus identified -- the "authoritarian personality" -- included beliefs in the segregation of neighborhoods, deportation, extension of police control, and willful deprivation of legal rights. Subjects characterized as having "authoritarian personalities" were also more likely

---

[62]Delgado, The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?, 22 Harv. C.R.-C.L. L. Rev. 301, 309 n.50 (1987) (quoting C. Pierce, Unity in Diversity: Thirty-three Years of Stress, Solomon Carter Fuller Lectures, American Psychiatric Ass'n Meeting, Washington, D.C. (May 12, 1986)). See also Davis, Law as Microaggression, 98 Yale L.J. 1559, 1565 (1989) [hereinafter Davis].

[63]Davis, supra note 62, at 1564.

[64]Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323, 335 n.50 (1987) (citation omitted).

to hold racial and ethnic stereotypes, agreeing with descriptions of Blacks as "lazy" or "superstitious."[65] Allport, used a similar psychological model in his text, The Nature of Prejudice, describing the phenomena of in-group identification and hostility toward out-groups. His examples of prejudice included characterization of social "others" as unintelligent, unclean, immoral and conspiratorial.[66]

As noted above, the 1954 Brown v. Board of Education decision began a period during which certain barriers erected by institutional racism began to be removed.[67] Indeed, post-Brown researchers began to note discernible shifts in white attitudes toward Blacks. Dovidio and Gaertner found that, with respect to the measures of prejudice cited by Adorno and Allport, overt expressions of stereotypes declined; in 1933, 84% of white respondents characterized Blacks as "superstitious" and 75% characterized them as "lazy"; by 1982, these attributions declined to 6% and 13%, respectively.[68]

Moreover, Schuman et al. evaluated results of surveys on racial attitudes conducted between 1942 and 1984: on the ten items evaluated, white responses favoring principles of equal treatment rose dramatically, from below 50% on all items in 1942 to above 90% on some items in the 1970s and 1980s. However, when the researchers evaluated comparable

---

[65] T. Adorno, The Authoritarian Personality (1950).

[66] G. Allport, The Nature of Prejudice (1954).

[67] See Simple Justice, supra note 42; Piven, Poor People's Movements (1979).

[68] J. Dovidio & S. Gaertner, Prejudice, Discrimination and Racism: Historical Trends and Contemporary Approaches, in Dovidio, supra note 60, at 1, 7 (Table 2).

survey data on attitudes toward policies which would implement principles of equal treatment, they did not find similar trends.[69]

As suggested by Schuman, the trend against certain forms of overt discrimination has influenced the course of research.[70] Researchers label the contemporary strain "modern" or "aversive" racial bias and describe its tenets more fully as follows:

> The principal tenets of modern racism are these: (1) Discrimination is a thing of the past because blacks now have the freedom to compete in the marketplace and to enjoy those things they can afford. (2) Blacks are pushing too hard, too fast and into places where they are not wanted. (3) These tactics and demands are unfair. (4) Therefore, recent gains are undeserved and the prestige granting institutions of society are giving blacks more attention and the concomitant status than they deserve. Two other tenets are added to this psychological syllogism: Racism is bad and the other beliefs do not constitute racism because these beliefs are empirical facts.[71]

The expression of this sort of racial bias is, according to advocates of the view, "not hostility or hate. Instead, this negativity involves discomfort, uneasiness, disgust, and sometimes fear, which tend to motivate avoidance rather than intentionally destructive behaviors."[72]

One response to this "modern" racial bias has been to recognize the ambiguity of intent surrounding an action and to contest it on the ground of its effect or its "cultural meaning." Professor Lawrence proposes the cultural meaning test to "evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial

---

[69] H. Schuman, C. Steeh and L. Bobo, Racial Attitudes in America: Trends and Interpretations (1988 ed.) (noting significant gap between black support for equal treatment principles and implementation, as well).

[70] Id. at 193.

[71] J. McConahay, Modern Racism, Ambivalence, and the Modern Racism Scale, in Dovidio, supra note 60, at 91-93.

[72] Aversive Racism, supra note 60, at 63.

significance."[73] Its focus is on stigmatizing actions which "brand the individual with a sign that signals her inferior status to others and designates her as an outcast."[74] This approach explicitly affirms the difficulty surrounding proof of intent, but does not deny the existence of racism on this ground, since

> [r]acism is in large part a product of the unconscious. It is a set of beliefs whereby we irrationally attach significance to something called race. I do not mean to imply that racism does not have its origins in the rational and premeditated acts of those who sought and seek property and power. But racism in America is much more complex than either the conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots. It is a part of our common historical experience and, therefore, a part of our culture. It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities.[75]

In this commentator's view, racism is neither an aberrant incident nor a marginal movement, but a historically embedded aspect of our national life.

Comprehensive empirical studies testing the premise that unconscious and aversive racial bias are present in the courtroom have not been conducted. In part, this may be attributed to the fact that overt demonstrations of racial bias are relatively infrequent. Moreover, subtle psychological events, even if they are perceived clearly by their victims, are difficult for an outsider to observe, much less quantify. One such example of microaggression which results in subjective feelings of inferiority but, perhaps, eludes quantification, is as follows:

---

[73] Lawrence, supra note 61, at 356.

[74] Id. at 351.

[75] Id. at 330.

> There is a great deal of resistance to having dignity. If you are a small Asian gentleman, you're treated like a child. And I can only say that with our emphasis upon stature in our culture, the Asian is made to feel like a boy . . . and they might have been men of quite dignified position who just happen to be small with no facial hair.[76]

Perceptions Shaped By Increase In Bias-Related Crimes

> Racial bias is one of the most serious evils that we confront, threatening the harmony of our neighborhoods, schools, and social institutions, and triggering violent incidents at an alarming pace. Last year [1987] set a new record for bias crimes in the city, with racially-motivated attacks against blacks up 154% over 1986. Bias attacks against Hispanics and Asian-Americans also multiplied last year, rising 107 and 240 %, respectively, over 1986.[77]

In New York City, such crimes rose 14% for the first four months of 1990, compared with the same time the previous year.[78]

The Commission takes no position on pending cases or in cases in which defendants were not convicted or, indeed, in cases in which the punishment levied against those convicted were believed to be inadequate by certain minorities. It notes, however, that at least two witnesses at its public hearings testified that bias-related violence against minorities contributes to the perception that the court system is biased when white defendants are set free without bail, or the charges against them are dismissed, or they are sentenced to community service[79]--"[I]t sends a clear message that they can go around beating up whoever they want to at will . . . [w]ithout having to put up bail and [not] hav[ing] to pay a

---

[76] Albany Hearing, supra note 32, at 164 (testimony of Helene Smith).

[77] 1 New York City Hearing, supra note 1, (exh. 6 at 1) (written testimony of Elizabeth Holtzman).

[78] Goleman, As Bias Crime Seems to Rise, Scientists Study Roots of Racism, N.Y. Times, May 29, 1990, at C1, col. 1 (citing Inspector Paul Sanderson of the New York City Bias Incident Investigation Unit).

[79] 5 New York City Hearing, supra note 1, at 972-73 (June 30, 1988) (testimony of Rockwell Chin) (citing Vincent Chin case in Detroit and Eleanor Bumpers case in New York); New York City Hearing II, supra note 34, at 277-79 (testimony of Erlene Bethel).

price for it . . . ."[80] In addition, a recent poll conducted by The Daily News/Eyewitness News suggests a strong public perception relating to the appearance of justice served by the acquittal of one of the two Bensonhurst defendants.[81]

II. COURT FACILITIES

This Section on court facilities and the photographs that accompany the Executive Summary graphically describe one reason why certain minorities may believe that justice is not color-blind: the facilities of those courts in which many minorities find themselves -- the "ghetto courts" -- are grossly deteriorated and inadequate. As Chief Judge Wachtler stated over four years ago:

> Those who work in and use the courts are entitled to decent, clean, safe and respectable places in which to conduct the business of justice. Too often, when the people of New York seek a dignified place of deliberation in which to resolve their controversies, they find not dignity, but deterioration.[82]

Testimony before this Commission suggested, and questionnaire data essentially confirmed, that the problem of indecent court facilities predominates in New York City. Thus, the perception of "justice degraded" may be strongest among minority users of the "ghetto courts" located in New York City. The term "ghetto courts" was used by at least one witness before this Commission primarily in terms of the black experience with the judicial system in New York.[83] Certain racial minorities -- especially Blacks and Hispanics -- are

---

[80] New York City Hearing II, supra note 34, at 280 (testimony of Erlene Bethel). See generally Williams, Spirit-Murdering the Messenger: The Discourse of Finger Pointing as the Law's Response to Racism, 42 U. Miami L. Rev. 127 (1987) (discussing the Eleanor Bumpers and Howard Beach cases).

[81] Nagourney, Mondello's Guilty, Say 61% Of City, Daily News, May 21, 1990, at 5, cols. 1-2.

[82] Justice Degraded, supra note 2, at 1.

[83] New York City Hearing II, supra note 34, at 143 (testimony of Laura Blackburn). It has comparable relevancy for Hispanics, perhaps lesser relevancy for Asian Americans (there are little data relating to their use of the "ghetto courts") and no relevancy to Native Americans, many of whom believe that the state and federal courts lack jurisdiction over them.

found in disproportionate numbers in the "ghetto courts." The importance of the Criminal Courts,[84] Family Courts,[85] Civil Courts[86] and Housing Courts[87] to the daily lives of these minorities cannot be overestimated.[88]

The Court Facilities Act of 1987

Legislation enacted in 1987[89] required state municipalities, including the City of New York to prepare, by August 1989, a long-term capital plan for court facilities situated within its jurisdiction. It essentially left undisturbed the fundamental responsibility of the City to

---

[84] See, e.g., 1 New York City Hearing, supra note 1, at 140 (testimony of Hon. Burton Roberts) (in Bronx County 95 % of defendants and 90% of alleged victims are black and Hispanic); id. at 90 (testimony of Archibald Murray). As one witness put it:

> [M]inority women . . . disproportionately suffer the effects of poverty . . . in our society . . . . They're complainants in criminal cases, because a black [woman] in this country is more than twice as likely to be mugged as a white [woman], and substantially more likely to be raped, and because black and Hispanic households are more likely than white households to be touched by crime . . . .

2 id. at 326 (testimony of Jeanne Thelwell).

[85] 1 Id. at 223 (testimony of Ernestine Benizeau) ("The thing that strikes you most about the Family Court, even in Richmond and Queens Count[ies] where minorities are certainly a minority in the population, is that they are a majority in the Family Courts . . . . This is definitely a court which impacts on black people and Hispanics, and other minorities as well."); 2 Id. at 327 (testimony of Jeanne Thelwell) (minority women come as petitioners in Family Court for orders of filiation and support). The Fund for Modern Courts in 1989 reported that among juveniles accused of delinquency in New York City's Family Court, 52% were black and 30% were Hispanic. Fund for Modern Courts, Report on the Facilities of the Family Court of New York City 2 (May 1989) [hereinafter Family Court Report].

[86] 3 New York City Hearing, supra note 1, at 661 (June 30, 1988) (testimony of Hon. Margaret Taylor) ("[M]ost of the clientele in our [Civil Court of the City of New York] . . . are of a minority--either Hispanic, . . . black, or a large number of women with children, because that's what Civil Court is.").

[87] City Wide Task Force on Housing Court, 5 Minute Justice Or "Aint Nothing Going On But the Rent!" 32 (Nov. 1986) [hereinafter Housing Court Report]. (Courtroom observations found that 53.7% of tenant litigants in Housing Court were black and 26.4% Hispanic, and, along with Asian Americans who comprised 0.9% of the tenant litigants, the minority tenant clientele of Housing Court was nearly 81% of the total); 1 New York City Hearing, supra note 1, at 63-64 (testimony of Hon. Yvonne Lewis). ("There's no question, but what--with respect to landlords, the majority of landlords are white; and with respect to tenants, the majority of tenants in the courts are minorities."); 2 id. at 327 (testimony of Jeanne Thelwell) (minorities are defendants in Housing Court); id. at 454-55 (testimony of Gustave Sosa) ("People of color" are essentially users of the Housing Court).

[88] E.g., Family Court "is perhaps the most important court in this state impacting on black people because it has to do with what happens in the black family." 1 New York City Hearing, supra note 1, at 222 (testimony of Ernestine Benizeau).

[89] 1987 N.Y. Laws, ch. 825.

furnish suitable and sufficient facilities for the use of the courts.[90] Continuation of that responsibility was at the very heart of the legislative compromise that produced the 1987 Act.[91] The measure, however, empowered the Chief Administrator to establish priorities among the facilities' needs.[92]

In timely fashion, the City did submit to the Chief Administrator a 15-year, $1.6 billion capital plan for court construction and rehabilitation -- familiarly known as the "Master Plan."[93] However, the City, after its filing of the Master Plan, made one modification regarding an existing facility, 80 Centre Street, that would house a criminal court complex and relieve the overcrowding in existing Manhattan Criminal Courts. This one change, according to the Chief Administrator, was "an important casualty. . . . [It] . . . fell victim to the inability of the City and the State to agree on how to pay the cost of relocating State agencies from the building. The City substituted a proposal for a new building [which] . . . will take precious additional years to wend its way through the City's land use and zoning approval processes."[94] Moreover, the City has proposed delay of construction of a court annex in Brooklyn, which will house additional criminal courtrooms.[95]

---

[90] N.Y. Jud. Law § 39(3)(a) (McKinney 1983). See also Bill Jacket to 1987 N.Y. Laws ch. 825 (Letter of Michael Colodner, Unified Court System, to Hon. Evan A. Davis, Counsel to the Governor, (July 28, 1987)) (citing N.Y. Jud. Law § 39(3)(a)).

[91] Crosson, Court Facilities Plan Sees Justice Upgraded, N.Y.L.J., Jan. 17, 1990, at 39, col. 3 [hereinafter Justice Upgraded].

[92] N.Y. Jud. Law § 219 (McKinney Supp. 1991).

[93] City of New York Court Facilities Capital Plan, Submitted on August 7, 1989 to the Chief Administrator of the Unified Court System of New York State under Chapter 825 of the Laws of 1987.

[94] Justice Upgraded, supra note 91, at 53, col. 4-5.

[95] Adams, City Budget Officials Seen Seeking Cuts in Court Construction Funds, N.Y.L.J., Oct. 17, 1990, at 1, col. 1.

The Commission is well aware of the current budget crisis in the City of New York. Nevertheless, the City would violate the very purpose of the 1987 legislation if -- on an annual fiscal basis -- it tampers, or attempts to tamper, with the Master Plan. Monies and financing are available through the Court Facilities Act to pay for the construction or rehabilitation.[96] In a recent speech, Hon. Milton L. Williams, Deputy Chief Administrative Judge of the City of New York, rhetorically asked, "Who is the youngest person in this room? You won't see the new buildings that have been promised until your grandchildren are born."[97] This statement was made before the magnitude of the current State and City fiscal crises became known.

The Commission believes that the first glimpse by many minorities of facilities in the "ghetto courts" may leave an indelible imprint on their collective psyche, an imprint that may well pollute their perception of the equality of justice in the State of New York. Thus, the prospect of changes in the allocation of resources promised to the courts presents a chilling spectre indeed -- especially in view of the explosive growth in caseloads in many of the "ghetto courts" that already taxes the resources of existing court facilities.[98] The

---

[96] N.Y. State Finance Law §§ 54-j, 94 (McKinney 1989 & Supp. 1991).

[97] M. L. Williams, Remarks at Meeting of the Network of Bar Leaders (Apr. 18, 1990).

[98] One commentator summarized the staggering caseloads in the "ghetto courts" as follows:

> In 1989, 320,000 arrest cases were filed in the New York City Criminal Court, almost 900 daily and over 4,400 cases per judge in 1989.
>
> * * *
>
> Family court caseloads have increased 700 percent in child neglect and abuse cases in the past 10 years; juvenile murder filings have increased 138 percent in recent years with juvenile drug arrests up 52 percent . . . .
>
> * * *
>
> Civil Court of the City of New York . . . is the highest-volume civil litigation court in the world. . . . [O]ver 50 percent of [its judges] are transferred to service in criminal

Commission therefore urges the City of New York to adhere to the agreed-upon Master Plan, to "see"--through the photographs--what gross conditions will be permitted to continue if the Master Plan is not timely implemented, and to realize what untold consequences the continued perception of "justice degraded" will have on minorities in this City.

The Present Status of Courtroom Facilities

All the evidence obtained by the Commission condemned the inadequacy, and often unsanitary conditions, of court facilities of the New York City "ghetto courts."[99] Minimally adequate facilities are important for a number of reasons. Not only do such facilities contribute to the perception of unequal justice by minority litigants, but they must also necessarily influence the attitudes of court personnel, including judges, regarding the importance of the judicial process. Moreover, inadequate facilities bear on the attitude of the litigants themselves. As one attorney testified: "When judges who are human have to

---

> cases . . . . [T]his court is "always in a crisis" with . . . its immense Housing Court calendar . . . .

Kelner, On Budgeting for Justice, N.Y.L.J., Mar. 30, 1990, at 1, col. 1, at 4, col. 4, 6 (LEXIS, Nexis library, Papers file). See also State of the Judiciary, supra note 3; Network of Bar Leaders, Report of the Network of Bar Leaders on the State of New York Unified Court System Budget for the Fiscal Year Beginning April 1, 1990 (Jan. 1990).

[99] A white litigator from New York City wrote the following as part of the litigators' study:

> Most people only have contact with the judicial system at the lowest level[:] Housing Court, Criminal Court, Family Court. And most of the people who have to go to these courts in N[ew] Y[ork] City are probably minority. What message is sent when these courts have facilities that are totally inadequate? A waiting room for 3 or 4 housing parts that has seating for 15 people and a calendar of 150 people? No public water fountains. No hand towels or toilet tissue in the bathrooms. There are no doors on the commodes at the Bronx Family Court. Would this be tolerated at the Appellate Division? It sends a message to the people in these courts that they aren't worth much.

New York State Judicial Commission on Minorities, Responses to Questionnaire for Litigators in New York State on Issues Relating to Professional Experiences and Perceptions of Fairness and Sensitivity in the Courtroom [hereinafter Litigators' Questionnaire].

work in such deplorable inhuman conditions, it impacts on their ability to treat those who come before them with respect and dignity."[100] Similarly, a judge observed:

> If the [Housing Court] facilities were made better it would attract a better attitude on the part of the court personnel. It would suggest to litigants coming in that they be on a different kind of behavior. It would suggest that they might have to respect this process, quite unlike what it is that they feel now.[101]

The Commission sampled both judges and litigators regarding the adequacy and conditions of facilities in the "ghetto courts." Tellingly, both groups of respondents consistently agreed that the Housing Court had the worst facilities, followed in order by the Civil Court, Criminal Court and Family Court. These data are detailed below in this report.

Housing Court

> It is widely known that among the most inadequate and even degrading court facilities in the State are those currently occupied by the Housing Part in New York City. In the past, I have compared conditions in the Bronx Housing Part to a bazaar in Calcutta: [teeming] throngs of people, nervous, excited and jammed together in a tiny smoke-filled, filthy place. Some courtrooms in the Bronx Housing Part are so small that the court system had to provide them with miniature furniture simply to allow judges and litigants room to move.[102]

The City Wide Task Force on Housing Court (the "Housing Court Task Force") conducted an observational field study in 1983 of Housing Courts located in New York City, including Bronx County, and documented these conditions, as described below.[103] The

---

[100] New York City Hearing II, supra note 34, at 144 (testimony of Laura Blackburn).

[101] 1 New York City Hearing, supra note 1, at 67-68 (testimony of Hon. Yvonne Lewis).

[102] 1989 State of the Judiciary, supra note 3, at 36-37.

[103] Housing Court Report, supra note 87.

study findings continue to have validity, as attested to by the Commission's photographs, reports in the popular media, public hearing witnesses and questionnaire data.

The Bronx Housing Court is located in the basement of the building. Several witnesses at the Commission's public hearings attested to the overcrowding conditions at that court, in waiting rooms and in hallways that have become "de facto standing-room-only waiting areas."[104] The Housing Court Task Force reported that garbage was dragged through these hallways each morning.[105] At least one litigator verified that these unsanitary and dehumanizing conditions still exist: "I have witnessed many occasions when litigants have passed out because of the waiting in poor conditions."[106]

The novel "mini-courtroom"[107] measure in Bronx Housing Court, where the litigants are primarily black and Hispanic,[108] enjoys, at most, mixed success. Concededly, it is a band-aid solution -- designed to accommodate dockets which rose from 70,000 cases

---

[104] 1 New York City Hearing, supra note 1, at 59 (testimony of Hon. Yvonne Lewis). Judge Lewis stated, in addition:

> [I]n the Bronx, in order to get from the door to the courtroom, you may frequently have to touch 20 or 30 people who are all standing so close to each other that you cannot pass without physically touching them to get from the door into the courtroom.

Id. The principal court clerk in the Supreme Court of Bronx County, Civil Division, testified:

> [T]here's a particular entrance to that courthouse that I never use because that is the entrance for the Housing Court.
>
> All that was said [at the public hearings] about not being able to pass through that area without touching somebody is entirely true; and most of the people are standing, and whether they have children or whether they are elderly or whether they are [infirm], there [are] no special accommodations made for them.

Id. at 118 (testimony of James Morton).

[105] Housing Court Report, supra note 87, at 20.

[106] Litigators' Questionnaire, supra note 99.

[107] Glaberson, Mini-Courtrooms Aid Crowded Dockets, N.Y. Times, Apr. 2, 1990, at B1, col. 3 [hereinafter Mini-Courtrooms].

[108] 1 New York City Hearing, supra note 1, at 59 (testimony of Hon. Yvonne Lewis).

a year in the 1960s to 100,000 a year in the 1980s -- by slicing space in half in certain existing courtrooms allocated by the City of New York.[109] Nevertheless, this "miniaturiz[ation]" of justice[110] necessarily must undermine the perception of justice because it leads to the confused reaction, as reported by one judge: "Gee! This is a courtroom?"[111]

The Housing Court Task Force described Brooklyn, along with the Bronx, as having the worst physical conditions.[112] Unlike the other "ghetto courts" which are owned by the City of New York, the Office of Court Administration (OCA) leases the Brooklyn Housing Court and is responsible for maintenance of its facilities.[113] Observers described a courtroom there that "looked like a bus depot"; a line of some 50 persons waiting for elevators; "[a]pproximately 100 tenants waiting [in] line to answer dispossesses"; and the lack of signs posted to direct tenants.[114] One witness at the Commission's public hearings, the Director of the Housing Law Unit of South Brooklyn Legal Services, cited to the Housing Court Task Force Report as continuing to have validity in its observations.[115] He stated that there was no sign outside the building indicating that there is a courthouse inside because the facility is owned by a private landlord.[116] In addition, once the tenants, who

---

[109] Mini-Courtrooms, supra note 107, at B1, col. 3.

[110] Id. at B6, col. 4.

[111] Id. at B6, col. 6 (quoting Hon. Sheldon J. Halprin).

[112] Housing Court Report, supra note 87, at 20. At least one witness before this Commission, the Schedule and Training Coordinator for the Brooklyn Housing Task Force, confirmed that conditions in "[t]he Bronx [are] worse than [in] Brooklyn. . . . And Brooklyn is bad." New York City Hearing II, supra note 34, at 272 (testimony of Jack Catania).

[113] Lease between Office of Court Administration and 141 Livingston Co., § 13 (Oct. 1, 1984).

[114] Housing Court Report, supra note 87, at 22.

[115] New York City Hearing II, supra note 34, at 223 (testimony of Roger Maldonado).

[116] Id. at 224-25.

are almost exclusively minority, appear to answer a petition, the line to the clerk's office "frequently goes out . . . all the way down the hallway."[117]

Although the Housing Court Task Force did not publish its observations regarding Queens County, it did note that conditions in Queens and Manhattan were better than those in the Bronx and Brooklyn.[118] Manhattan was described as follows:

> The bathrooms are fairly clean. . . . [T]he Landlord/Tenant court lobby is often crowded. . . . The elderly and the handicapped must have a particularly difficult time moving about, but people are not blocked. . . . There is always traffic in and out of all the court rooms. . . . The fifth floor hall is used as a waiting room. There are no seats but the crowding seems manageable, except as the noise in the hall affects the noise in the court rooms when the doors [are] open.[119]

One judge testified at the Commission's public hearings that Housing Court in Manhattan has better facilities than those in Brooklyn "because some of the tenants who come before that [Manhattan] court are not the down-and-out. We are talking . . . about affluent and white tenants. The court is a better court for that reason."[120]

---

[117] Id. at 225.

[118] Housing Court Report, supra note 87, at 20.

[119] Id. at 23-24 (some ellipses in original).

[120] 1 New York City Hearing, supra note 1, at 64 (testimony of Hon. Yvonne Lewis). The following colloquy ensued:

> MR. CHAIRMAN: Are you suggesting, Judge, that the Office of Court Administration, or whomever has the responsibility for providing facilities, has consciously made a determination that where a significant number of the persons coming before the Housing Court will be white -- e.g., in Manhattan -- that the facilities will be better than those facilities in a place such as the Bronx where a minimum number of the persons coming before the courts with their complaints are white?
>
> JUDGE LEWIS: I cannot say that that is fact, but I can certainly say that that is the appearance . . . [and] the perception.

Id. at 64-65.
There are no supporting data in the Housing Court Report, supra note 87, for this contention.

Civil Court

In New York Civil Court, the condition of the facilities appears to depend on the type or nature of the part: it includes Housing Court, the conditions of which were described above. At least one white respondent to the Commission's survey of judges noted:

> [T]he disrepair, and, often, unhealthiness, of our court facilities is a monument to racial bias. It takes no in-depth examination to see the vast discrepancy between the facilities in Civil Court in which most minority litigants appear -- namely, Housing and Small Claims Court -- and the better facilities maintained for those litigants, usually white and/or of financial means, in the same courthouse.[121]

The problem of Civil Court facilities is compounded by the crushing dockets of the Criminal Courts. Originally, the New York City Civil Court located at 111 Centre Street exclusively housed courts of civil jurisdiction. In order to meet the criminal case load, however, space at 111 Centre Street is being utilized as criminal courtrooms, holding pens and other required facilities. "Civil Court is being pushed into whatever space is left."[122]

Criminal Court

> I was working arraignments the other day . . . [in] one of the largest courtrooms, and there was a rat there running around . . . .
>
> * * *
>
> [Poor conditions] affect[ ] the way people perform within the system. A judge sitting in the sewer I don't think has to be taken seriously by the people that

---

[121] New York State Judicial Commission on Minorities, Responses to Questionnaire for Judges in New York State on Issues Relating to Judicial Selection and Perceptions of Fairness and Sensitivity in the Courtroom [hereinafter Judges' Questionnaire].

[122] Telephone interview with Hon. Peter Tom, then Justice, New York City Civil Court (Apr. 24, 1990) (estimating that 60% of courtroom space at 111 Centre Street is presently allocated to Civil Court).

> come in. I think that the people who work there, the lawyers, begin to think less of what they're there for.[123]

In a similar vein, a witness at the Commission's public hearings described certain facilities at 100 Centre Street, which houses certain of the criminal courts, as the "'roach coach."'[124] And Chief Judge Wachtler has described the Manhattan Criminal Court as "the busiest and certainly the dirtiest in the United States."[125] Not only are such court facilities filthy, but as the Chief Judge pointed out, inadequate space impedes the ". . . [ability] to administer justice . . . to the defendants . . . . In some places, we don't even have room for defendants to consult with their lawyers."[126] Moreover, inadequate holding facilities for criminal defendants in courthouses exacerbate arrest-to-arraignment delay, which, at 100 Centre Street, averages 35 to 50 hours.[127]

Family Court

The Family Courts in this state, especially in New York City, have been long neglected--both in terms of adequate facilities and sufficient numbers of judges and other

---

[123] Survey: Meager Court Facilities Are No. 1 Problem, Manhattan Lawyer, Apr. 18-24, 1989, at 37 (LEXIS, Nexis library, Papers file) (quoting Theodore Hecht, Legal Aid Society staff attorney) [hereinafter Meager Court Facilities].

[124] 3 New York City Hearing, supra note 1, at 634 (June 30, 1988) (testimony of Professor Lawrence Vogelman). Accord Litigators' Questionnaire, supra note 99. ("The Courts and District Attorney's office should be clean, decent office[s] and courtrooms to work in. They should not be rat and roach infested.")

[125] Margolick, In Effort to Upgrade Courts, Koch Advertises for Judges, N.Y. Times, Nov. 4, 1985, at B3, col. 5.

[126] Pitt, Drug Arrests and the Courts' Pleas for Help, N.Y. Times, Apr. 9, 1989, § 4, at 6, col. 1 (quoting Hon. Sol Wachtler).

[127] Pinsley & Adler, More Holding Pens Sought for 100 Centre Basement, Manhattan Lawyer, May 1990, at 6 (LEXIS, Nexis library, Papers file) (adequate holding facilities at 100 Centre Street could decrease arrest-to-arraignment time to less than 24 hours); Meager Court Facilities, supra note 123 (citing Mary Baker). See also 5 New York City Hearing, supra note 1, at 1054-55 (June 30, 1988) (testimony of William Kunstler) (Bronx Housing Court is a "zoo" . . . . "[W]hen you walk into that courthouse on the ground level, every morning there are hundreds of the poor people. Mainly it seems to me Hispanics and blacks who are going into the housing court, trying to save their homes."); New York City Hearing II, supra note 34, at 24-25 (testimony of Hon. Priscilla Hall) (lack of detainment space in Brooklyn court house contributes to arrest-to-arraignment delay).

personnel to attend to the burgeoning caseload.[128] Although this report defines "ghetto courts" to include certain New York City courts, the situation in Family Court outside New York City is also poor, as Commission questionnaire data show. One white litigator outside New York City commented: "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."[129]

The Fund for Modern Courts conducted an observational study and surveyed judges and other courthouse personnel in "an urgent mission" to assess the adequacy of the physical conditions of the Family Courts located in the City of New York.[130] It aptly described Family Court as a "poor people's court" and warned that "[b]ecause its clientele are generally poor and minority, because its proceedings are generally closed to the public, and because it has been shortchanged in the past, many fear that the Family Court will be shortchanged again when facilities are being upgraded."[131] The Fund for Modern Courts' report concluded:

> New York City's Family Court, created 27 years ago to handle family matters and youthful offenders, is overwhelmed today by a new generation of children more abused and neglected than ever: In 1962, the Family Court handled 34,912 cases; in 1988, it handled 159,763 such cases, an increase of 450 percent. It is unable to function properly because of inadequate physical facilities.

---

[128] Litigators' Questionnaire, supra note 99.

[129] Id.

[130] Family Court Report, supra note 85, at 1.

[131] Id. at 2.

> The desperate needs of the Family Court were easy for Modern Courts' observers to see. In each of the five boroughs, they found the courthouses to be so overcrowded and run-down that they undermine the administration of justice. People are unable to move, to get court records, to conduct hearings properly. The facilities provided for a court and the functioning of the court are inextricably related.
>
> Modern Courts' observers found people waiting for their cases to be called packed in degrading and inhuman conditions, in overcrowded waiting rooms, where battered women are thrown together with the men who [allegedly] abused them and [alleged] juvenile delinquents with complaining witnesses. And they wondered how the dilapidated facilities must make a person who comes here, a[n alleged] young juvenile delinquent for example, think of justice in New York City. How would that young person have any respect for the "majesty of the law?"[132]

Data From the Studies of Judges and Litigators

As noted above, the Commission sampled both litigators and judges with respect to their assessment of court facilities. Litigators were asked to rate the physical conditions of all the courts in which they practice: "excellent," "good," "adequate" and "poor."[133] Thus, the sample size of litigators rating each court fluctuates. Judges, for their part, rated the physical conditions of the courts in which they serve.[134] Since judges typically serve in one court, whereas litigators appear in many, there are fewer responses per court type for judges than there are for litigators. Litigators' and mean ratings for all the courts are provided in Table II.1.1. A mean of "4" corresponds to a rating of "excellent," a mean of "3" corresponds to a rating of "good," a mean of "2" to a rating of "adequate" a mean of "1" indicates "poor."

---

[132] Id. at 54.

[133] New York State Judicial Commission on Minorities, Questionnaire for Litigators in New York State on Issues Relating to Professional Experiences and Perceptions of Fairness and Sensitivity in the Courtroom 18 (Mar. 16, 1989) (reproduced as Appendix A to the Report of Findings From A Survey of New York State Litigators in vol. 5 of this report) [hereinafter Blank Litigators' Questionnaire].

[134] New York State Judicial Commission on Minorities, Questionnaire for Judges in New York State on Issues Relating to Judicial Selection and Perceptions of Fairness and Sensitivity in the Courtroom 17 (undated) (reproduced as Appendix A to the Report of Findings From A Statewide Survey of the New York Judiciary in vol. 5 of this report) [hereinafter Blank Judges' Questionnaire].

Table II.1.1
Means and Standard Deviations
Litigators' Ratings of Satisfaction
with the Physical Conditions of the Courts
(range 1-4, 4= excellent)

	NEW YORK CITY			OUTSIDE NEW YORK CITY			TOTAL			
	N	Mean	Standard Deviation	N	Mean	Standard Deviation	N	Mean	Standard Deviation	Sig. level (where applicable)
Court of Appeals	108	3.70	.64	74	3.75	.48	182	3.72	.58	NS *
Appellate Division	271	3.39	.67	176	3.41	.70	448	3.40	.68	NS
Supreme Court	452	2.02	.81	230	2.69	.82	682	2.24	.87	P=.000
Court of Claims	62	2.88	.81	42	3.23	.78	104	3.02	.81	P=.032
Surrogate Courts	209	2.72	.84	153	2.80	.81	363	2.75	.82	NS
County Courts	NA **	NA	NA	184	2.55	.87	NA	NA	NA	NA
Family Courts	257	1.41	.66	186	1.86	.90	442	1.60	.80	P=.000
NYC Criminal Courts	294	1.34	.57	NA	NA	NA	NA	NA	NA	NA
NYC Civil Courts	300	1.53	.61	NA	NA	NA	NA	NA	NA	NA
NYC Housing Courts	250	1.14	.39	NA	NA	NA	NA	NA	NA	NA
District Courts	NA	NA	NA	48	2.39	.88	NA	NA	NA	NA
City Courts	NA	NA	NA	168	2.24	.93	NA	NA	NA	NA

* NS = NOT SIGNIFICANT ** NA = NOT APPLICABLE

There were no statistically significant differences between minority and white litigators in their ratings of court facilities. The most obvious differences are those among types of courts. The mean scores for the Court of Appeals, the Appellate Division, the Court of Claims, and the Surrogate Courts represent ratings of "good" or "excellent"; the mean scores for other courts are lower. There is also a significant difference between litigators practicing in New York City and those outside of New York City in their respective ratings of the comparable courts. Thus, Family Courts outside New York City are rated on average as "adequate" whereas in New York City these courts are on average rated as "poor." The

physical conditions of New York City Criminal, Civil and Housing Courts are similarly rated on average as "poor." There is also a significant difference between litigators practicing in New York City and those outside New York City in their respective ratings of the conditions of Supreme Courts in which they appear. In general, outside New York City, Supreme Courts are rated as "good," whereas in New York City, they are rated as "adequate."

For judges, the substantial differences in ratings are found among courts rather than between race categories or regions. The only statistically significant regional difference is that judges in New York City rated the conditions of the Supreme Court as "fair" and those sitting in Supreme Court outside New York City rated their courts as "good". The larger differences in this table include average ratings of "excellent" for the Court of Appeals and the Court of Claims in contrast to average ratings of "poor" for New York City Civil, Criminal and Housing Courts. In general, judges rated the conditions of any particular court higher than did litigators.

Ratings by judges were also compared for four groups of courts. These data are provided in Table II.1.2.

Table II.1.2
Judges' Ratings of the Physical Conditions of the Courts by the Type of Court Over Which Judges Preside
(Numbers in parentheses are percentages)

	Group A	Group B	Group C	Group D
Poor	6 (9.1)	52 (29.2)	58 (63.7)	41 (24.0)
Fair	8 (12.1)	43 (24.2)	16 (17.6)	46 (26.9)
Good	18 (27.3)	51 (28.7)	15 (16.5)	48 (28.1)
Excellent	34 (51.5)	32 (18.0)	2 (2.2)	36 (21.1)
MEAN	3.21	2.35	1.57	2.46

Group A is comprised of judges of the Court of Appeals, Appellate Term, Appellate Division, Court of Claims and Surrogate Court. The Group A mean rating is 3.21, that is, between "good" and "excellent." Group B, which includes only Supreme Court judges, has a mean rating of 2.35, between "fair" and "good." The lower courts were divided into those in New York City and those outside New York City. Group C is comprised of New York City Housing Court, Criminal Court, Civil Court and Family Court judges; Group D includes County Court, City Court and Family Court judges outside New York City.

The physical conditions of lower courts in New York City are rated between "poor" and "fair" (1.57); the lower courts outside New York City have a group mean rating between "fair" and "good" (2.46 -- one point higher than the New York City lower courts). Indeed, the physical conditions of the lower courts in New York City (Group C) have a significantly lower rating than those in the three other groups. Additionally, courts in Group A have a significantly higher rating than do those in Groups B and D.

Table II.1.3
Judges' Ratings of the Physical Conditions of the Courts by the Geographical Location of the Courts
(Numbers in parentheses are percentages)

	Group 1	Group 2	Group 3
Poor	98 (54.7)	36 (22.9)	19 (15.0)
Fair	42 (23.5)	30 (19.1)	33 (26.0)
Good	31 (17.3)	57 (36.3)	36 (28.3)
Excellent	8 (4.5)	34 (21.7)	39 (30.7)
MEAN	1.72	2.57	2.75

Table II.1.3 compares the physical conditions of courtrooms which are located in counties with a large, medium or small minority population without regard for court type. Judges were grouped into three categories based on 1980 census data for the counties in which they sit. Group 1 judges are those who sit in courts in Kings, Bronx, New York and Queens counties, where the minority population as of 1980 represented 52%, 67%, 49% and 38%, respectively, of the total populations. Group 2 judges are those who sit in courts in Albany, Dutchess, Erie, Monroe, Nassau, Orange, Richmond, Rockland, Suffolk, Sullivan and Westchester counties; the minority populations in these counties range from 9 - 17%. Group 3 judges are those who sit in courts in the remaining counties of the state where the minority population is less than 9%. The mean rating for Group 1 courts is between "poor" and "fair" (1.72). This rating is significantly lower than those for either groups 2 or 3 (which are between "fair" and "good" (2.57 and 2.75, respectively). If the race distribution in the county at large is a fair indicator of the demographics of the court-user population, then the judges in this study are, in effect, indicating that minority litigants generally confront the most

poorly maintained of the state courts. Litigator data could not be organized according to court type or geographical region in the same manner as judges' data because litigators appear in many different courts.

In addition to their ratings of the physical conditions of the courts in which they practice or serve, litigators and judges were asked, "Are there public services . . . that should be provided in the courts . . . but are not provided?"[135] Data relevant to physical facilities and maintenance are provided in Table II.1.4 below.

Table II.1.4
Number and Percent of Litigators and Judges
Making Suggestions Regarding Physical Facilities
(Numbers in parentheses are percentages)

	LITIGATORS IN NEW YORK CITY				LITIGATORS NOT IN N.Y.C.		TOTAL LITIGATORS	JUDGES		TOTAL JUDGES
	White	Black	Hisp.	Asian	White	Minor.		White	Minor.	
Better rooms/ facilities	25 (29.8)	16 (22.9)	6 (8.6)	6 (16.7)	28 (37.3)	14 (25.0)	95 (24.3)	155 (61.8)	27 (61.4)	182 (61.7)
Maintenance/ Physical Conditions	23 (27.4)	15 (21.4)	9 (12.9)	4 (11.1)	12 (16.0)	1 (1.8)	64 (16.4)	149 (59.4)	18 (40.9)	167 (56.6)
Amenities	17 (20.2)	7 (10)	8 (11.4)	7 (19.4)	6 (8.0)	4 (7.1)	49 (12.5)	50 (19.9)	8 (18.2)	58 (19.7)
BASE: Those who specified a need for any improvement.	84	70	70	36	75	56	391	251	44	295

Overall, approximately, half of all litigators and judges (53% and 46%, respectively) mentioned a need for improvement in physical facilities. Nearly one quarter (24%) of litigators, but more than 60% of judges, mentioned the need for improved rooms and facilities. The need for improved maintenance was mentioned by 16% of all litigators, but particularly by Whites and Blacks in New York City. In contrast, over one-half of the judges

[135] Blank Litigators' Questionnaire, supra note 133, at 18; Blank Judges' Questionnaire, supra note 134, at 17.

who responded to this question mentioned improved maintenance. One in five white litigators in New York City, white judges, and minority judges also mentioned the need for more amenities, such as public telephones and drinking fountains.

The higher incidence of judges providing suggestions for improving the physical facilities of the court may be attributable to the greater amount of time that judges spend in court buildings. Among litigators, only prosecutors and public defenders are likely to spend as much time in court as do judges.

The Agreed-Upon Master Plan

As noted, 1987 legislation required the City of New York to establish the Master Plan and empowered the Chief Administrator of the Unified Court System to set forth priorities as to the courts' needs.[136] Certain priorities established in the agreed-upon 15-volume plan may fairly be summarized by the following excerpt from the 1989 State of the Judiciary Report:

> The City of New York has submitted a capital plan that would provide 16 newly constructed courthouses and 10 major renovation projects of existing courthouses. The City's plan, which would cost in excess of $1.6 billion, would provide, among other things: a new Supreme Court, Criminal Term building in Manhattan; new Family Court, Civil Court, and Supreme Court, Criminal Term buildings in Brooklyn; new Housing Court and Supreme Court, Criminal Term buildings in the Bronx, as well as a major renovation of the existing Merola Building; new Civil Court and Supreme Court, Criminal Term buildings in Queens, as well as renovation and expansion of the existing Family Court building on Parsons Boulevard; and a new Justice Center in Staten Island.[137]

---

[136] Ch. 825 of the Laws of 1987.

[137] 1989 State of the Judiciary, supra note 3, at 58. For a summary of the costs allocated these respective facilities for either new construction or renovation prior to the 80 Centre Street disavowal by the City of New York, see Adams, 15-Year City Courts Plan Filed - $1.2 Billion Project Subject to OCA Review, N.Y.L.J., Aug. 9, 1989, at 1, col. 3.

The Commission urges all municipalities, but especially the City of New York, to recognize the urgency of adhering to the timetables established in the 15-year program and to use funding mechanisms provided by the Court Facilities Act. The Commission recognizes that the present New York City mayoral administration inherited both the Master Plan and its attendant requirements. Nevertheless, the exigency of the situation is made vivid by the following example. The new Brooklyn Family Court structure -- the existing structure having been identified by the Fund for Modern Courts as the worst Family Court facility in the City -- will not be completed for at least seven years, assuming that the design, approval and construction processes continue apace.[138] As the Chief Administrator has cautioned, "Over the next several years, everyone of us in the Judiciary and in the Bar will be called on again and again to ensure that progress toward better facilities continues, and that paper commitments are translated into action."[139]

III. COURTROOM TREATMENT

The mandate to this Commission called for a study of "racially biased courtroom atmospheres." As described in the previous section, the facilities of the New York City "ghetto courts" themselves contribute significantly to the perception that equal justice has not been afforded to those minorities who find themselves in the Housing Courts, Family Courts, Civil Courts and Criminal Courts. The issue of racial bias in courtrooms is by no means confined to the "ghetto courts" of the City, however,[140] as demonstrated in this section.

---

[138] Kanige, New Buildings, More Cash Sought for Family Court, Manhattan Lawyer, Dec. 12-18, 1989, at 21 (LEXIS, Nexis library, Papers file).

[139] Justice Upgraded, supra note 91, at 53, col. 6.

[140] As detailed below, data from the judges' and litigators' studies reveal, in many instances, significant differences in perceived racial bias between judge and litigator respondents with regular experience in the "ghetto courts" as contrasted with respondents who do not.

The term "courtroom atmospheres" has many components. Apart from the physical surroundings, it is comprised of the difficulties confronting litigants who must negotiate the court system due to lack of readily available information, the racial composition of the judicial and nonjudicial officers of the court, and the treatment accorded minority litigants, witnesses, and attorneys therein. In essence, these components are those of process -- the perception that minorities will receive fair play in the courts. At least one recent study suggests that respectful courtroom treatment is critical to minority users of the courts in shaping perceptions of racial bias.[141] The Commission believes that both court process or treatment on the one hand, and case outcome on the other, share equal importance.

Lack of Information To Negotiate the Court System

One witness before the Commission put it simply: "the courts really should look at being user-friendly."[142] Section IV of this chapter describes in detail the fears that many minorities have with respect to any involvement with the courts. To the extent that they must use the judicial system, those fears may be compounded by the lack of readily accessible information relating to negotiation of the system. Thus, there is no information available as to where the litigant should go to appear in a hearing or proceeding. Similarly, there is no information available concerning courtroom procedures.

---

[141] L. Tyler & T. Tyler, The Social Psychology of Procedural Justice 229-30 (1988) ("It appears that observing norms of politeness, showing respect for individuals, and generally following accepted social forms are part of what people mean by procedural justice.") (citations omitted). The Commission notes that numerous researchers and commentators have attempted to measure or define the respective importance of process and case outcome insofar as they influence the belief by litigants that the judicial system is fair. E.g., T. Tyler, Why People Obey the Law (1990); Chevigny, Book Review, 64 N.Y.U.L. Rev. 1211, 1214 (1989) ("[i]n making the distinction between 'outcome' and 'process,' Lind and Tyler largely ignore the choice of values and shaping of facts in the course of the process, which in turn affects the outcome . . . ."); National Center Report, supra note 7, at 17-18; Thibaut & Walker, A Theory of Procedure, 66 Cal. L. Rev. 541 (1978); J. Thibaut & L. Walker, Procedural Justice: A Psychological Analysis (1975).

[142] 5 New York City Hearing, supra note 1, at 978 (June 30, 1988) (testimony of Rockwell Chin).

The importance of adequate information about the courts was described by one attorney who testified before this Commission regarding the long lines of pro se tenants waiting to reach the clerk's office in Brooklyn Housing Court and the absence of signs directing litigants where to proceed.[143] Where signs do exist, especially in the "ghetto courts," they are often hand-lettered,[144] suggesting the lack of any organized, concerted effort by these courts to provide meaningful logistical information. In some instances, the signs provide only negative information regarding what not to do, rather than providing helpful information on where to appear and what to do.[145]

Race of Courtroom Work Force and Attorneys

The minority litigant who enters the courtroom may also perceive the environment to be hostile because of the virtual absence of other minorities among judicial and nonjudicial personnel. As then-Manhattan Borough President David N. Dinkins testified before this Commission:

> [A]ccording to the 1980 [c]ensus, black[s] comprise 21.7% and Latinos 23.5% of New York City's population. . . . The New York City Commission on the [Y]ear 2000 anticipates that blacks, Latinos and Asians will be a clear and substantial majority of the city's population by the turn of the century.
>
> However, if you walk through the courthouse[s] of our five counties and observe the judges, court officers, stenographers, law assistants, district attorneys and their staffs, as well as private counsel practic[ing] before the bar, you will not see a true reflection of the reality of today's New York City.[146]

---

[143] New York City Hearing II, supra note 34, at 223-25 (testimony of Roger Maldonado).

[144] See Photographs appended to the Executive Summary.

[145] Id.

[146] 3 New York City Hearing, supra note 1, at 702 (June 30, 1988) (testimony of Hon. David N. Dinkins).

Volume IV provides data on the race and ethnic composition of the judicial and nonjudicial work force respectively, data which elaborate on the validity of this perception. Numerous hearing participants in New York City,[147] Albany[148] and Buffalo testified that the fact that "the reality of today's New York" was not mirrored in the courtrooms contributes to the perception of bias among minorities.[149] As one witness put it, the black or Hispanic defendant

> appears in a court filled with white people in charge of everything: court clerks, stenographers, lawyers, district attorney[s], judges and jurors. Everyone who is running the system is white and everyone to whom something is happening is black or Hispanic; and if his case goes to trial, an all-white jury and judge will determine his [fate].
>
> * * *
>
> Our court system, run primarily by whites who pass judgment upon a disproportionate number of black and Hispanic defendants, promotes the appearance of injustice and unfairness.[150]

The sentiment was echoed by a Buffalo witness:

---

[147] 5 Id. at 939 (testimony of Andrew Horowitz) ("There's sort of a club mentality to the way the criminal justice system operates. And I find that I'm often in a situation where I'm called to a bench conference where the judge is white, the district attorney is white, and I . . . am white. And more often than not all the characters are white males, which adds another element to the . . . old boy . . . situation . . . . Except the defendant . . . who is black or Hispanic."); New York City Hearing II, supra note 34, at 138 (testimony of Dr. Arthur Davidson) ("[O]ft times you go into the courtroom and everybody is white except the defendant."); id. at 156 (testimony of Philip Kane). ("The racial composition of the courts pervades the idea that a minority person could not receive a fair trial. The judge, the prosecution, and defense attorneys, court officers, and court clerks are predominately white.")

[148] Albany Hearing, supra note 32, at 14 (testimony of Edward Williams) (virtually all-white courtroom contributed to perception of bias); id. at 203 (testimony of Lorraine Freeman) ("Can you imagine how a black single parent feels the first time she goes into that intimidating place [Family Court] and sees white clerks, white guards, white psychologist, white correctional officers, white lawyers, and white court judges? . . . [S]he immediately senses that they have all the power, and we have none."); id. at 254 (testimony of Donald McKever) ("I remember looking around when I was in court [as a minority litigant] with . . . my wife and my four kids, the only minorities. . . . I really didn't expect that much justice coming out of the trial . . . . ").

[149] "[W]e need more black, Hispanic and Asian judges in all the courts because of the perception given the public in seeing a mostly white judiciary." 4 New York City Hearing, supra note 1, at 877 (June 30, 1988) (testimony of Hon. William Booth) (noting that he had been convinced by OCA in 1976 to accept an appointment to state Supreme Court because more black judges were needed there). If there were more minority judges in the Bronx, "[t]here would be a feeling that the litigants -- whether rightly or wrongly -- are getting a fairer shake . . . ." 1 Id. at 138-39 (June 29, 1988) (testimony of Hon. Burton Roberts).

[150] Albany Hearing, supra note 32, at 56-57 (testimony of Alice Green).

> [In Buffalo City court,] 95 percent of the clerks, court officials, city marshals, law assistants, and attorneys are members of the majority community. Out of 13 court reporters assigned to City Court, only one is an African-American, and there are no Hispanics.
>
> * * *
>
> [B]ecome, if you will, the parents of a 16 or 17-year-old, or the youngsters themselves, and walk into City Court[;] you cannot help but notice that most of those in the courtroom who are of color are seated where you've been told to [sit]. More often than not, the arresting officer, the bailiff, the prosecuting attorney, the defense attorney, the court clerks and judges will all be non-minority.
>
> It is clear that white folks are in charge, and this justice means, "just us." We become conditioned, and quite often predisposed, to what we expect to happen to us. The question becomes whose justice will we receive. The notion of being innocent until proven guilty in our town becomes a fleeting and almost an alien thought.[151]

An Asian-American witness testified further that the "color" of the courtroom affects perceptions of bias among Asian Americans because "people say[] that you have no way to win because the judge there would not understand . . . ."[152]

Finally, as the statement by then-Manhattan Borough President Dinkins implies, this perception may well be especially exacerbated in New York City, where, at least one authority has anticipated, "[b]y 2000, non-whites and Hispanics will account for about 60 percent of the city's population."[153]

---

[151] Buffalo Hearing, supra note 35, at 125, 127-28 (testimony of Donald Lee on behalf of George K. Arthur).

[152] 5 New York City Hearing, supra note 1, at 1030 (June 30, 1988) (testimony of Wing Lam).

[153] Commission on the Year 2000, New York Ascendant 19 (June 1987).

Assembly Line Justice

The time spent actually obtaining a disposition in the "ghetto courts" is exceedingly brief. This phenomenon, noted by observers of the Criminal Courts,[154] Family Courts[155] and the Housing Courts,[156] has been aptly described as "assembly line justice." One criminal defense attorney stated, "Judges are concerned more with dispositions and getting their calendars completed."[157] The accelerated processing of matters in these courts in which minorities predominate as litigants,[158] due to the heavy volume of cases,[159] fuels the perception that the judicial system places a priority on the administration of cases rather than on the dispensation of justice. Whether or not budgetary constraints preclude the allocation of sufficient judicial resources to these courts, judges and nonjudicial personnel should recognize that any necessity for quick disposition of cases should not justify discourteous treatment of minority litigants, which, as described below,

---

[154] Glaberson, Din of Assembly-Line Justice in New York, N.Y. Times, Jan. 16, 1990, at B1, col. 2 [hereinafter Assembly-Line Justice]. The Times reporter observed that it took four minutes to process a plea bargain in Brooklyn Criminal Court id., at B5, cols. 2-3. See also Gearty, Justice in a Jiffy at Part N, N.Y. Daily News, Dec. 12, 1988, at 25, col. 2 (reporter observed plea bargain in the narcotics part of the Bronx Criminal Court consummated in five minutes).

[155] Kanige, The Grim Business of Family Court - Child Abuse Filings in City Up 699% in 10 Years, Manhattan Lawyer, Dec. 12-18, 1989, at 1.

[156] Housing Court Report, supra note 87, at 50-51. As one attorney testified before the Commission, most Brooklyn Housing Court judges do not read case files before they sign stipulations to ascertain whether the tenant has any defenses, in part because "they are swamped and they are trying to deal, from their point of view, with as many cases as possible, as quickly as possible." New York City Hearing II, supra note 34, at 236-38 (testimony of Roger Maldonado).

[157] 2 New York City Hearing, supra note 1, at 427 (testimony of Kimberly Detherage). See generally id. at 316-17 (testimony of Michael Letwin) (presumption that the purpose of the entire criminal justice system is "to quickly process" indigent black and Hispanic defendants).

[158] See supra ch. 1, § I.

[159] Assembly-Line Justice, supra note 154, at B1, col. 2. For example, in the first 11 months of 1989, the Brooklyn District Attorney presented the 41 judges of the court with 13,460 felony cases. In 1986, 40 judges handled 7,863 felonies. id. at B5, col. 1. See also Deferred Maintenance, and Murder, N.Y. Times, Sept. 6, 1990, at A26, col. 1-2 (recommending 90 more judges in New York City to meet burgeoning case load lest "justice suffer"); Judges' Questionnaire, supra note 121. In New York City Family Courts, the number of neglect and abuse cases increased 699% over the last decade. 1989 State of the Judiciary, supra note 3, at 6. Moreover, dispositions of summary landlord and tenant proceedings in Housing Court doubled over the last decade. Id. at 35.

happens with marked frequency. As one judge put it, "The Office of Court Administration . . . can promote equal treatment to all who [enter] the portals of criminal court. Judges must be reminded that the defendants who appear before them are human beings[,] not statistics. A premium must be placed on the dispensation of justice, not the disposition of cases. Judges should be given the opportunity to become aware of our biases and prejudices and to confront and correct these attitudes."[160]

Judges' and Litigators' Assessments of the In-Court Treatment of Minorities

The Commission surveyed white and minority judges and litigators about their respective experiences regarding the treatment of minorities in the courts. Some minority litigants and other witnesses testified as to their experiences in the courts as well. With respect to the survey data, in many instances there were striking differences in responses between judges and litigators who respectively sat in or appeared in the "ghetto courts" and those who did not. The sample sizes did not permit analysis of treatment among types of "ghetto court."

The Commission sought to ascertain whether minorities have been the victims of overt, as well as more subtle, forms of racial bias. Many of the hypotheses that were tested were fairly stated by one commentator in the context of juror fact-finding:

> [J]urors know from experiences inside and outside the courthouse that racial stereotypes and assumptions of white superiority permeate society to create cognitive drifts in the direction of findings of black culpability and white victimization, black incompetence and white competence, black immorality and white virtue, black indolence and white industriousness, black lasciviousness and white chastity, blacks careless and in need of control and whites in control and controlling, blacks as social problems and whites as valued citizens. These cognitive drifts render fragile a wide variety of factual claims: the defense of

[160] New York City Hearing II, supra note 34, at 14-15 (testimony of Hon. Priscilla L. Hall).

> a black parent charged with child neglect; the claim that the potential and quality of a black life has been impaired by a white person's negligence; the defense of a black accused of malpractice; the credibility of a black witness; the worth of the opinion of a black expert; the merits of a black tenant's request for a stay of eviction; a black woman's claim of rape.[161]

In the Commission's questionnaires, litigators and judges were asked to rate the frequency with which certain behaviors occur.[162] The data presented in Table II.1.5 and Table II.1.5a are by race.

---

[161] Davis, supra note 62, at 1571.

[162] Blank Litigators' Questionnaire, supra note 133, at 4-10; Blank Judges' Questionnaire, supra note 134, at 13-15. Frequency ratings were: "never" 0%, "rarely" 1-5%, "sometimes" 6-25%, "often" 26-50%, and "very often" 51-100%.

Table II.1.5
Litigators' Report as to Treatment of Litigants
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NEW YORK CITY						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
Racial stereotypes affect evaluation of litigants' claims.	24 (20.9)	47 (41.2)	44 (38.0)	72 (63.2)	34 (29.8)	8 (7.0)	51 (46.4)	39 (35.5)	20 (18.2)	16 (27.6)	23 (39.7)	19 (32.8)	10 (9.6)	54 (49.8)	44 (40.6)	45 (54.9)	24 (29.3)	13 (15.9)	218 (37.2)	221 (37.7)	148 (25.2)
Judges, attorneys or courtroom personnel publicly repeat ethnic jokes, epithets or demeaning remarks.	10 (7.7)	30 (22.6)	92 (69.7)	30 (25.2)	20 (16.8)	69 (58.0)	23 (19.2)	31 (25.8)	66 (55.0)	4 (5.9)	17 (25.0)	47 (69.1)	10 (7.0)	27 (19.5)	102 (73.4)	18 (18.8)	30 (31.3)	48 (50.0)	95 (14.1)	155 (23.0)	424 (62.9)
Comments by judges re: personal appearance of minority litigants, witnesses, and attorneys.	5 (3.6)	14 (11.4)	106 (85.0)	24 (20.5)	26 (22.2)	67 (57.3)	13 (11.1)	31 (26.5)	73 (62.4)	7 (11.1)	12 (19.0)	44 (69.8)	2 (1.5)	6 (5.0)	120 (93.5)	12 (13.0)	15 (16.3)	65 (70.7)	62 (9.7)	105 (16.3)	475 (74.0)
Minority attorneys, litigants, witnesses addressed by first name.	8 (6.3)	20 (16.1)	97 (77.6)	47 (36.2)	37 (28.5)	46 (35.4)	26 (21.5)	33 (27.3)	62 (51.2)	6 (8.8)	14 (20.6)	48 (70.6)	0 (.3)	8 (6.8)	110 (92.9)	20 (22.0)	20 (22.0)	51 (56.0)	107 (16.4)	132 (20.2)	414 (63.3)
Court personnel discourteous to minority litigants.	24 (17.5)	44 (32.1)	69 (50.4)	51 (39.2)	53 (40.8)	26 (20.0)	48 (38.4)	49 (39.2)	28 (22.4)	17 (24.6)	25 (36.2)	27 (39.1)	3 (2.2)	27 (19.0)	114 (78.9)	22 (22.4)	39 (39.8)	37 (37.8)	165 (23.5)	237 (33.7)	301 (42.8)
Court personnel discourteous to white litigants.	8 (5.7)	55 (40.2)	74 (54.1)	7 (5.5)	43 (33.6)	78 (60.9)	8 (6.3)	45 (35.7)	73 (57.9)	3 (4.3)	29 (41.4)	38 (54.3)	0 (0)	34 (23.1)	113 (76.9)	3 (3.1)	22 (22.9)	71 (74.0)	29 (4.1)	228 (32.4)	447 (63.5)
Minority defendants complain of maltreatment in holding areas.	18 (28.3)	22 (33.6)	25 (38.1)	44 (65.7)	16 (23.9)	7 (10.4)	33 (45.8)	20 (27.8)	19 (26.4)	8 (36.4)	8 (36.4)	6 (27.3)	7 (8.5)	28 (33.5)	48 (58.0)	28 (46.7)	19 (31.7)	13 (21.7)	138 (37.5)	113 (30.5)	118 (31.9)
White defendants complain of maltreatment in holding areas.	4 (6.2)	27 (41.9)	33 (51.8)	5 (8.2)	22 (36.1)	34 (55.7)	7 (10.1)	21 (30.4)	41 (59.4)	3 (14.3)	9 (42.9)	9 (42.9)	5 (5.4)	26 (31.4)	53 (63.1)	3 (5.2)	23 (39.7)	32 (55.2)	27 (7.4)	128 (35.9)	202 (56.6)

Table II.1.5a
Judges' Reports as to Treatment of Litigants
(Numbers in parentheses are percentages)

	WHITE JUDGES			MINORITY JUDGES			TOTAL JUDGES		
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
Court personnel are disrespectful and discourteous to minority litigants.	6 (1.2)	51 (10.3)	436 (88.4)	6 (9.2)	21 (32.3)	38 (58.5)	12 (2.2)	72 (12.9)	474 (84.9)
Court personnel are disrespectful and discourteous to white litigants.	3 (.6)	51 (10.2)	448 (89.2)	1 (1.5)	15 (23.1)	49 (75.4)	4 (.7)	66 (11.6)	497 (87.7)
Attorneys or courtroom personnel publicly repeat ethnic jokes, epithets or demeaning remarks about minorities.	16 (3.1)	86 (16.8)	409 (80.0)	9 (13.6)	17 (25.8)	40 (60.6)	25 (4.3)	103 (17.9)	449 (77.8)
Attorneys are more respectful of white than of minority witnesses in cross-examination.	8 (1.6)	55 (11.2)	426 (87.1)	17 (25.4)	19 (28.4)	31 (46.3)	25 (4.5)	74 (13.3)	457 (82.2)
Racial stereotypes affect evaluation of litigants' claims.	12 (3.1)	75 (19.5)	298 (77.4)	16 (30.8)	22 (42.3)	14 (26.9)	28 (6.4)	97 (22.2)	312 (71.4)

New York City litigators and judges were categorized by type of court in which they respectively appeared or sat, those who worked in "ghetto courts," those who did not.[163] All items were analyzed to determine differences between those with and without "ghetto court" experience. There are many significant differences between those with "ghetto court" and those without "ghetto court" experience; significant differences are discussed below in the context of each item. In addition, all items were analyzed to determine possible

[163] Significantly more minority than white attorneys were practicing in "ghetto courts": 75% of white, but 87% of black, 84% of Hispanic, and 85% of Asian-American litigators. There were no significant differences between white and minority judges in the proportions sitting in "ghetto courts"; 51% of white and 45% of the minority judges sat in these courts.

differences between those involved in civil practice versus those engaged in criminal court practice. There were no statistically significant differences between those involved in civil practice versus those engaged in criminal court practice.[164]

Racial Stereotypes and Litigants' Claims

Turning to the first item in Table II.1.5, overall, more than one-third (37%) of the litigators surveyed reported that "racial stereotypes affect minority litigants' claims" "often/very often." Although this question did not specify the source of the prejudicial behavior, there are significant differences among groups as to the frequency of such racial stereotyping. Thus, 63% of black, 46% of Hispanic, 28% of Asian-American and 21% of white litigators in New York City, and 55% of minority and 10% of white litigators outside New York City reported that racial stereotypes affect minority litigant claims "often/very often." Although white litigators reported such effects less frequently than did minority litigators, an additional 41% of white litigators in New York City, and 50% of white litigators outside New York City, reported that such effects occur "sometimes."

Differences between litigators practicing in "ghetto" and "non-ghetto courts" are significant. Forty-four percent of "ghetto court" litigators, as compared to 33% of "non-ghetto court" litigators, reported that "racial stereotypes affect the evaluation of litigants' claims" "often/very often." Conversely, 31% of "non-ghetto court" litigators, as

---

[164] For the purposes of this analysis, litigators and judges appearing/sitting in both civil and criminal courts were excluded. It was possible to classify 517 of 740 litigators in the study as having either a civil or criminal court practice. The distribution of litigators in civil versus criminal practice was fairly even across race--with the exception that significantly more Asian Americans were engaged in civil rather than criminal practice. Thus, 62% of white, 75% of black, 58% of Hispanic but 87% of Asian-American litigators in New York City were engaged in civil practice; 63% of white and 65% of minority litigators outside New York City were so engaged. Among judges, it was possible to classify 326 out of 645 as sitting in either civil or criminal court. The remainder were sitting in courts such as county court, in which either type of case could be heard. Fifty five percent of white and 48% of minority judges were sitting in civil courts; these differences are not significant.

compared to 21% of "ghetto court" litigators reported that such behavior "rarely" or "never" occurs.

The response of white judges to this item was very different from that of white litigators. Only 3% of white judges reported "often" (no white judges responded "very often"); 20% reported that such behavior occurs "sometimes." Among minority judges, 31% reported that the behavior occurs "often/very often" -- substantially fewer than the 63% of black or 46% of Hispanic litigators who gave this response. There are no differences between New York City "ghetto" and "non-ghetto court" judges.

Substantial numbers of litigators commented on racial stereotyping and the way it affects the treatment of litigants. Examples of such comments are provided below.

Criminal Courts. A white litigator outside New York City wrote:

> Certainly there is a greater reluctance to hold white defendants in jail or to sentence them to substantial incarceration, than there is to incarcerate black defendants; coupled with this is a greater willingness to regard white defendants as "kids" who got into trouble as opposed to budding career criminals. Also, jail is perceived as a natural part of ghetto culture, and there may be a feeling that incarcerating a ghetto black is less of an imposition on him or her than incarcerating a white from an intact nuclear family, where actually the opposite may be true, particularly where children are dependent on the incarcerated person.[165]

In a similar vein, a white New York City litigator stated:

> In general, the system makes the assumption at all levels that blacks and Hispanics are more likely to flee, more likely to be guilty and less likely to be rehabilitated than their white counterparts.[166]

Asian Americans, too, may be the victims of racial stereotyping, as one witness testified:

---

[165] Litigators' Questionnaire, supra note 99.

[166] Id.

> [T]here is . . . a real insensitivity to all minorities . . . be it Asian or other, because when you have an Asian defendant . . . [judges] assume that they're part of a gang; and that kind of guilty-until-proven-innocent applies to Asian defendants who are charged with robbery or whatever because the media or everyone else assumes that they're part of a gang.[167]

Family Courts. A white litigator practicing outside New York City observed:

> In child abuse/neglect Family Court cases, white children are protected more i.e., [t]here is a higher tolerance of violence toward minority children before judicial intervention occurs.[168]

Similarly, a black litigator in New York City noted how cultural stereotypes work against the minority victim:

> [In a] wife abuse case where the defendant stabbed his wife in the stomach, the judge sentenced the defendant to the minimum amount of jail time and said, "these type of people do this all the time, it's no big deal."[169]

Housing Courts. An Hispanic litigator in New York City commented:

> Just go and sit in any of the housing courts. Whites also are subjected to this treatment, but often the color of their skin entitles or gives them the benefit [of the doubt and the case is] resolved in their favor.[170]

Yet another New York City Hispanic litigator recounted:

> Where a judge was about to grant a warrant of eviction, she rationalized her decision by saying, "This family isn't going to be homeless, since they're now living with neighbors; anyway these people are used to doubling up in apartments." [The] Family happened to be black.[171]

---

[167] 5 New York City Hearing, supra note 1, at 926 (June 30, 1988) (testimony of John Yong).

[168] Litigators' Questionnaire, supra note 99.

[169] Id.

[170] Id.

[171] Id.

"Non-Ghetto Courts." A white litigator outside New York City wrote:

> My client was Japanese. I was arguing a motion before a Supreme Court [j]udge and had submitted an affidavit of my client outlining the facts. The opposing attorney alleged that my client was lying and suggested that the Japanese cannot be trusted -- and the Judge agreed![172]

Racial Jokes, Epithets or Demeaning Remarks

As can be seen from Table II.1.5, 14% of all litigators stated that "judges, attorneys, or courtroom personnel publicly repeat ethnic jokes involving minorities, use racial epithets, or make demeaning remarks about a minority group" "often/very often"; 23% stated that such behavior occurs "sometimes." Among the six study groups, 8% of white, 25% of black, 19% of Hispanic and 6% of Asian-American litigators in New York City, and 7% of white and 19% of minority litigators outside New York City, reported that such behavior occurs "often/very often." Minority litigators outside New York City reported significantly greater frequency of such behavior than did white litigators outside New York City, but substantial proportions of white litigators (20%) reported that such behavior occurs "sometimes." There are no significant differences among any of the groups in New York City, suggesting that all litigators there, regardless of race, have had similar experiences regarding the frequency with which such behavior occurs.

There are significant differences between litigators practicing in "ghetto courts" and those practicing in "non-ghetto courts." Nearly twice as many litigators with "ghetto court" experience (17%) as those with "no ghetto court" experience (9%) reported that such behavior occurs "often/very often." Conversely, 61% of those with "ghetto court" experience,

---

[172] Id. This comment as to a litigant's veracity was echoed by a hearing witness. 5 New York City Hearing, supra note 1, at 941-42 (June 30, 1988) (testimony of Andrew Horowitz) (attorney perceived judge was prevented from reaching a fair conclusion about minority client's veracity due to client's ethnicity).

as contrasted with 70% of those without such experience, reported that such behavior "rarely/never" occurs.

Whereas litigators were asked whether "judges, attorneys or courtroom personnel publicly repeat ethnic jokes, epithets, or demeaning remarks," judges were asked only whether attorneys or courtroom personnel make such remarks. Only 3% of white judges and 14% of minority judges stated that such behavior occurs "often/very often." There is a significant difference between the responses of white and minority judges on this item and between "ghetto" and "non-ghetto court" judges.

Certain comments by respondents regarding this question pertained to general behavior rather than to particularized courts. Thus, one black judge wrote:

> On several occasions I have witnessed non-minority attorneys (usually privately retained rather than agency attorneys) use characterizations of minority persons which are demeaning and/or disparaging (e.g., reference to "those people" or to a "certain type" of litigant). In each instance[], I have, on the record, either requested that counsel clarify their statement or have admonished them for their inappropriate conduct.[173]

In addition, at least one respondent, a black litigator practicing outside New York City, noted that intonation of certain speech was demeaning to minorities:

> People use tone of voice, like a Negro dialect, to try to make a statement. It's meant as a put down and happens quite a bit.[174]

Criminal Courts. Several litigators commented regarding a panoply of racially biased behavior in the criminal courts -- behavior that, for the most part, may be characterized as fairly overt. For example, a white litigator from outside New York City commented:

---

[173] Judges' Questionnaire, supra note 121. In a similar vein, a black litigator outside New York City commented that a "Judge referred to adult black client as 'boy' ('you people') etc." Litigators' Questionnaire, supra note 99. See generally id; Albany Hearing, supra note 32, at 237-39 (testimony of Celinda Okwuosa).

[174] Litigators' Questionnaire, supra note 99.

> Clearly I have heard ethnic or [other] racial jokes, slurs, from white police, court deputies, fellow prosecutors and attorneys. Black remarks are more prevalent. I have only heard such ethnic/racial from one judge, although I [have] been with dozens. Such feelings about minority defendants are shared by police, court staff, [and] witnesses -- who are also minority members themselves.[175]

A black litigator outside New York City recounted:

> A judge in Queens told a black defendant to tell him where the other "Niggers" are. Some judges mock the speech of black witnesses and litigants.[176]

Moreover, a white litigator practicing outside New York City alluded to

> [j]udges and attorneys mak[ing] references to the injuring of minorities as "one less" or "just another black person" or "should have killed him."[177]

Finally, an Hispanic litigator in New York City stated:

> I've heard judges tell criminal defendants, in [the] USA we don't steal unlike what you're used to in X Latin American country -- I've heard judges talking about not having a Chinaman's chance to Asians.[178]

These anecdotal accounts in responses to the questionnaires were echoed in testimony before the Commission:

> I . . . observed a quasi-fraternity relationship between the judge and public defenders. Specifically, neither showed a convincing professional detachment from each other during the courtroom proceeding[]. In fact, they seemed to demonstrate a unified personality of disdain and amusement for having to interact with the accused, which . . . were predominantly black. For instance,

---

[175] Id.

[176] Id.

[177] Id.

[178] Id.

> the judge would insult the defendant with a sarcastic humor, and the public defender would stand there and laugh along with him.[179]

Indeed, as Archibald R. Murray, Executive Director of the Legal Aid Society described it, Legal Aid Society lawyers have

> related instances . . . of judges and prosecutors referring to minority defendants by their first name while not behaving in similar fashion when they have dealt with white witnesses or other [participants] in the process who were not of a minority group.
>
> One lawyer related an instance in which in a conference, a judge addressing himself to a black male defendant in his mid 30[']s said to the defendant, who happened to agree with some point that the judge was making, [']there, that's a good boy.[']180

Family Court. A white litigator outside New York City wrote, "A Family Court attorney repeatedly called party 'boy' and [the] Judge refused to admonish [him or her]."[181]

New York City Civil Court. An Hispanic litigator in New York City commented:

> Civil Court . . . judges constantly make remarks showing disdain and insensitivity about women with children, particularly women of color (e.g., [calling them] "dead-beats," [or] "rabbits").[182]

---

[179] Albany Hearing, supra note 32, at 11-12 (testimony of Edward Williams). The following colloquy ensued:

> MS. BIRNBAUM: Mr. Williams, did you get the impression that people were being treated differently because of their race or background, or was everyone being treated in the same discourteous fashion? Was there a difference in the treatment that you could see?
>
> EDWARD WILLIAMS: . . . [M]ost of the people that day there, who were arrested, were black. I sensed that there was a reluctance, almost a feeling of, do-we-have-to-deal-with-them-again type attitude, and . . . it was like the judge read each case . . . in a typical boring type fashion; here's another one, here's another one; and when they called a couple of the defendants to approach the bench the judge showed no sensitivity to the fact that [they were] young.

Id. at 16 (colloquy between Commissioner Birnbaum and Edward Williams).

[180] 1 New York City Hearing, supra note 1, at 96 (testimony of Archibald R. Murray).

[181] Litigators' Questionnaire, supra note 99.

[182] Id.

Similarly, a black litigator in New York City observed:

> Once in Civil Court -- Housing Part -- Kings, while representing a black client, the judge, in open court, remarked that the landlord (who was white) was "stuck" with a "tarbaby."[183]

Racial bias against litigants is sometimes compounded with gender bias. For example, one witness testified that in a Housing Court nonpayment proceeding, a judge remarked of a black female professional who had lost her position with a major university, "[M]aybe she can turn a trick and be able to get the money she needs."[184] In addition, one witness, employed as a pro se law clerk in Housing Court, gave an example of unconscious racial bias:

> For instance, an example of the sort of racism that's involved -- and that's not to say that even many of the judges are aware of the . . . level of the remarks . . . [is] a judge who is heard as saying in the courtroom to a court officer, ["L]et me have that Chinese case.["] Now, normally, cases are not referred to in an ethnic manner.[185]

Comments Relating to Personal Appearance of Minorities

As shown in Table II.1.5, 10% of the litigators surveyed reported that "comments are made by the judge about the personal appearance of minority attorneys, litigants, or witnesses when no comments are made about the appearance of white attorneys, litigants, or witnesses" "often/very often." There are significant differences between white and minority litigators outside New York City and between both black and Hispanic litigators in New York City and white litigators in New York City. Substantial proportions of litigators reported that such behavior on the part of judges occurs "often/very often" or "sometimes."

---

[183] Id.

[184] New York City Hearing II, supra note 34, at 314 (testimony of Sara Manzano).

[185] Id. at 313.

Among white litigators in New York City, 4% reported that such comments by judges are made "often/very often" and another 11% reported "sometimes"; among black litigators, 21% reported "often/very often" and another 22% reported "sometimes"; among Hispanic litigators, 11% reported "often/very often" and another 27% reported "sometimes"; and among Asian-American litigators 11% reported "often/very often" and another 19% reported "sometimes." Among white litigators outside of New York City, only 2% reported "often/very often" and 5% reported "sometimes"; among minorities outside of New York City, 13% reported that such behavior occurs "often/very often" and another 16% said "sometimes."

There are significant differences between litigators practicing in "ghetto" and "non-ghetto courts." Thus, 12% of litigators with "ghetto court" experience reported that judges make such comments on personal appearance "often/very often"; in addition, 21% stated that judges engage in this type of behavior "sometimes." By contrast, 8% of those with no "ghetto court" experience stated the behavior occurs "often/very often" and 11% stated that it occurs "sometimes."[186]

Addressing Minorities By First Name

The practice of addressing minorities by their first names, which has been recognized by justices of the United States Supreme Court as a "relic of slavery,"[187] persists. Overall, 16% of litigators reported that minority attorneys, litigants, or witnesses are addressed by their first name, while white attorneys, litigants, or witnesses are addressed more formally

[186] Judges were not asked this item.

[187] Bell v. Maryland, supra note 44.

"often/very often"; an additional 20% reported that it happens "sometimes." There are significant differences among groups. Six percent of white and 9% of Asian-American, but 36% of black and 22% of Hispanic litigators in New York City reported that such behavior occurs "often/very often." Additionally, 16% of white, 21% of Asian-American, 29% of black, and 27% of Hispanic litigators in New York City reported that such behavior occurs "sometimes." Outside New York City there are significant differences between white and minority litigators. Not one white litigator reported that the behavior occurs "often/very often" and 7% reported that it occurs "sometimes," while 22% of minority litigators reported "often/very often" and an additional 22% reported "sometimes."

There are significant differences between litigators practicing in "ghetto" courts and those practicing in "non-ghetto courts." Nearly twice as many litigators practicing in "ghetto courts" (21%) as those practicing in "non-ghetto courts" (11%) reported that this behavior occurs "often/very often." Although this question was not asked of judges, numerous minority and white judges commented on this phenomenon. One black judge stated that he would issue contempt citations for such behavior.[188] A white judge wrote as follows:

> There have been occasions when witnesses and/or defendants who are minorities were treated in a patronizing fashion and addressed by their first names. As an attorney I would object. As a judge, I would admonish the offending party.[189]

---

[188] Judges' Questionnaire, supra note 121. ("[I have experienced u]se of first names of witnesses, especially minorities. . . . [I r]equire use of appropriate title (Mr. Mrs. etc.) for minority witness[es]. [I have issued c]ontempt citation for disparaging and contemptuous attorney").

[189] Id.

Another white judge noted that addressing female minority witnesses in such fashion could also be attributed to gender bias.[190]

Disrespect and Discourtesy By Court Personnel To Minority Litigants

The pair of items dealing with the frequency with which court personnel are disrespectful and discourteous to white litigants and to minority litigants show interesting results. Overall, relatively few litigators (4%) reported discourtesy toward white litigants by court officers. In fact, fewer litigators reported such discourtesy than any other form of discourtesy discussed above. Significantly fewer white litigators outside New York City reported discourtesy of court officers toward white litigants than did any other group of litigators; there were no other significant differences. Higher proportions of litigators reported court officer discourtesy to minority litigators. Overall, 24% of litigators reported that discourtesy toward minority litigants occurs "often/very often." There are significant differences among groups. Substantially fewer white (2%) than minority (22%) litigators outside New York City reported that such behavior occurs "often/very often." Relatively fewer white (18%) and Asian-American (25%) than black (39%) and Hispanic (38%) litigators reported that such behavior occurs "often/very often." It is noteworthy that although more black and Hispanic than white or Asian-American litigators perceived discourtesy to minority litigants, both white and Asian-American litigators, nevertheless, perceived more discourtesy toward minority litigants than toward white litigants. In fact, there is a significant difference between the overall average discourtesy scores for white and minority litigants; the latter are treated with greater discourtesy.

---

[190] Id. ("Calling a black woman by her first name. Don't know whether to blame racial or gender bias. I said, "You mean Mrs. Jones, don't you?").

There is a significant difference between litigators practicing in "ghetto" and "non-ghetto courts" in terms of court personnel discourtesy to minority litigants, with 33% of "ghetto court" litigators but 18% of "non-ghetto court" litigators stating that such behavior occurs "often/very often."

Among judges, only 1% of white judges and 9% of minority judges stated that court personnel are disrespectful to minority litigants "often" (no judges responded "very often"). One percent of white judges and 2% of minority judges, reported that court personnel are disrespectful to white litigants. Thus, judges were far less likely to perceive such behavior on the part of court personnel than were litigators. There are no significant differences between "ghetto" and "non-ghetto court" judges.

Numerous comments by black and white litigators (and by at least one judge) were highly critical of the behavior of court personnel.[191] This chapter discusses only the treatment of minority litigants, witnesses and their families by court officers. The chapter on the "Legal Profession" discusses the treatment by nonjudicial personnel, including court officers, of minority litigators. Finally, the chapter on the "Court Officer Problem" describes some recommendations for inappropriate behavior, including the need for sensitivity training.

Litigators who responded to the Commission's survey variously characterized court officers as treating minority defendants like "animals,"[192] calling them by racially

---

[191] In addition, one litigator criticized the behavior of a hearing officer:

> Client was told by a hearing officer to speak louder [and] to talk as loudly as he does when he's robbing someone on the street. The hearing officer said he was sure the client could do it, that he had experience in such matters.

Litigators' Questionnaire, supra note 99.

[192] Id.

derogatory names,[193] and displaying rude treatment to their families.[194] Moreover, the derogatory word "skel" -- defined as "bum, worthless person," "trash," "nigger" or "homeless person" -- is often attributed to minority defendants and complainants.[195] A black court officer described the following experiences while working in the Criminal Courts in New York County:

> I was told by fellow court officers that these people who enter [the courtroom] doors are slimes. They're called slime and motes.
>
> * * *
>
> Not only defendants, anyone. Anyone, any minority entering into the courtroom. It can be a defendant. It can be a friend or relative of the defendant. I was working in the desk appearance part, an arraignment part.[196]

This court officer continued:

> [T]he children were considered baby slime. I was told this by fellow court officers. I was told that I was not to show these people, "any courtesy whatsoever." If I told them to take off their hat -- I was to tell them and not ask them.[197]

Similarly, as one white litigator from New York City explained:

---

[193] Id.

[194] Id. See also 2 New York City Hearing, supra note 1, at 424-26 (testimony of Kimberly Detherage) (Regarding Brooklyn Criminal Court: "The attitude among court personnel is to tell these [black and Hispanic] defendants and their families to sit down, shut up and wait for your name to be called. . . . In contrast, white court officers will often approach white defendants in the courtroom or their families and ask them why are they in court, who are they here for. . . . And in fact sometimes the court officers even call those cases ahead of other attorneys who have signed those cases in to the calendars, knowing that these white families are waiting in court").

[195] 1 New York City Hearing, supra note 1, at 194 (testimony of Veronica Singleton) (heard the word "skel every single day of my life"); Albany Hearing, supra note 32, at 216-17 (testimony of Frank Munoz). Cf. Buffalo Hearing, supra note 35, at 80-81 (testimony of John Elmore) (never heard judge employ the term).

[196] 1 New York City Hearing, supra note 1, at 189 (testimony of Veronica Singleton).

[197] Id. at 190 (testimony of Veronica Singleton).

> Court officers present an especially horrible problem. Some officers are wonderful and treat all defendants equally. However, they are few and far between. Generally, of all court personnel, this group is the most openly hostile and racially biased in the court system. White defendants are treated with a modicum of deference. Minority defendants are treated like scum. Cursed and ordered about in a derisive tone and manner, white court officers revel in exercising their power over an individual who is basically helpless and at their mercy. In the seventeen years I have practiced law, I have seen numerous courtroom fights between white court officers and minority defendants. I no longer count these incidents, while the number of fights between white defendants and white court officers is limited in my experience to two, and in both of those cases the defendants were drunk.[198]

The phenomenon is by no means confined to the Criminal Courts;[199] a white litigator in New York City observed the following:

> A court officer [told] a pro se minority litigant that she would be better off [if] she stopped screwing around and making more welfare kids.[200]

A witness before this Commission testified in a similar vein as follows:

> [P]eople coming before the family court are treated by the personnel frequently and also frequently by the judges as criminals.[201]

Physical Maltreatment in Holding Areas

The final pair of items presented in Table II.1.5 pertains to minority and white defendants' complaints of physical maltreatment while they are in the holding areas within

---

[198] Litigators' Questionnaire, supra note 99 (emphasis in original). Similarly, an Asian-American attorney testified at the public hearings:

> I know from my experience that the court officers are among the most abusive people in the court system. They refer to the defendants as bodies . . . there's absolutely no respect for the defendants when they sit in the courtroom. . . . When it's a white individual they treat them differently.

5 New York City Hearing, supra note 1, at 922 (June 30, 1988) (testimony of John Yong).

[199] Albany Hearing, supra note 32, at 10 (testimony of Edward Williams) (discourteous treatment by courtroom personnel).

[200] Litigators' Questionnaire, supra note 99.

[201] 1 New York City Hearing, supra note 1, at 74 (testimony of Karen Martin).

the courts. The questions posed did not allocate responsibility for any maltreatment among court personnel, the police, the New York State Department of Corrections, or the New York City Board of Correction (which is required to establish standards for, among other things, the treatment of persons confined under the jurisdiction of the department).[202]

Overall, 7% of all litigators reported that white defendants complain of maltreatment "often/very often." There are no significant differences among any of the groups. In contrast to the small proportions of litigators reporting that white defendants complain "often/very often," 38% of all litigators said that minority defendants complain "often/very often" of such abuse. There are significant differences among groups. It is important to note, however, that even though relatively fewer white than minority litigators reported that such complaints occur "often/very often," white litigators reported a greater frequency of such occurrences in relation to minority defendants than to white defendants. Thus, 28% of white litigators in New York City reported that minority defendants complain "often/very often," in contrast to the 6% of white litigators in New York City who reported that white defendants complain "often/very often." Nine percent of white litigators outside of New York City reported that minority defendants complain of physical maltreatment "often/very often"; 5% made the same report regarding white defendants. Much higher proportions of black and Hispanic litigators in New York City and minority litigators outside of New York City reported that minority defendants complain about physical maltreatment "often/very often": Blacks, 66%; Hispanics, 46%; minorities outside of New York City, 47%. There is

---

[202] Blank Litigators' Questionnaire, supra note 133, at 10. See Association of the Bar of the City of New York Committee on Corrections, Inadequacies in New York City Court Prearraignment Pens, 45 Rec. 390 (Apr. 1990) (recognizing shared responsibility for holding cells among these various entities and recommending that the City of New York appoint an official with oversight responsibility).

a significant difference between the average physical maltreatment scores of white and minority defendants; minority defendants are reported to receive maltreatment with substantially greater frequency.[203]

One respondent, a white litigator in New York City, commented on this question in the following manner:

> [T]he actions of court personnel on all levels, that result in unfair treatment as a result of racial or ethnic bias are rampant. They range from subtle expressions to explicit actions including manhandling of incarcerated clients by court officers.[204]

Minority Treatment Scale

The items in Table II.1.5 were combined into a litigators' minority treatment scale.[205] Black and Hispanic litigators in New York City gave significantly higher maltreatment ratings than did Whites in New York City; the same relationship was found for minority and white litigators outside New York City. Among New York City litigators, those who practice in "ghetto courts" gave significantly higher maltreatment ratings than did those who did not practice in these courts.

In sum, it can be concluded that significantly more minority litigators, particularly black litigators, perceive maltreatment of minority litigants than do white litigators and that

---

[203] There were no differences in the responses of litigators practicing in "ghetto" or "non-ghetto courts." This pair of items was not asked of judges.

[204] Litigators' Questionnaire, supra note 99.

[205] For a discussion of the items used, the reliability of the scale and the statistical results, see Report of Findings From A Survey Of New York State Litigators, in vol. 5 of this report. A comparable scale was not developed for judges because they were asked fewer items.

significantly more litigators practicing in "ghetto courts" than those practicing in "non-ghetto courts" perceive maltreatment of minority litigants.[206]

Treatment of Witnesses

Litigators were asked a series of five questions about whether white and minority judges give greater credibility to the testimony of white, than of minority, lay and expert witnesses and whether minority attorneys are more respectful of white, than of minority, witnesses in cross-examination; judges were asked only one of these questions.[207] Results are provided in Table II.1.6.

---

[206] A regression analysis was run on the minority treatment scale in order to determine the relative strength of association with this scale of variables that have been shown to be related to the perception of biased treatment, as well as other variables which are related conceptually to the scale. First, descriptive characteristics, namely race/ethnicity, and gender were entered into the model. Being black emerged as most strongly associated with perceiving biased treatment, followed by being Hispanic, Asian American, and female, respectively. The adjusted r2 at the end of this first block was .253. Next, a natural log of the number of years since passing the bar exam was included on the assumption that those litigators with fewer years of experience in the courts might have a different sensitivity to bias. This variable did not meet the .05 criterion for inclusion. The next block included four variables for stepwise inclusion. The first three employment variables were being employed by a firm or corporation, public defenders offices or civil legal services, and prosecutor's offices or Corporation Counsel. The fourth variable was a log of total number of appearances; the latter entered first in the last stepwise block and was positively associated with perceiving bias. Beyond this, only being employed as a public defender or legal services attorney met the .05 criterion for inclusion. The final adjusted r2 was .283. The regression model assesses how well the independent variables (race, gender, years in practice, employment, amount of time spent in court) explain the propensity to perceive bias in the courtroom. Thus, minority status is the best predictor of perceived bias; being female, employed as a public defender or in a civil legal services office and having made more courtroom appearances were also important. These variables accounted for .283 of the variation in perceived biased treatment; the closer the score is to 1.00, the more the variability is accounted for. Since the minority treatment scale is a measure of subjective assessment of bias which is harder to predict than a less subjective phenomenon, an adjusted r2 of .283 is quite strong. The important point is that race is the strongest predictor of perceived maltreatment.

[207] Blank Litigators' Questionnaire, supra note 133, at 7.

Table II.1.6
Litigators' Reports as to Credibility and Treatment of Witnesses by Judges and Attorneys
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NEW YORK CITY						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
White judges give more credibility to white than to minority expert witnesses.	8 (8.4)	21 (21.6)	68 (70.0)	33 (38.8)	26 (30.6)	26 (30.6)	29 (33.3)	18 (20.7)	40 (46.0)	5 (12.8)	14 (35.9)	20 (51.3)	1 (1.0)	8 (9.8)	76 (89.2)	14 (25.0)	15 (26.8)	27 (48.2)	90 (20.0)	102 (22.8)	257 (57.2)
Whites judges give more credibility to white than to minority lay witnesses.	10 (9.8)	25 (24.3)	69 (65.9)	39 (37.1)	36 (34.3)	30 (28.6)	35 (31.8)	36 (32.7)	39 (35.5)	7 (16.3)	14 (32.6)	22 (51.2)	2 (2.1)	25 (21.8)	86 (76.1)	25 (30.9)	25 (30.9)	31 (38.3)	119 (21.3)	161 (28.9)	277 (49.7)
Minority judges give more credibility to white than to minority expert witnesses.	2 (1.8)	11 (11.5)	81 (86.7)	15 (17.0)	23 (26.1)	50 (56.8)	11 (12.1)	22 (24.2)	58 (63.7)	4 (12.9)	9 (29.0)	18 (58.1)	1 (1.1)	3 (3.6)	71 (95.3)	4 (8.3)	10 (20.8)	34 (70.8)	36 (8.6)	77 (18.2)	312 (73.2)
Minority judges give more credibility to white than to minority lay witnesses.	6 (6.1)	15 (14.9)	80 (79.0)	16 (15.4)	25 (24.0)	63 (60.6)	21 (20.0)	27 (25.7)	57 (54.3)	2 (5.4)	11 (29.7)	24 (64.9)	2 (2.0)	7 (8.3)	74 (89.7)	8 (12.5)	10 (15.6)	46 (71.9)	55 (11.1)	95 (19.2)	344 (69.7)
Attorneys are more respectful of white than of minority witnesses in cross-examination.	12 (9.8)	26 (21.4)	84 (68.7)	53 (45.7)	37 (31.9)	26 (22.4)	26 (22.2)	43 (36.8)	48 (41.0)	11 (21.2)	17 (32.7)	24 (46.2)	5 (3.6)	13 (9.6)	115 (86.8)	27 (29.3)	23 (25.0)	42 (45.7)	134 (21.2)	159 (25.2)	339 (53.7)

Litigators reported that white judges give more credibility to the testimony of white lay and expert witnesses than to the testimony of comparable minority witnesses. Overall, 20% of litigators said that white judges give more credibility to white expert witnesses and 21% said white judges give more credibility to white lay witnesses than to minority witnesses "often/very often." There are significant differences among groups. Fewer white litigators outside New York City (1% in relation to expert witnesses, 2% in relation to lay witness) than minority litigators outside New York City, (25% in relation to expert witnesses, 31% in relation to lay witness) reported that white judges find white witnesses more credible than minority witnesses "often/very often." Similarly, fewer white litigators in New York City reported these occurrences than did black or Hispanic litigators in New York City; there was also a significant difference between black and Asian-American litigators. Thus, 10% of white, 37% of black, 32% of Hispanic, and 16% of Asian-American litigators in New York City reported that white judges find white lay witnesses more credible than minority lay witnesses "often/very often." Similarly, 8% of white, 39% of black, 33% of Hispanic, and 13% of Asian-American litigators in New York City reported that white judges find white expert witnesses more credible than minority expert witnesses "often/very often."

There are significant differences between New York City litigators who have and those who lack "ghetto court" experience. Thus, 26% of litigators with "ghetto court" experience reported that white judges give more credibility to white expert witnesses and the same percentage reported that white judges give more credibility to white lay witnesses "often/very often"; 27% reported that such preferential treatment of expert witnesses occurs "sometimes"; and 32% reported that such preferential treatment of lay witnesses occurs

"sometimes." Among "non-ghetto court" litigators, the comparable percentages are 17% for expert witnesses and 18% for lay witnesses, "often/very often"; and 17% expert witnesses and 20% lay witnesses, "sometimes."[208]

Minority judges are perceived by litigators as being more even-handed and less likely to give extra weight to the testimony of white witnesses than are white judges. Overall, only 9% of all litigators reported that minority judges give more credibility to the testimony of white expert witnesses, as opposed to 20% of litigators reporting such bias among white judges. Similarly, only 11% reported that minority judges give more credibility to the testimony of white lay witnesses "often/very often," while 21% said this of white judges. Two percent of white, 17% of black, 12% of Hispanic, and 13% of Asian-American litigators in New York City reported that minority judges give greater weight to white expert witness testimony "often/very often." Similarly, 1% of white and 8% of minority litigators outside New York City reported that minority judges give greater weight to white expert testimony.

The comparable findings in relation to minority judges' attitudes toward white lay witnesses show that 6% of white, 15% of black, 20% of Hispanic, 5% of Asian-American litigators in New York City, and 2% of white and 13% of minority litigators outside New York City, reported that minority judges give more credibility to white than to minority witnesses "often/very often." On average, white judges were rated as giving greater credence to the testimony of white than minority witnesses (expert or lay) with greater frequency than minority judges. The important point is that minority judges are seen as less likely to give greater credence to the testimony of white as opposed to minority witnesses.

---

[208] Judges were not asked this pair of questions.

There are no differences between litigators in "ghetto" and "non-ghetto courts" in their perception of how minority judges relate to expert and lay witnesses.[209]

As shown in Table II.1.6, overall, 21% of litigators reported better treatment of white than of minority witnesses by attorneys conducting cross examination. There are significant differences among groups. Whereas only 10% of white litigators in New York City reported that preferential treatment of white witnesses occurs "often/very often," 46% of black, 22% of Hispanic, and 21% of Asian-American litigators in New York City made this statement. Outside New York City, 4% of white, but 29% of minority litigators reported that white witnesses receive better treatment than minority witnesses "often/very often."

There are significant differences in the responses of litigators practicing in "ghetto" and "non-ghetto courts." Thus, 26% of attorneys with "ghetto court" experience reported that attorneys are more deferential toward white than minority witnesses "often/very often" and 32% reported that this happens "sometimes." By contrast, 19% of attorneys without "ghetto court" experience reported that the behavior occurs "often/very often" and 18% reported that it occurs "sometimes."

Among judges, 2% of white, and 25% of minority, judges stated that white witnesses receive better treatment than minority witnesses during cross examination "often/very often"; an additional 11% of white and 28% of minority judges stated that this behavior occurs "sometimes." There are no significant differences between "ghetto" and "non-ghetto court" judges.

---

[209]This pair of items was not asked of judges.

Minority Witness Treatment Scale

The litigator responses to the five witness treatment items were combined into a witness treatment scale.[210] There are significant differences between the mean scores of both black and Hispanic litigators in New York City and white litigators in New York City on the witness treatment scale. Also, white litigators outside New York City were significantly less likely to report biased treatment of witnesses than were minority litigators outside New York City. Litigators who appear in "ghetto courts" report significantly higher bias ratings on the witness treatment scale than do litigators who do not. Litigators illustrated their responses with numerous perceived instances of biased conduct, which included the giving of greater credence to white rather than minority witnesses,[211] the mocking of black dialect or vernacular[212] and the improper impeachment of minority witnesses.[213]

---

[210] For a discussion of the reliability of the scale and the statistical results, see Report of Findings From A Survey Of New York State Litigators in vol. 5 of this report. A comparable scale was not created for judges because they were asked only one item.

[211] An Hispanic litigator in New York City commented:

> Case where the testimony of five Hispanic witnesses for the defense [was] minimized and the testimony of one white police officer was given excessive credit. I believe the witnesses testimony was minimized by the judge because they were Hispanic, poor, and did not have a good command of English.

Litigators' Questionnaire, supra note 99.

[212] Litigators commented: "Judge in conference following black expert witness testimony burlesqued imitation of testimony using Amos 'n Andy type of speech." Id. "District attorney questioning minority witnesses in 'street vernacular' rather than common words. District Attorney ridiculing minority nicknames or customs." Id.

[213] Respondents observed:

> I once had a minority doctor . . . give expert testimony regarding the treatment given to a person who later died. The DA was allowed to go into the doctor's past brushes with the law, the IRS, his matrimonial problems and drinking/AA treatments. He never asked the doctor about his medical opinion.

Id.

> [The p]rosecution in my experience usually asks defendants where they live -- which is nowhere near [the] place of [the] crime -- trying to infer . . . what they are doing in that neighborhood?

Id.

Juror Reactions to Victims, Litigants, and Witnesses

A series of items was asked about the frequency with which white and minority jurors react more positively to white victims and to white litigants, and about the testimony of minority expert and lay witnesses being less effective because of juror reactions to the witnesses' race.[214] These data are provided in Table II.1.7.

Adversary cross examining minority litigant was permitted to verbally abuse litigant over my objections and was not admonished by white judge at all. Message conveyed was that verbal battering was O.K.

Id.

[214] Blank Litigators' Questionnaire, supra note 133, at 5-7.

Table II.1.7
Litigators' Reports as to Juror Reactions to Victims, Litigants, and Witnesses
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NEW YORK CITY						TOTAL LITIGATORS		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
White jurors sympathize more with a white victim.*	25 (27.9)	39 (42.8)	27 (29.3)	70 (76.1)	15 (16.3)	7 (7.6)	48 (58.5)	22 (26.8)	12 (14.6)	18 (58.1)	9 (29.0)	4 (12.9)	19 (23.4)	30 (37.6)	31 (39.0)	41 (63.1)	13 (20.0)	11 (16.9)	221 (50.1)	128 (29.1)	92 (20.9)
Minority jurors sympathize more with a white victim.	2 (2.6)	24 (26.2)	64 (71.2)	21 (22.6)	35 (37.6)	37 (39.8)	10 (12.2)	33 (40.2)	39 (47.6)	5 (16.1)	8 (25.8)	18 (58.1)	2 (2.7)	13 (17.9)	58 (79.4)	18 (30.0)	18 (30.0)	24 (40.0)	58 (13.6)	131 (30.5)	240 (55.9)
White jurors react more positively to a white litigant.	24 (25.0)	41 (42.7)	31 (32.3)	60 (62.5)	29 (30.2)	7 (7.3)	43 (51.2)	28 (33.3)	13 (15.5)	12 (36.4)	16 (48.5)	5 (15.2)	18 (24.7)	29 (39.3)	27 (36.0)	39 (58.2)	20 (29.9)	8 (11.9)	196 (43.6)	163 (36.2)	91 (20.1)
Minority jurors react more positively to a white litigant.**	4 (4.3)	21 (22.8)	69 (72.9)	20 (21.1)	39 (41.1)	36 (37.9)	8 (10.0)	36 (45.0)	36 (45.0)	4 (12.1)	15 (45.5)	14 (42.4)	0 (0)	18 (26.1)	51 (73.9)	14 (23.3)	28 (46.7)	18 (30.0)	50 (11.6)	157 (36.5)	223 (51.8)
Testimony of a minority lay witness is less effective because of juror reactions to the witness' race.	10 (10.2)	35 (34.0)	57 (55.8)	26 (26.8)	39 (40.2)	32 (33.0)	28 (31.8)	36 (40.9)	24 (27.3)	11 (30.6)	11 (30.6)	14 (38.9)	7 (6.7)	48 (47.3)	47 (46.0)	35 (50.0)	19 (27.1)	16 (22.9)	117 (23.7)	188 (38.0)	190 (38.4)
Testimony of a minority expert witness is less effective because of juror reactions to the expert's race.	2 (3.1)	30 (37.8)	48 (59.1)	13 (18.8)	26 (37.7)	30 (43.5)	14 (24.1)	18 (31.0)	26 (44.8)	7 (30.4)	4 (17.4)	12 (52.2)	3 (5.3)	19 (32.0)	37 (62.7)	12 (27.9)	12 (27.9)	19 (44.2)	52 (15.5)	109 (32.9)	171 (51.6)

* This item was worded differently for judges: "Jurors sympathize more with a white victim than with a minority victim."
** This item was worded differently for judges: "Jurors react more positively to a white litigant than to a minority litigant."

Overall, 50% of litigators reported that "white jurors sympathize more with a white victim than with a minority victim" "often/very often"; 14% reported that "minority jurors sympathize more with a white victim than with a minority victim" "often/very often." There are significant differences among groups. While more black and Hispanic than white litigators in New York City, and more minority than white litigators outside New York City, reported that white jurors sympathize with a white victim more than with a minority victim, even substantial proportions of white litigators reported that such juror bias occurs "often/very often." Thus, 28% of white, 76% of black, 59% of Hispanic, and 58% of Asian-American litigators in New York City, and 23% of white and 63% of minority litigators outside New York City, gave this response. Much smaller proportions of litigators reported that minority jurors sympathize more with a white victim than with a minority victim "often/very often."

Overall, 14% of litigators reported that minority jurors are more sympathetic to white victims than to minority victims. Three percent of white, 23% of black, 12% of Hispanic, and 16% of Asian-American litigators in New York City, and 3% of white and 30% of minority litigators outside New York City, reported this phenomenon. The only significant differences are between minority and white litigators outside New York City and between black and white litigators in New York City. A comparison of mean scores on these two items shows that, on the average, litigators believe that white jurors are significantly more likely than minority jurors to sympathize with a white victim. There is no difference between New York City litigators practicing in "ghetto" and "non-ghetto courts" on this pair of items.

Judges were asked the question in a different manner. While litigators were asked about the reactions of white and minority jurors separately, judges were asked about the reactions of jurors (regardless of juror race).[215] Significantly more minority judges than white judges reported that jurors sympathize more with white than with minority victims. Thus, 32% of minority, but only 6% of white judges reported that greater juror sympathy for white victims happens "often/very often." There were no differences among New York City judges between those sitting in "ghetto" and "non-ghetto courts."

Overall, 44% of litigators reported that white jurors react more positively to a white litigant than to a minority litigant "often/very often." This is only slightly less than the 50% who stated that white jurors react more positively to a white victim than to a minority victim "often/very often." In general, the response patterns to both items are quite similar. Twenty-five percent of white, 63% of black, 51% of Hispanic, and 36% of Asian-American litigators in New York City, and 25% of white and 58% of minority litigators outside New York City, reported that white jurors react more positively to a white than to a minority litigant "often/very often." Overall, only 11% of litigators stated that minority jurors react more positively to white than to minority litigants. Mean differences on these two items are significant; more litigators reported that white jurors react more positively than do minority jurors to white litigants as opposed to minority litigants. There is no difference among New York City litigators who practice in "ghetto" and "non-ghetto courts."

Unlike litigators, judges were not asked to differentiate between white and minority jurors in terms of the latters' reaction to the race of the litigants. There are significant

---

[215] Blank Judges' Questionnaire, supra note 134, at 13.

differences between white and minority judges. Thus, 20% of minority, but only 4% of white, judges reported that jurors react more positively to white than to minority litigants "often/very often." There are no significant differences among New York City judges between those in "ghetto" and those in "non-ghetto courts."

The race of the witnesses was rated to be considerably less important than the race of the victims and the litigants in influencing juror decisions. Thus, 24% of all litigators stated that the testimony of a minority lay witness is less effective with jurors than the testimony of a white lay witness "often/very often"; only 16% of all litigators gave this response to the comparable item about expert witnesses. There are no significant differences among groups in relation to expert witnesses; relatively few attorneys in any group reported that the testimony of minority expert witnesses is less effective than the testimony of white expert witnesses with jurors "often/very often." There are, however, significant differences between minorities and Whites outside of New York City and among Whites, Blacks, and Hispanics in New York City, in the ratings of whether jurors respond more positively to white than to minority lay witnesses. Ten percent of white, 27% of black, 32% of Hispanic, and 31% of Asian-American litigators in New York City, and 7% of white and 50% of minority litigators outside New York City, stated that the testimony of a minority lay witness is less effective because of juror reactions to the witness' race "often/very often."

There is a significant difference between litigators in New York City who practice in "ghetto courts" and those who practice in "non-ghetto courts" in terms of their responses to juror bias regarding the testimony of minority expert witnesses. Thus, 17% of "ghetto court"

litigators reported that such juror bias occurs "often/very often"; only 10% of "non-ghetto court" litigators made this statement.

There are also significant differences between white and minority judges in terms of the frequency with which jurors were reported to respond more favorably to white than to minority lay and expert witnesses. Thus, 8% of minority judges, but 3% of white judges, reported that jurors respond less favorably to the testimony of minority lay witnesses "often/very often"; 35% of minority, but 21% of white, judges reported that this occurs "sometimes." Small proportions of white (2%) and minority (3%) judges reported that such juror bias occurs with respect to expert witnesses "often/very often," but 25% of minority judges, as contrasted with 9% of white judges, stated that it occurs "sometimes." There are no differences between New York City judges sitting in "ghetto courts" and those sitting in "non-ghetto courts."

The litigator response to the six juror items were combined into a juror reaction scale.[216] Black and Hispanic litigators in New York City gave significantly higher ratings of juror bias than did white litigators in New York City. There is also a significant difference between white and minority litigators outside New York City. There are no differences on the juror reaction scale between New York City litigators who do or do not practice in "ghetto courts."

[216] For a discussion of the reliability of the scale and the statistical results, see Report of Findings From A Survey Of New York State Litigators in vol. 5 of this report. A comparable scale was not created for judges because they were asked too few items.

Experience with Courtroom Bias and Efforts to Protest

Litigators were asked, "Have you ever experienced a situation in which you perceived the treatment of minority attorneys, litigators, jurors, or witnesses to be unfair or insensitive, or otherwise different from the treatment of whites?"[217] Those who responded in the affirmative were asked, "Have you ever protested unfair or insensitive treatment of a minority attorney, litigant, juror, or witness to the appropriate authority?"[218] Those who responded in the negative were asked why they had not reported the incident. These data are provided in Table II.1.8

[217] Blank Litigators' Questionnaire, supra note 133, at 11.

[218] Id.

Table II.1.8
Experiences of Bias and Efforts at Redress
(Numbers in parentheses are percentages)

		LITIGATORS IN NEW YORK CITY				LITIGATORS OUTSIDE NYC		TOTAL LITI-GATORS	JUDGES		TOTAL JUDGES
		White	Black	Hisp.	Asian	White	Minor.		White	Minor.	
Ever perceived unfair treatment?*	Yes	42 (29.2)	83 (64.8)	71 (56.3)	29 (39.2)	41 (27.2)	59 (58.4)	325 (44.9)	85 (15.0)	32 (42.1)	117 (18.3)
	No	101 (70.8)	45 (35.2)	55 (43.7)	45 (60.8)	110 (72.8)	42 (41.6)	398 (55.1)	480 (85.0)	44 (57.9)	524 (81.7)
If so, ever protested? (Litigators), or corrected? (Judges)	Yes	18 (42.4)	40 (48.2)	31 (43.7)	6 (20.7)	14 (34.4)	25 (43.1)	134 (41.3)	64 (76.2)	29 (90.6)	93 (80.2)
	No	24 (57.6)	43 (51.8)	40 (56.3)	23 (79.3)	27 (65.6)	33 (56.9)	190 (58.7)	20 (23.8)	3 (9.4)	23 (19.8)
(Litigators Only) Reasons for not protesting.*	Don't know where to report.	5 (20.8)	11 (25.6)	6 (15.0)	6 (26.1)	4 (14.8)	14 (42.4)	46 (24.2)			
	Afraid of reprisal against client.	10 (41.7)	19 (44.2)	18 (45.0)	7 (30.4)	7 (25.9)	11 (33.3)	72 (37.9)			
	Afraid of reprisal against self.	10 (41.7)	23 (53.5)	18 (45.0)	9 (39.1)	7 (25.9)	11 (33.3)	78 (41.1)			
	Other reasons.	14 (58.3)	23 (53.5)	20 (50.0)	13 (56.5)	13 (48.1)	24 (72.7)	107 (56.3)			
Base	Persons not Protesting	24	43	40	23	27	33	190			

* The exact wording for this question on the litigator and judge survey is "Have you ever experienced a situation in which you perceived the treatment of minority attorneys, litigants, jurors, or witnesses to be unfair or unsensitive, or otherwise different from the treatment of whites?."

** Multiple responses were allowed, therefore totals are greater than 100%.

Overall, nearly half (45%) of all litigators reported that they had witnessed biased treatment of a minority person in the courtroom. There are significant differences between white, Asian-American, black and Hispanic litigators in New York City, as well as between white and minority litigators outside New York City. Nevertheless, the proportions of litigators reporting bias experiences in all groups are striking. Thus, 29% of white litigators in New York City, and 27% of white litigators outside New York City, as well as 65% of black, 56% of Hispanic, and 39% of Asian-American litigators in New York City, and 58%

of minority litigators outside New York City, reported an experience of biased treatment of a minority person.

Among litigators who reported that they had witnessed biased behavior, less than the majority in any group stated that they had reported the incident. Very similar proportions of all groups, except Asian Americans, reported making a protest. Approximately half as many Asian Americans (21%) as litigators in most other groups protested (42% of Whites, 48% of Blacks and 44% of Hispanics in New York City, and 43% of minorities outside New York City). Among those who refrained from protesting, substantial proportions of litigators stated that they did not know to whom they could report biased behavior. Overall, nearly one-fourth (24%) of those who made no report gave this response. Even higher proportions -- over one-third -- stated that they refrained from making a report because they were afraid of reprisals against their clients (38%) or against themselves (41%). Among these who reported another reason for not protesting, 31% stated that such protest is "a waste of effort," 21% said that the behavior was too subtle or that they lacked proof, and 18% said that the problem was somehow resolved without their making a formal protest. There is a significant difference among New York City litigators practicing in "ghetto courts" and those practicing in "non-ghetto courts." Thus, 53% of "ghetto court" litigators, as compared to 30% of "non-ghetto court" litigators, reported having perceived a bias incident.

There is also a significant difference between minority and white judges in terms of the proportions of respondents who reported that they had "experienced a situation in their courtroom in which they perceived the treatment of minority attorneys, litigants, jurors, or

witnesses to be unfair or insensitive."[219] Thus, 42% of minority, but only 15% of white, judges reported that they had witnessed such a situation. There are no differences between "ghetto" and "non-ghetto court" judges in New York City.

IV. UTILIZATION OF THE COURTS

The mandate of this Commission specifically includes "[d]etermining the extent to which minorities underutilize the judicial process and . . . examining the reasons for any underutilization that is found . . . ." One witness before the Commission described his belief in the following manner:

> People are told constantly . . . ["D]on't solve your problems in the street, bring it to the courts["] and then they bring it to the courts and the justice they see is far less just than the justice that they can get in the streets.[220]

The Office of Court Administration does not maintain race data on civil litigants, and thus it is not possible to verify the hypothesis that minorities are underrepresented as plaintiffs in civil courts. The Commission asked judges and litigators to estimate the percentages of minority users in various types of courts. Reliability of the estimates among those in the same courts, however, was so low as to be unusable.[221]

---

[219] Blank Judges' Questionnaire, supra note 134, at 11-12.

[220] 3 New York City Hearing, supra note 1, at 632 (June 30, 1988) (testimony of Lawrence Vogelman). Accord Shipp, Panel to Study Racial Fairness of New York Courts, N.Y. Times, Jan. 22, 1988, at B3, col. 1 (quoting Hon. Sol Wachtler) ("What is terribly unsettling . . . is that there might be people out there who should be seeking redress from the courts who are not because they distrust the courts. What do you do when you don't trust the courts? You then take the law into your own hands.").

[221] A recent study of instances of medical malpractice in New York hospitals is suggestive, but not conclusive, on this point. The report concluded that thousands of hospital deaths and tens of thousands of injuries are tied to negligence each year but that relatively few victims seek redress through the courts--"[w]e found an incidence of litigation of approximately 10.9% (2967/27,179) of the frequency of negligence, i.e., nine patients suffer adverse events from negligent medical care for every patient who files a tort claim." Harvard Medical Practice Study, Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York 7-27 (1990) [hereinafter Patient Study]. In the Glossary, an "adverse event" was defined as "an unintended injury caused by medical management rather than by the disease process." "Negligence" was defined as "a failure on the part of the physician to provide reasonably careful treatment, i.e., treatment that normally should be expected from the practitioner usually caring for this kind of disease in the particular year in which the care was provided."

Despite the absence of data, the perception that minorities underutilize the state courts is very strong. The National Center for State Courts[222] identified several barriers to use of civil plaintiffs: the psychological barrier, the economic barrier, the knowledge barrier, the language barrier and the geographic barrier.[223] It appears to the Commission that these barriers, as well as cultural barriers, have a disproportionate impact on minorities.

Psychological Barriers: The Recurring Problem of Perception

Among the important factors deterring minorities from using the court system are psychological barriers. As noted above, distrust of the courts is wide spread, more so among minorities than among nonminorities. The courtroom environment, which may be perceived as alien and hostile, should not be discounted as a cause of this, especially given the perceived underrepresentation of minorities among judges[224] and the demonstrated underrepresentation of minorities among court officers in certain courts.[225] Accordingly, the National Center for State Courts notes as follows:

> The psychological barrier probably is felt most by minorities . . . . In some instances alienated, in others merely fearful, they are reluctant to enter the unfamiliar, imposing, complicated environment of the regular courts.
>
> * * *
>
> American courts can appear a very alien environment to a Black, an [Asian American], or a [Hispanic] American. For the most part, judges are

---

[222] E. Johnson, Jr., Toward a Responsive Justice System, reprinted in, National Center Report, supra note 7, at 107.

[223] Id. at 109. This 1978 report did not purport to quantify the effects of these respective barriers, nor does the Commission.

[224] See infra vol. 4, ch. 3 (no significant disparities in proportions of minority judges, relative to the pool of minority attorneys).

[225] See infra vol. 4, ch. 4.

> European Whites; the prosecutors, lawyers, clerks and other court personnel are the same.
>
> * * *
>
> For the purposes of this report, we are not so concerned with the plight of the individual minority group members who may be deprived of the opportunity to become lawyers or judges. We are more worried about the hundreds of thousands or millions of their fellow citizens who are deprived of an adequately integrated legal system.[226]

Hearing participants before this Commission essentially agreed with the proposition that the courts were perceived to be "alien environments" by minorities. As one Legal Services attorney testified, "We find that when our clients come to us they're not seeking affirmative assistance from the courts. We find that they do not believe they are going to get justice in the courts and so they're not eager to get there."[227] A Native American stated as follows:

> [I]t would not be advantageous for us to go into courts, it would be costly, and we would lose anyway because of the frame of minds of those who are in the courts and the attitude of the federal government and the state.[228]

Economic Barriers

Economic barriers affect minorities disproportionately, since Blacks and Hispanics are overrepresented among lower income groups.[229] While it is true that fewer Asian-

---

[226] National Center Report, supra note 7, at 112.

[227] 5 New York City Hearing, supra note 1, at 1065 (June 30, 1988) (testimony of Stephen Myers). See also, New York City Hearing II, supra note 34, at 211-12 (underutilization of legal system by Asians caused by perceived racism) (testimony of Charles Wang); Albany Hearing, supra note 32, at 35 (testimony of Walter Kiang) (perception among Chinese Americans that court system is "another different ethnic world . . . and they hardly have any confidence to feel the outcome of [the] trial would become fair and just to them, so they try to avoid whenever they possibly can this kind of situation.").

[228] 1 New York City Hearing, supra note 1, at 247 (testimony of Chief Irving Palace).

[229] See The Report of the Mayor's Commission on Black New Yorkers 4-5, 10-11, Tables I-E & I-G (Nov. 1988) [hereinafter Black New Yorkers] (data comparing white and black family income and poverty status); New Hispanic Immigrants, supra note 46, at 11 (comparing Puerto Rican and "other Hispanic" income with New York City median).

American families live below the poverty level, certain new immigrants do face significant economic barriers.[230] Among the effects of these disparities in income is the inability to engage the services of an attorney in certain types of matters.[231] As one hearing witness put it: "Most people don't have experience with this [court] system and when minorities have experience with the system, very often it's a disagreeable experience because they're not able to get the kind of legal help they need."[232]

A recent study of hospital patients included the following comment on the issue of representation:

> [T]hese patients suffered minor injuries of insufficient monetary value to interest trial lawyers in taking the case on a contingent fee basis. The ability of patients to seek redress and compensation via courts depends on the functioning of the market for legal services. These services are provided by personal injury specialists who are in the business of accepting cases that will return a profit in the form of a contingent fee. These attorneys tend to accept clients whose injuries bear a combination of: a high probability of negligence and thus a high probability of producing a favorable jury verdict and court judgment, and a large damage award if the verdict is favorable. A large award is a function of: (a) the degree of patient disability; (b) the level of lost wages and earning capacity; and (c) the remaining life expectancy of the injured patient.[233]

---

[230] Asian family income, on average, was about the same as non-Asian family income. New York City Report on Asian Americans, supra note 53, at 13-14. But see Hays, Immigrants Strain Chinatown's Resources, N.Y. Times, May 30, 1990, at B1, col. 2 (segregated cheap labor market for Chinese workers); Chira, New York's Clamor Intrudes Koreans' Insularity, N.Y. Times, May 22, 1990, at B1, col. 2.

[231] See ch. 2.

[232] New York City Hearing II, supra note 34, at 7-8 (testimony of Philip Damashek). See also, Housing Court Report, supra note 87, at 34-35, 45 (Nov. 1986); 3 New York City Hearing, supra note 1, at 618 (June 30, 1988) (testimony of David Correa) ("Hispanics have had limited access to the courts. They usually cannot afford the expense of quality counsel."); New York City Hearing II, supra note 34, at 223 (testimony of Roger Maldonado) (almost all minority tenants who appear in Housing Court are pro se); Albany Hearing, supra note 32, at 40-41 (testimony of Walter Kiang) (need for more Asian lawyers).

[233] Patient Study, supra note 221, at 7-35. The report noted that it "cannot answer why, of the 280 patients who suffered adverse events from negligent medical care, 8 patients filed malpractice claims and 272 others did not." Id. at 7-36 n.41. Compare with the following hearing testimony:

> [T]he problem [of legal representation] comes in those cases wherein the . . . lawyer is not likely to take the case on a contingency basis, then the litigant has the problem of being able, whether or not they are able to, in fact, afford the lawyer, and whether or not the cost

Several witnesses described a variety of other barriers relating to economic status that impede use of the courts: lack of facilities for litigants who cannot afford to arrange for child care;[234] court sessions that take place only during the day, which is inconvenient to minorities who must work at night and risk the prospect of losing pay, or even a job, due to absence from work;[235] and heavy court calendars that create uncertainty in arranging work schedules.[236] These economic barriers are especially daunting to minorities who may perceive that they will not prevail in any litigation.[237]

Other economic barriers include costs associated with litigation, including court filing fees, the expense of obtaining deposition transcripts, and the like.[238] The Commission believes that recent increases in certain court filing fees will, as Chief Judge Wachtler

---

of the lawyer can be justified by the possibility that they may succeed.

1 New York City Hearing, supra note 1, at 57-58 (testimony of Hon. Yvonne Lewis) (emphasis added).

234 2 New York City Hearing, supra note 1, at 328 (testimony of Jeanne Thelwell) ("Courthouses provide very little or no provision for children. . . . [A] mother will frequently face the Hobson's choice of attending to her role as a litigant or attending to her child . . . .").

235

> Since the people whom I represent [in Housing Court] are by definition poor that means they have lost a day's pay . . . money that they cannot afford to lose. Indeed, [for] people being on the margin, as they are, not only is a day's pay often the problem, but potentially a job. They're easily replaced if they miss too many days of work because they're in court they stand to lose their job, their livelihood.

5 Id. at 1066 (June 30, 1988) (testimony of Stephen Myers).

236

> Whether the problem r[e]quires resolution in the Criminal, Civil, Family, or Housing Court, many feel that to seek relief there is a waste of time and effort. Trials . . . which require many appearances . . . are time consuming. It is difficult to arrange work schedules to . . . accommodate these uncertain changes. And another factor is the heavy court calendar . . ..

New York City Hearing II, supra note 34, at 156 (testimony of Philip Kane).

237 1 New York City Hearing, supra note 1, at 55-56 (testimony of Hon. Yvonne Lewis) ("most do not have the ability to take off the time from work, and, in fact, lose the wages that they would otherwise be assured of to gamble, if you will, on income that they may or may not receive in the court.").

238 National Center Report, supra note 7, at 111.

warned, "limit[] a citizen's access to the courts"[239] -- especially access by the minority poor.[240] Although certain in forma pauperis relief is available,[241] testimony adduced before the Commission indicates that its availability is not widely known.[242]

The Commission asked litigators a question that relates to economic barriers to the use of the courts: "Are there public services (e.g., child care, information booth) that should be provided in the courts in which you practice, but are not provided?"[243] The findings are provided in Table II.1.9.[244]

---

[239]Spencer, Cuomo Court-Fee Plan Assailed, N.Y.L.J., Feb. 20, 1990, at 1, col. 3, at 4, col. 6 (quoting Hon. Sol Wachtler).

[240]Letter from Hon. Franklin H. Williams to Hon. Mario M. Cuomo, March 21, 1990.

[241]CPLR 1102(d) provides:

> [a] poor person shall not be liable for the payment of any costs or fees unless a recovery by judgment or by settlement is had in his favor in which event the court may direct him to pay out of the recovery all or part of the costs and fees, a reasonable sum for the services and expenses of his attorney and any sum expended by the county or city under subdivision (b) [stenographic transcript provision].

CPLR 8018(b)(3) states, in pertinent part: "No fee shall be charged for the assignment of an index number . . . to a . . . poor person entitled by law to exemption from payment of fees to a county clerk . . . ."

Moreover, Section 202.6(a) of the Uniform Rules for the New York State Trial Courts exempts the payment of the RJI fee where an application for poor person relief is made:

> The court shall not accept for filing any . . . paper [specified in the section] unless accompanied by a written request for judicial intervention . . . except that where an application for poor person relief is made, payment of the fee for filing the request for judicial intervention accompanying the application shall be required only upon denial of the application.

22 N.Y.C.R.R. § 202.6(a).

[242]5 New York City Hearing, supra note 1, at 1080 (June 30, 1988) (testimony of Lauren Anderson) (lack of information regarding availability of in forma pauperis relief).

[243]Blank Litigators' Questionnaire, supra note 133, at 18.

[244]Data pertaining to services and information are provided in this Section. Data pertaining to physical maintenance and facilities are presented in Section II of this chapter.

Table II.1.9
Services That Litigators Want Provided in the Courthouses in Which They Practice*
(Numbers in parentheses are percentages)

	NEW YORK CITY				Outside N.Y.C.		
	White	Black	Hisp.	Asian	White	Minor.	TOTAL
Child Care	35 (41.7)	36 (51.4)	36 (51.4)	12 (33.3)	43 (57.3)	35 (62.5)	197 (50.4)
Public Information	50 (59.5)	42 (60.0)	38 (54.3)	20 (55.6)	33 (44.0)	23 (41.1)	206 (52.7)
Social Services	6 (7.8)	2 (2.9)	2 (2.9)	3 (8.3)	1 (1.3)	3 (5.4)	16 (4.1)
Legal Services	6 (7.1)	5 (7.1)	5 (7.1)	4 (11.1)	4 (5.3)	2 (3.6)	26 (6.6)
Other	11 (13.1)	11 (15.7)	22 (31.4)	5 (13.9)	6 (8.0)	7 (12.5)	62 (15.9)
Base: number of persons in each group who mentioned any service	84	70	70	36	75	56	391

*Numbers add up to a total greater than the base, and percentages add up to a total greater than 100 because of multiple responses.

Fewer than half of all litigators mentioned the need for any additional services. Among those who mentioned any service need, child care and public information received the largest number of comments. This is not surprising given that these two services were prompted in the wording of the question. Small proportions of litigators mentioned any other services. The "other" category includes mentions of interpreters, more/better staff, and improved attorney support; none of these was mentioned by more than ten persons in any group. There are no differences among groups.

Judges were also asked, "Are there public services that should be provided in your courthouse, but are not provided?"[245] Data on services are provided in Table II.1.10.

[245] Blank Judges' Questionnaire, supra note 134, at 17.

Table II.1.10
Services That Judges Want Provided in Their Courthouses
(Numbers in parentheses are percentages)

	White Judges	Minor. Judges
Child care	57 (22.7)	15 (34.1)
Handicapped access/system for hearing impaired	23 (9.2)	1 (2.3)
Social Services (e.g. Counseling job referrals, homes for the evicted).	19 (7.6)	4 (9.1)
Base: Judges who indicated the need for any additional service.	251	44

It should be noted that fewer than half (44%) of the white judges and slightly more than a majority (58%) of the minority judges gave any response to this question. Among those who did, the largest percentages of both minority and white judges were clearly concerned about child care, which was not prompted in the wording of the question. This concern was voiced by one white judge as follows:

> Day care, too, must be provided in the courthouse. Since most minority litigants in [New York City] Civil Court are black women (usually with small children) they are frequently forced into unfair agreements simply because they have nowhere to put their children should they want to negotiate longer or have a trial.[246]

Another white judge wrote the following:

> The Family Court desperately needs enhanced facilities for families in litigation and crisis, particularly for those individuals who are borderline eligible for Legal Aid, 18-B and Law Guardian services. More attorneys, more psychologists, more psychiatrists and more counseling programs must be designed and provided for our litigants who are often poor women, blacks, Hispanics and very often nearly illiterate who come to this court in [a] time of real need for judicial intervention.[247]

---

[246] Judges' Questionnaire, supra note 121.

[247] Id.

It is interesting to note some of the characteristics of the courts on which judges who suggested child care sit. Over one quarter (26%) of the judges who suggested child care preside over Family Courts, 26% are in the Supreme Courts, 20% are in New York City Civil Courts and 18% are in New York City Criminal Courts. There was no significant difference in the frequency with which judges who preside over criminal and civil courts suggested child care services. The availability of child care in the courthouse seems to be an urban concern. Eighteen percent of judges in New York City suggested the necessity of child care, compared to 7% of judges outside New York City.

Negative Experiences With "Ghetto Courts"

One judge testified before the Commission regarding the issue of "underutilization" of the courts by the minority community that, "it is very hard to come by hard data."[248] He suggested, however, that underutilization may result from the fact that "too often the minority community member['s] experience with the court has been involuntary, and, [in] most instances, negative. It's either been an arrest, eviction, or foreclosure, or garnishment."[249]

Additional witnesses linked the negative experiences of many minorities with the issue of underutilization in a variety of contexts. Data adduced before this Commission indicate, for example, that most of the plaintiffs or petitioners in Housing Court are landlords attempting to evict tenants.[250] Minority tenants, by contrast, do not affirmatively employ

---

[248] 3 New York City Hearing, supra note 1, at 522 (June 30, 1988) (testimony of Hon. Joseph B. Williams).

[249] Id. The issues of negative experiences with the courts, insofar as they pertain to the adequacy of court facilities and courtroom treatment, were treated above in Sections II and III. Chs. 3 and 4 of this volume treat the issues of negative experiences, insofar as they pertain to criminal penalties and civil case outcomes, respectively.

[250] Housing Court Report, supra note 87, at 47.

the courts to seek redress for what are often inadequate housing conditions for the following reason:

> [They] do not perceive -- and for the most part justifiably -- that they are likely to get real redress in the court. . . . The right to the rent is considered [by the courts to be] far greater a right, far more important a right, than the right to a decent, adequate living facility.[251]

An attorney testified that her client, a black grandmother, affirmatively did seek legal relief from the Family Court. In that case, her client had petitioned for custody of her grandson, who had been placed with the Commissioner of Social Services:

> [She] was reduced to tears by the sitting judge in the intake part who in no uncertain terms told her that she had a great deal of nerve to assume that she had a prior right over the Commission[er] of Social Services to determine the best interest of the child.[252]

Based on this and other observations, this attorney concluded that "people coming before the family court are treated by the personnel frequently and also frequently by the judges as criminals."[253]

Informational Barriers

Informational barriers also have a disproportionate impact on minorities. First, a greater proportion of Blacks and Hispanics in comparison to Whites, are not high school or college graduates.[254] In one survey, the National Center for State Courts determined that

---

[251] 1 New York City Hearing, supra note 1, at 61-62 (testimony of Hon. Yvonne Lewis); 2 Id. at 454-55 (testimony of Gustave Sosa).

[252] 1 Id. at 74-75 (testimony of Karen Martin).

[253] Id. at 74.

[254] See Black New Yorkers, supra note 229, 14 & Table I-L (Nov. 1988) (New York data); New Hispanic Immigrants, supra note 46, at 8-9 (1984) (New York City data). With respect to Asian Americans, as a whole they are more likely to possess high school, college and graduate school degrees or to have post-college education than the rest of the population, but available data indicate that education for certain immigrants could have been obtained abroad. See New York City Report on Asian Americans, supra note 53, at 14; Outlook - The Growing Asian Presence in the Tri-State Region 15 (1987).

Blacks and Hispanics have less information about the court system than do Whites.[255] As the following statement by a Korean-American witness indicates, the lack of such information can decrease the likelihood that minorities will make use of the courts:

> [W]hy is it that my fellow Koreans do not participate in this [judicial] system? Why do we not embrace this forum that potentially gives equal time to each individual regardless of race, color, religion, wealth, or level of education? Why do we [not], after all avenues for conciliation are exhausted, pursue our rights? Why do we stand by while injustices are done to us and not seek assistance when available? It is because we do not know our rights and due processes under the law. It is because we do not know that the judicial process is open to us. It is because Koreans have not understood what is available nor how to exercise the rights conferred to us by the United States Constitution.[256]

Second, minority litigants lack practical information concerning the use of the courts. One witness put it as follows:

> There is no attempt to have any sort of information distributed in the courts in the [form] of pamphlets or information in the [form] of just a booth in the lobby where somebody can come and say, ["H]ey, what's going on, where do I go, what happens here?["][257]

One witness testified that the only OCA brochure she could locate after considerable effort was one relating to Small Claims Court. She gave the following explanation of why the dissemination of information regarding procedures was important to utilization:

> The lack of information [such as brochures] available explaining litigation procedures . . . probably affects minorities to a greater extent. Information is vital and will encourage use of the court system to solve problems and disputes. Individuals need information to determine if choices are available. Information is needed on alternative approaches to resolving problems or disputes such as mediation, but if you don't know about them you can't choose

---

[255] National Center Report, supra note 7, at 4, 11 (Table I-7).

[256] 5 New York City Hearing, supra note 1, at 1074-75 (June 30, 1988) (testimony of Nicole Yae Kyoung Kim).

[257] 3 Id. at 634-35 (testimony of Lawrence Vogelman).

them. Information is needed to understand just what is ahead in terms of time, money, and legal assistance required.[258]

Language Barriers

As detailed in Chapter 5, language barriers are formidable to many Asian Americans, Haitian Creoles, and Hispanics, who, if their fluency in English is limited, may not be able to understand court proceedings and may, therefore, not seek the intervention of courts to redress their grievances. An Asian-American witness testified, for example as follows:

> The[] mother language is different. This is for the first generation. The second generation wouldn't have any problem. However, the question still confront[s] us, because [it's] continuous . . . .[259]

In Housing Court, the language barrier may be especially difficult for Hispanic litigants who, according to a courtroom observational study, comprised 26.4% of all tenants -- twice their representation among the New York City population.[260] As noted above, however, very small proportions of cases were commenced by the tenants themselves.[261] This study did not isolate race data relating to Hispanic tenants who were among the petitioners.[262]

Cultural Considerations

In addition to linguistic barriers, differences in cultural values may deter persons of some nationalities from using litigation to settle differences.

---

[258] Albany Hearing, supra note 32, at 85 (testimony of Maria Lanides).

[259] Id. at 46 (testimony of Walter Kiang). See also, 5 New York City Hearing, supra note 1, at 1031 (June 30, 1988) (testimony of Wing Lam).

[260] Housing Court Report, supra note 87, at 30, 32 (Table 4.1). Some of this discrepancy may be due to the fact that "[c]ensus data [for] persons of hispanic origin are not clearly defined." Id. at 30.

[261] Id. at 47.

[262] See ch. 5 for a further discussion of barriers facing linguistic minorities.

One commentator has noted that, largely due to the influence of Buddhist, Taoist or Confucian doctrines, "in Asian society the use of law as a method for settling disputes is regarded as something to be avoided."[263] Thus, there is a preference among some first-generation Chinese Americans, for example, to settle legal disputes through informal mediation and community groups. This preference was echoed by several Asian-American hearing participants.[264] Among Chinese Americans, the cultural emphasis on amicable resolution of disputes, coupled with the traditional view of Chinese courts as "place[s] of punishment first and citadels of justice second . . . still exert a powerful influence on people."[265]

Transportation Problems

As recognized by the National Center for State Courts, geographical barriers deter some minorities from use of the courts.[266] Thus, the Commission asked litigators to report on the frequency with which transportation problems cause delays for minority and white clients.[267] Findings relevant to these two items are provided in Table II.1.11.

---

[263] Kahng, Asian Americans and Litigation, Equal Opportunity Forum 2 (March 1977).

[264]
> Asian Americans have not fully utilized the judicial process due to several reasons . . . includ[ing] . . . a cultural heritage of avoiding litigation. . . .
>
> * * *
>
> The Chinese American community has always been composed mostly of immigrants who brought with them cultural traditions. One of these is the esteem for harmony and the avoidance of conflict.

4 New York City Hearing, supra note 1, at 730-32 (June 30, 1988) (testimony of Robert Wu).

[265] Id. at 733.

[266] National Center Report, supra note 7, at 109.

[267] Blank Litigators' Questionnaire, supra note 133, at 7-8.

Table II.1.11
Frequency of Transportation Problems for Minority and White Litigants
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NYC						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
Transportation problems cause delays for white litigants.	6 (6.2)	24 (23.9)	71 (69.9)	2 (2.3)	28 (31.8)	58 (65.9)	5 (5.6)	29 (32.6)	55 (61.8)	3 (6.7)	11 (24.4)	31 (68.9)	5 (3.9)	42 (35.0)	73 (61.1)	4 (5.1)	22 (27.8)	53 (67.1)	25 (4.8)	156 (29.9)	341 (65.3)
Transportation problems cause delays for minority litigants.	36 (34.7)	25 (23.9)	43 (41.3)	48 (48.5)	21 (21.2)	30 (30.3)	42 (45.2)	28 (30.1)	23 (24.7)	11 (23.9)	14 (30.4)	21 (45.7)	21 (18.8)	45 (40.1)	47 (41.1)	40 (49.4)	19 (23.5)	22 (27.2)	199 (37.0)	152 (28.4)	186 (34.6)

Significantly smaller proportions of all litigators reported that transportation problems have an impact on white (5%) than on minority (37%) clients "often/very often." There are no significant differences among groups in their experiences regarding white client transportation problems. There are also no differences among litigators in New York City regarding the frequency of problems for minority clients. Thus, 35% of white, 49% of black, 45% of Hispanic, and 24% of Asian-American, litigators in New York City reported transportation problems for minority clients "often/very often." Significantly, fewer white (19%) than minority (40%) litigators outside New York City reported a high frequency of transportation problems for minority litigants. As a whole, litigators reported a significantly greater frequency of problems for minority than for white litigants. An Hispanic litigator noted, "There is total insensitivity to problems of minority litigants." He observed the following situation in which a litigant arrived late to court:

> [Litigant:] "I was late judge because I couldn't get someone to babysit and I needed to borrow the carfare."
>
> [Judge:] "Well, I can't do anything about that[;] you should have come to court anyway. That isn't the [opposing party's] problem."[268]

[268] Litigators' Questionnaire, supra note 99.

FINDINGS

1. There is a general public perception of bias in the courts of the State of New York.
2. Vestiges of long-standing discrimination by a variety of institutions and entities against Blacks, Hispanics, Asian Americans and Native Americans pervade their respective perceptions of their ability to achieve justice in the courts of the State of New York.
3. The facilities of many courts used mainly by minorities -- particularly the so-called "ghetto courts" of the City of New York, namely, the Family, Criminal, Civil and Housing Courts -- are grossly deteriorated and inadequate.
4. The lack of readily available information about the court system makes it difficult for all users of the court system to negotiate the system.
5. The minority litigant who enters the courtroom may perceive the environment to be hostile, especially in the "ghetto courts."
6. Nearly half of all litigators surveyed by the Commission reported experiences of unfair, insensitive or otherwise different treatment of minority attorneys, litigants, jurors and witnesses in New York State courtrooms. Substantial proportions of judges also reported such behavior.
7. Court personnel are frequently disrespectful of and discourteous to minority litigants, family members, and witnesses. They refer to them by derogatory terms such as "skel" (defined as "bum, worthless person, trash, nigger").
8. The confidence of minority litigants in the court system is undermined by the speed with which their cases are frequently decided, a phenomenon known as "assembly line justice."

9. There are many barriers to greater utilization of the court system by minorities. Minorities often cannot afford counsel or overcome serious language barriers; in addition, they perceive the courtroom as a culturally alien and hostile place.

RECOMMENDATIONS

1. The City of New York must take prompt action to cure the crisis regarding the deteriorated facilities of the "ghetto courts" by implementing the 1989 Master Plan. The City should avail itself of funding mechanisms authorized by statute. At the very least, the crisis regarding the physical condition of deteriorated "ghetto courts" must be addressed by the avoidance of space allocations that crowd "ghetto court" facilities.

2. To the extent that the Office of Court Administration has not implemented programs of sensitivity training for judges and nonjudicial personnel, it should implement such programs. Training should include, as a critical component, a program of "cross-cultural competence," which would include: (a) the capacity to understand and appreciate different values, languages, dialects, cultures and life styles; (b) a capacity for empathy that transcends cultural differences; (c) avoidance of conduct that may be perceived as demeaning, disrespectful, discourteous or insensitive to persons from other cultural groups; and (d) a critical understanding of stereotyped thinking and a capacity for individualized judgment.

3. The court system should be made more "user-friendly." This can be accomplished through at least two means:

(a) First, there should be an Office of Ombudsperson in each court to assist all persons entering the court to understand court processes, secure interpretation

services and locate facilities (such as child-care facilities, where they exist). The Office of Ombudsperson would also notify all users of a court (i) that complaints about the court or about court personnel can be made to this office, and (ii) that such office would attempt to resolve all complaints expeditiously.

(b) Second, informational brochures, written in easily understandable English and translated into Chinese dialects, Haitian Creole, Korean and Spanish, should be published and made available in each clerk's office and Office of Ombudsperson. These brochures should contain information relating to dispute-resolution entities other than the courts.

4. The judicial outreach program to communities that is being conducted by the Office of Court Administration on a pilot basis and the voluntary judicial mentoring of high school students should be continued and expanded.

5. Existing court tour programs sponsored by the Office of Court Administration should be expanded, taking into account the needs of "language minorities," including Asian Americans, Haitian Creoles and Hispanics.

[Commissioner Davis issues a separate statement as to the entire report, appended to Volume IV.]

CHAPTER TWO LEGAL REPRESENTATION

CHAPTER 2

LEGAL REPRESENTATION

CHAPTER OVERVIEW

> I believe that inadequate legal representation of poor and middle class people is one of the basic causes of racial unfairness in the N[ew] Y[ork] S[tate] Unified Court System, since most minorities are poor or middle class and often cannot find or afford a competent lawyer to represent them in times of need. Until legal aid/legal services for the poor is greatly expanded and until [it] is made available and affordable for the middle class, the vast majority of the minority people will either not get their day in court, when they need it, or else will not be well-represented by competent counsel when they do get their day in court.[1]

The issues of quality and availability of legal representation for minorities are inextricably tied to the more general issue of legal representation for the poor. The statistics on poverty in the State of New York show that a significant proportion of the population lives at or below the poverty level and that racial and ethnic minorities are disproportionately represented among them. Overall, 14.6% of the state's population lived in households with incomes below the federal poverty line in 1987. In 1987, 11.5% of the state's white population were living below the poverty line; 31.6% of the state's black population were living below the poverty line; and 38.0% of the state's Hispanic population were living below the poverty line.[2]

Because of the disproportionate number of minorities among the poor, the

---

[1] New York State Judicial Commission on Minorities, Responses to Questionnaire for Litigators in New York State on Issues Relating to Professional Experiences and Perceptions of Fairness and Sensitivity in the Courtroom [hereinafter Litigators' Questionnaire].

[2] New York State Dep't of Economic Development, Tabulations from the Current Population Survey For New York State 4-5 (Mar. 1988) (Tables 3, 4) (introduction provides explanation of population sample used and the sampling variability). See also R. Plotnick and S. Dansinger, Poverty Rate by State in the Mid 1980's: An Update, Focus (Fall 1988).

Commission examined studies that address the issue of legal representation for the poor and the adequacy and availability of legal representation for minority defendants/litigants.

The New York State Constitution mandates representation in all criminal cases but does not set forth guidelines regarding the quality of the representation that must be made available.[3] While there is no constitutional mandate for civil representation, studies clearly demonstrate that minorities are overrepresented among those persons without access to legal representation in civil court.[4] Although a mandatory obligation on the part of private attorneys to provide pro bono service is often discussed, there is considerable controversy within the profession as to whether attorneys should be required to provide such services.

Accordingly, Section I of this chapter sets forth a brief history of legal representation in both the criminal and civil courts of New York State. Section II discusses data on the adequacy and availability of counsel provided to indigents in the criminal context. Section III examines the problem of the unavailability of legal counsel for poor people in civil matters. Section IV details the Commission's findings regarding the impact of inadequate representation in housing court. Finally, Section V describes some efforts to increase the availability of legal counsel.

I. HISTORY OF INDIGENT LEGAL ASSISTANCE

Over the years, the State of New York has increasingly recognized the importance of legal representation for indigents. The Commission has attempted to determine the extent to which this trend has increased access to the courts for minority litigants.

---

[3] See N.Y. Const. art. I, §6.

[4] See New York State Judicial Commission on Minorities, Legal Representation of Minorities: Background Briefing Paper #3 at 15-25, in vol. 5 of this report.

A. Criminal Cases

At the turn of the 20th century, lawyers began to move away from criminal practice towards corporate law in an effort to achieve higher status in the profession.[5] Simultaneously, there was a period of massive immigration.[6] Because there was failure on the part of the private bar[7] to offer pro bono defense services, most of these cases came to be defended by court-assigned private counsel.[8]

This group of lawyers was heavily criticized for alleged unethical behavior and poor-quality work. Specifically, these "courthouse regulars," as they came to be called, were said to gouge fees from poor clients, to provide incompetent and inadequate representation, and to prolong trials unnecessarily through the use of excessively adversarial tactics.[9] Reformers campaigned to replace the court-assignment system for indigents with a public defender's office.[10]

The first "indigents-only" public defender office was established in Los Angeles in 1914.[11] These new public defender agencies saw their role as that of nonadversarial, quasi-judicial officers, analogous to that of public prosecutors, whose goal was to foster accuracy

---

[5] J. Auerbach, Unequal Justice Lawyers and Social Change in Modern America 26 (1976) [hereinafter Auerbach]. See also McConville & Mirsky, Criminal Defense of the Poor in New York City, 15 N.Y.U. Rev. L. & Soc. Change 581, 599-600 (1986-87) [hereinafter McConville & Mirsky].

[6] See Auerbach, supra note 5, at 58-59 (the wave of immigration created "a vast unassimilated mass concentrated in urban ghettos, generating concern about lawlessness and disorder."); see also McConville & Mirsky, supra note 5, at 592-93 & n.43.

[7] See McConville & Mirsky, supra note 5, at 593 n.47 (defines "private bar" to refer to the private practice of law).

[8] See id. at 592-93 (noting growth in legal aid organizations to meet the need wrought by these changes).

[9] Id. at 597-99.

[10] Id. at 601.

[11] Id.

and efficiency within the criminal justice system.[12] Defenders who negotiated guilty pleas and obtained dismissals won support from the legal establishment because they helped to cut the costs of court administration and prosecution.[13]

In New York State, the establishment of a public defender's office was successfully opposed by the organized bar,[14] which resisted the socialization of legal services.[15] However, the gap was partially filled by the development of private agencies. A private charitable organization, the Deutscher Rechts-Schutz Verein, was founded in 1876 to provide legal aid in civil cases to German immigrants in New York County.[16] Its activities expanded beyond the German community in 1890, and the organization was reincorporated as the Legal Aid Society (LAS) in 1896.[17] In 1917, the Legal Aid Society's Voluntary Defenders' Committee began to provide defense in criminal cases as well.[18] The Defenders' Committee represented 500 criminal cases in 1917, growing to defend 1,600 in 1936.[19] Reincorporated as the Criminal Courts Branch of the Legal Aid Society in 1939, it was to become a principal provider of criminal defense services in the City, representing 35,506 cases by 1959.[20]

---

[12] Id. at 602-10.

[13] Id. at 605-10.

[14] Id. at 593 n. 47 (defines "organized bar" to refer to the organized sector of the private legal profession (e.g. City Bar Association)).

[15] Id. at 612-14.

[16] Id. at 614.

[17] Id.

[18] Id. at 618.

[19] Id. at 627.

[20] Id.

There were limitations, however, on the activities of the private charitable defenders, in part because they were not required to accept cases which were not to their taste, or in line with the stated principles of the organization. For example, the LAS declined to take homicide cases, for which attorneys could be compensated under the Code of Criminal Procedure, for fear of antagonizing the private bar through competition.[21] LAS also maintained a distinction, in evaluating who might qualify for their services, between the "worthy" poor and the "unworthy" poor.[22] In cases where the defendant was believed by the LAS attorney to be guilty, attorneys were encouraged to take a "confession" and facilitate, with the prosecutor, the speedy adjudication of the case without having to resort to trial.[23] Dismissal was encouraged in cases where the innocence of the defendant seemed clear.[24] The LAS was enthusiastically supported by the legal establishment because it attempted to replace the disreputable "courthouse regulars," and cut the cost of operating the criminal courts by avoiding trials.[25]

In 1961, the LAS began to receive funding for criminal defense work from the City of New York.[26] This permitted the agency to increase significantly its staff and caseload, and virtually to displace assigned private counsel, except in cases involving two or more indigent defendants. In 1963, the United States Supreme Court mandated that counsel be

---

[21] Id. at 625-26.

[22] Auerbach, supra note 6, at 56; see also McConville & Mirsky, supra note 5, at 615-16.

[23] McConville & Mirsky, supra note 5, at 619-23.

[24] Id. at 623.

[25] Id. at 623-26.

[26] Id. at 633-34.

provided to all defendants charged in felony indictments[27] and that such criminal defense be adversarial in nature, in contrast with the "cost-efficiency" approach taken by such institutional providers as the LAS.[28] The City responded by (1) engaging the LAS as a private contract defender to represent indigent defendants in most criminal cases in exchange for a fixed yearly fee, and (2) establishing an 18-B Panel,[29] comprised of private attorneys who were reimbursed for time and expenses in handling cases of homicide (at the judge's discretion), cases involving a conflict of interest with the LAS, multiple-defendant cases, and cases involving unusual circumstances.[30] The 18-B Panel was conceived as performing a function peripheral to the institutional defense provided by the LAS. Its compensation rates were intended to cover the expenses incurred by otherwise employed defense attorneys, not to provide a livelihood to full-time assigned counsel.[31]

B. Civil Cases

On the civil side, the awakening of interest in the rights of the poor led to the creation of federally funded "neighborhood law firms" under the auspices of the Office of Economic Opportunity (OEO) in 1964. The OEO program spawned legal service agencies throughout the country which expanded and came under the reorganized aegis of the Legal Services Corporation (LSC) in 1974.

---

[27] See Gideon v. Wainwright, 372 U.S. 335 (1963).

[28] See McConville & Mirsky, supra note 5, at 636-38.

[29] See N.Y. County Law art. 18-B, § 722 (McKinney Supp. 1991). Article 18-B provides for the operation of a plan for providing counsel for persons charged with crimes, or parties who are entitled to counsel pursuant to sections of the family court act or the surrogate's court procedure act, who are financially unable to obtain counsel. Such counsel are commonly referred to as "18-B lawyers."

[30] See McConville & Mirsky, supra note 5, at 646-47.

[31] Id. at 650.

Prior to this, the LAS had been the major provider of legal assistance to the poor in civil as well as criminal cases, but, in the civil area, as in the criminal area, there were limitations as to the type of cases accepted. The LAS declined to handle disputes in which the amount of money involved was considerable, for fear of antagonizing private lawyers.[32] The range of cases handled was also limited by the moral standards imposed by the organization. For example, the LAS refused to handle most divorces, bankruptcies, personal injury claims, or workers' compensation claims.[33] The decision to provide civil legal aid to the needy "focused on the character of the client as well as the character of his legal problem."[34]

With the advent of federal funding for civil legal services, legal aid organizations could no longer restrict the types of cases which they would handle. Programs which received federal funds were required to accept all categories of cases from eligible clients.[35] In addition, federally funded programs began an enthusiastic campaign of "impact" litigation designed to improve poor clients' access to government services and to effect legal reform.[36] These were particularly important for poor minorities since discrimination in public benefits programs had long been a concern.[37]

---

[32] Auerbach, supra note 5, at 56.

[33] See id.; see also Breger, Legal Aid For the Poor: A Conceptual Analysis, 60 N.C. L. Rev. 282, 300-01 (1982) [hereinafter Breger].

[34] Breger, supra note 33, at 301.

[35] Id. at 301-02.

[36] See Katz, Caste, Class, and Counsel for the Poor, Am B. Found. Res J. 251, 266 (1985).

[37] See generally id.

With the consolidation of civil legal services under the LSC, an active campaign was begun to expand programs to achieve "minimum access" to the legal system.[38] "Minimum access" required that two LSC lawyers be made available for every 10,000 eligible clients.[39] The goal had nearly been achieved in 1981--the LSC provided 85% of all funding for civil legal assistance programs nationwide and the programs served more than 1.2 million people annually--when the first attempt was made to eliminate the LSC from the federal budget.[40] In the decade which followed, although Congress resisted the attempt totally to disband federally supported legal services, the program was severely curtailed. The chairman of the LSC called for the abolition of the LSC,[41] and lawsuits by conservative activists sought to restrict the activities of LSC programs.[42] Repeated Reagan Administration proposals to reduce the organization's budget allocation to zero resulted in a 25% budget cut instead.[43] The cut, however, also had a dramatic impact on LSC programs.[44]

The first round of cuts in the LSC budget represented a $5 million dollar loss for New York State legal services programs in 1982.[45] One of New York City's principal legal aid organizations, Community Action for Legal Services (CALS), which is funded entirely by

---

[38] Ehrlich, Legal Services For Poor People, 30 Catholic U.L.R. 483, 484 (1981).

[39] Id.

[40] Murray, Access of Poor to Judicial System Continues as Legal Aid Society Goal, N.Y.L.J., Jan. 30, 1984, at 51, col. 1.

[41] See Durant, Entrepreneurial Justice, N.J.L.J., Feb. 26, 1987, at 5, col. 2. Durant's article provoked some heated responses. See, e.g., Trombadore, A Myopic And Short-sighted Vision, N.J.L.J., Mar. 5, 1987, at 5, col. 2; Miller, Second Class Justice -- Should the Poor Get Less?, N.J.L.J., Mar. 5, 1987, at 5, col. 3.

[42] Kornhauser, Suit Hits Congressional Limits on LSC, Legal Times, Oct. 26, 1987, at 2, col. 1.

[43] Glaberson, Legal Services Still Fighting for Life, N.Y.L.J., Aug. 30, 1982, at 1, col. 3 [hereinafter Glaberson].

[44] Id.

[45] Id.

Federal funds, found in 1982 that it had assisted 29% fewer clients in government benefits disputes, and 34% fewer clients in housing cases than it had before the LSC cuts occurred.[46] The other major legal aid group in the City of New York, the LAS civil division, received only 14% of its funding from the LSC and was thus less vulnerable than CALS to Federal budget cuts.[47] Hardest hit of all were the rural and suburban legal services programs, which were smaller than urban programs to begin with and had more difficulty in absorbing necessary staff reductions.[48] Although funding was not reduced further after the 25% cut in 1981, inflation soon took its toll. By 1987, there were roughly half as many LSC lawyers as there were in 1980.[49]

Several states, including New York, adopted alternative financing programs to cover part of the loss of LSC funds. The state approved the voluntary Interest on Lawyer Account Fund (IOLA) program in 1983.[50] Participation in the program became mandatory in February 1989.[51] By mandating participation in IOLA, it is expected that the amount available to legal aid organizations from this source will triple (from $2 million to $6 million).[52] There have also been efforts to fill the growing gap in services through private donations and pro bono work on the part of private practitioners.

---

[46] Fox, Legal Aid, CALS Launch Joint 'Pro Bono' Drive, N.Y.L.J., Oct. 19, 1982, at 1, col. 4.

[47] Communication by Archibald R. Murray, Executive Director and Attorney-in-Chief, Legal Aid Society, to the New York State Judicial Commission on Minorities (July, 1989).

[48] See Glaberson, supra note 43.

[49] Englade, The LSC Under Siege, A.B.A. J., Dec. 1, 1987, at 66, 72.

[50] Act effective July 25, 1983, L. 1983, ch. 659, § 2 (codified as amended at N.Y. Jud. Law § 497 (McKinney Supp. 1991)).

[51] N.Y. Jud. Law § 497 sub. 4(a) (McKinneys Supp. 1991).

[52] Dean, Civil Legal Services for the Poor, N.Y.L.J., Sept. 19, 1988, at 3, col. 3; Wise, $4 Million a Year Seen for IOLA Fund, N.Y.L.J., Sept. 19, 1988, at 1, col. 5.

This century has seen significant expansion of legal services in general as well as explicit recognition of a constitutional right to counsel, at least in criminal cases. Still, existing legal services organizations are limited in the assistance which they can provide. Political opposition and funding restrictions, especially in the last decade, have exacerbated these limitations.

II. ADEQUACY OF COUNSEL PROVIDED IN CRIMINAL CASES

Most data on the criminal defense of the poor in New York State are from the City of New York, where the greatest number of cases arise. The City thus experiences the full range of problems endemic to criminal defense systems. The overwhelming majority of defense services for the indigent in the City are provided by annual contract between the Criminal Defense Division of the Legal Aid Society and the City. In certain circumstances, e.g., conflict of interest, criminal cases are handled by private practitioners assigned to the panels of such attorneys -- "18-B Panels."

The contract provides for fixed allocation and an 18-B Panel of private practitioners, who are reimbursed for time spent. The compensation for 18-B attorneys was last raised in 1985 to a rate not exceeding $25 an hour for out-of-court time and $40 an hour for in-court time, with certain exceptions for representation in an appellate court and for representation upon a hearing.[53] For representation in an appellate court, compensation

[53] See N.Y. Jud. Law § 35 (McKinney 1983 & Supp. 1991). A proposed rate increase to a flat $50 an hour, in or out of court, is pending. See Adams, Wachtler Unveils City Court Plan 52 New Judges, Community Courts, Special Gun Parts Included, N.Y.L.J., Oct. 10, 1990, at 1, col. 4.

and reimbursement may be fixed by the court, according to limitations set by law.[54] These two systems disposed of 163,821 cases in 1984.[55]

The most extensive study of legal representation for the poor appears in a study commissioned by the Committee on Criminal Advocacy of the Association of the Bar of the City of New York.[56] One of the report's conclusions is that the inadequate funding for the state's indigent defense system has resulted in unwieldy caseloads for both the LAS and 18-B defense attorneys.[57] The City initially planned to have the LAS function as the principal provider of criminal defense for the poor, with members of the 18-B Panels representing defendants only in homicide or conflict of interest cases.[58] This plan has not been realized due to an ever increasing caseload which has overwhelmed the LAS. The result has been increasing 18-B representation of criminal defendants.[59]

The growth of the 18-B Panel has given rise to many concerns. One of the most important problems is the selection of Panel members. The approval process for 18-B attorneys is not very rigorous.[60] Approved attorneys also do not enjoy the range of training opportunities, monitoring mechanisms, staff support, or research and investigation assistance

---

[54] See N.Y. Jud. Law § 35 (McKinney 1983 & Supp. 1991).

[55] McConville & Mirsky, supra note 5, at 872.

[56] See The Committee on Criminal Advocacy, Association of the Bar of the City of New York, A System In Crisis: The Assigned Counsel Plan In New York: An Evaluation and Recommendation For Change (undated) [hereinafter A System In Crisis].

[57] See id.

[58] See id. at 11-12.

[59] See id. at 15-19.

[60] Id. at 31-34.

available to LAS attorneys.[61] McConville and Mirsky's survey of 862 Panel attorneys demonstrates the salience of such concerns.[62] Only 16% of the survey respondents were asked to go before a screening committee to demonstrate their qualifications.[63] Only 44% took clinical courses at law school (compared to 67% of LAS attorneys).[64] Forty-three percent of the Panel attorneys relied upon court assignments for more than half of their criminal practice, and fully 69% of the Panel attorneys are solo practitioners, whose small practices often preclude access to staff support and research resources.[65]

McConville and Mirsky, the Bar Association Committee on Criminal Advocacy, and the LAS all agree that the increasing number of cases going to the 18-B Panel results in inadequate defense services.[66] The 18-B system functions in such a way that many attorneys are deprived of basic support services, and continuous representation is discouraged. Thorough investigation of facts or the use of expert witnesses is very difficult because an 18-B attorney must submit a motion to the court and have it approved before being permitted to engage an investigator or expert. LAS, on the other hand, has access to these services in-house.[67]

---

[61] See id. at 19-34; McConville & Mirsky, supra note 5, at 715-74; see also Mounts & Wilson, Systems For Providing Indigent Defense: An Introduction, 14 N.Y.U. Rev. L. & Soc. Change 193 (1986).

[62] McConville & Mirsky, supra note 5, at 707.

[63] Id. at 729-30 n.785.

[64] Id. at 732.

[65] Id. at 720-721, 744.

[66] See id. See also A System In Crisis, supra note 56; New York State Judicial Commission on Minorities, Summary of Meeting with I. Goldart (Deputy Attorney-in-Charge, Criminal Defense Division) and S. Lindenauer (Counsel to the Executive Director, Legal Aid Society) (July 17, 1989) [hereinafter I. Goldart and S. Lindenauer].

[67] I. Goldart and S. Lindenauer, supra note 66.

Although McConville and Mirsky's criticisms of LAS have been disputed, both the Committee on Criminal Advocacy and LAS agree with the study's depiction of the 18-B Panel as providing inadequate and discontinuous representation.[68] All concur that hasty case processing and the excessive rate at which cases are transferred from LAS to the 18-B Panel are the result of underfunding.[69] This failure to fund properly and to reform the indigent defense system may be difficult to cure, however, because it serves the financial interests of both local governments and the court administration.

Of particular note is a recent study by the Association of the Bar of the City of New York, Subcommittee on Advocacy Misconduct. That study found that 50% of 123 federal and state judges who hear criminal cases in New York City believed that advocacy misconduct is a "serious" or "very serious" problem,[70] and two-thirds of the judges polled believed existing sanctions are of "little use" or "no use."[71] Approximately half of these judges declared defense attorneys to be the "major offenders" in this regard, and some singled out LAS and 18-B attorneys as most responsible.[72]

For 76% of the judges, the major occurrence of misconduct is the failure to make required court appearances.[73] More than half of the judges cited disrespectful behavior

---

[68] Association of the Bar of the City of New York, A System in Crisis, The Assigned Counsel Plan in New York: An Evaluation And Recommendations For Change (1986).

[69] I. Goldart and S. Lindenauer, supra note 66.

[70] Subcommittee on Advocacy Misconduct, Association of the Bar of the City of New York, Preliminary Report of the Subcommittee on Advocacy Misconduct 1 (undated).

[71] Id. at 3.

[72] Id. at 2.

[73] Id. at 3.

toward opposing counsel and/or the court; failure to file papers on time;[74] and tactics such as "baiting, tricking and insulting" witnesses, or questioning witnesses in a manner "particularly demeaning to minorities or women because of their jobs, neighborhoods, [or] lifestyles."[75] (Prosecutors, too, were charged with a range of misconduct including "racism in addressing witnesses,"[76] and attacking defendants based upon their prior background or material that had nothing to do with the crime charged).[77]

Outside New York City, there are public defender services in addition to the 18-B Panels. Unfortunately, many of the deficiencies evident in LAS and 18-B case processing are evident in the defender services. As one witness testified before the Commission:

> [T]here are 84 separate plans providing defense services in the State of New York in 62 counties at this point. There is not any qualifications training, either commitment-wise or experience-wise in 60 of those counties . . . . There are currently no performance standards for reviewing the issues that you [the Commission] are reviewing or any other aspects of trial performance in New York State. There is no mandatory training as an adjunct -- even skills training, not just sensitivity training, to represent any criminal defendant in the State of New York; and there is no procedural system for monitoring performance. It has not been, I think, therefore, an accident that the kinds of things that you heard, which are a reflection of a kind of step-child charity system, that these things occur.[78]

Efforts to remedy deficiencies in the defense system for the poor in general will obviously benefit the minority poor. However, some of the deficiencies in the system are

---

[74] Id.

[75] Id.

[76] Id. at 5-6.

[77] See Subcommittee on Advocacy Misconduct, Association of the Bar of the City of New York, Hearing on Advocacy Misconduct In Criminal Litigation 367-69 (May 10, 1989) (testimony of Hon. Milton Mollen).

[78] 4 New York State Judicial Commission on Minorities, New York City Public Hearing 854-55 (June 30, 1988) (testimony of Jonathan Gradess, Director, New York State Defenders Association) (hereinafter New York City Hearing).

specific to minority defendants and must therefore be addressed accordingly. For example, one black judge commented as follows:

> With respect to the [F]amily [C]ourt, in the county of Westchester, the County Attorney's Office prosecutes all j[uvenile] o[ffender], neglect, abuse, [and] [g]uardianship cases. Most of the respondents and families in this category are non-white. Most, if not all of the attorneys assigned to Family Court from the County Attorneys office have less than 2 years legal experience, limited courtroom experience, no significant training and in many cases are not admitted to the Bar yet. This works to the detriment of the respondents as well as the non-white and white children in whose interest these cases are brought. There appears to be an attitude that these issues and people are not important enough to warrant diligent and experienced attorneys.[79]

The Commission surveyed judges regarding the frequency with which minority and white litigants are inadequately represented.[80] Among those judges handling exclusively criminal caseloads, 2% reported that white litigants "often/very often" have inadequate legal representation, and 38% reported that this "sometimes" occurs. The comparable figures for minority litigants were 10% and 33% respectively. Regarding both minority and white litigants, judges in New York City "ghetto" courts reported a higher frequency of inadequate legal representation than did other New York City judges. Nine percent of "ghetto" court judges reported that white litigants are "often/very often" inadequately represented, but 28% made such reports of minority litigants. Five percent of other New York City judges said white litigants experience inadequate legal representation, but 18% said this about minority litigants. Among the white judges questioned, there was no statistically significant difference in their perceptions regarding the quality of representation available to white and minority

---

[79] New York State Judicial Commission on Minorities, Responses to Questionnaire for Judges in New York State on Issues Relating to Judicial Selection and Perceptions of Fairness and Sensitivity in the Courtroom [hereinafter Judges' Questionnaire].

[80] See New York State Judicial Commission on Minorities, Report of Findings From A Statewide Survey of the New York State Judiciary, § 4, in vol. 5 of this report [hereinafter Judges' Survey: Report of Findings].

litigants. Overall, minority judges reported poor quality of representation for all litigants more often than did white judges, but particularly for minority litigants. Larger proportions of minority (53%) than white (38%) judges reported that representation received by white litigants is "sometimes" inadequate. Minority judges reported a greater frequency of inadequate representation for minority litigants. Whereas only 6% of the minority judges surveyed responded that white litigants "often/very often" receive inadequate representation, 49% answered that minority litigants "often/very often" receive inadequate representation.

Significantly more litigators reported inadequate legal representation for minority than for white litigants. These data are shown in Table II.2.1.

Table II.2.1
Litigators' Assessments of the Adequacy of Legal Representation for White and Minority Litigants
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NYC						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
Minority litigants get inadequate legal represen-tation.	38 (30.8)	53 (43.5)	31 (25.8)	79 (62.7)	39 (31.0)	8 (6.3)	67 (57.8)	34 (29.3)	15 (12.9)	28 (46.7)	26 (43.3)	6 (10.0)	24 (17.6)	55 (40.3)	57 (42.1)	44 (46.8)	33 (35.1)	17 (18.1)	280 (42.7)	240 (36.7)	135 (20.6)
White litigants get inadequate legal represen-tation.	14 (10.9)	66 (52.5)	46 (36.5)	14 (12.2)	57 (49.6)	44 (38.3)	10 (9.5)	54 (51.4)	41 (39.0)	7 (11.1)	38 (60.3)	18 (28.6)	16 (11.6)	71 (51.3)	51 (37.1)	7 (8.0)	45 (51.7)	35 (40.2)	68 (10.7)	331 (52.2)	235 (37.1)

Thus, only 11% of white litigators in New York City reported that white litigants "often/very often" receive inadequate legal representation. Almost three times as many white litigators (31%) gave this same response in relation to minority litigants. Minority attorneys reported an even larger disparity in quality of legal representation for white and minority litigants. Among black litigators, 12% reported that inadequate representation for Whites occurs "often/very often," but 63% reported that this was true for minorities. Among Hispanic litigators, the comparable percentages were 10% for white, and 58% for minority litigants. Among Asian-American litigators, the percentages were 11% for white, and 47% for minority litigants. Among minorities outside New York City, the percentages were 8% for white, and 47% for minority litigants. Among Whites outside New York City, the percentages were 12% for white, and 18% for minority, litigants.

There were no significant differences among the groups surveyed regarding the frequency with which white litigants receive inadequate representation. The overall mean for all the groups was in the "sometimes" range. Thus, on average, litigators in all groups agreed that white litigants "sometimes"--that is, approximately 6%-25% of the time--receive inadequate legal representation. Although greater numbers of litigators from all the groups reported that minorities receive inadequate legal representation, there were significant differences among groups regarding the magnitude of the problem.

Black and Hispanic litigators rated inadequate representation of minorities as a more frequent occurrence than did white litigators either inside or outside New York City. Asian-American litigators in New York City, and minority litigators outside New York City, differed significantly from white litigators outside New York City, but not from white

litigators in New York City. Asian-American, Hispanic, and black litigators gave average frequency ratings in the "often" range for the inadequate representation of minorities. One African-American litigator from outside New York City wrote:

> The dismantling of the Legal Services Program has severely impacted the delivery of legal services to poor and disadvantaged people from around the country.
>
> The disenfranchised and powerless are legion. Access to the legal/judicial system is primarily limited to those fortunate enough to be able to afford it. The growing gap between the rich and the poor, black [and] white is intensified in criminal or civil proceeding[s] where ironically "equal protection" -- in the halls of justice -- is to a large part separate and unequal.[81]

A black litigator from outside New York City asserted:

> Most white litigants can afford a private attorney who will usually provide more adequate representation than his overworked and overloaded legal aid counterpart, who represents most of the minority litigants.[82]

Finally, an Asian-American litigator in New York City stated:

> Almost all 18B attorneys are white, and insensitive and unaware of the cultural issues of the extended Latino family which are important in the context of child placement.[83]

III. THE UNMET LEGAL NEEDS OF THE POOR IN NEW YORK STATE IN CIVIL MATTERS

An indigent litigant in New York State has a right to assigned counsel in civil proceedings only when required either by the due process clauses of the Federal or the State Constitutions or by statute. The United States Constitution requires that counsel be

---

[81] Litigators' Questionnaire, supra note 1.

[82] Id.

[83] Id.

appointed only if the litigant faces the loss of his or her physical liberty.[84] Otherwise, there is a rebuttable presumption against such a right, which is to be determined on a case-by-case basis in light of the particular facts and circumstances presented.[85]

New York State has recognized a right to counsel under the State Constitution in two instances not recognized by the United States Supreme Court under the Federal Constitution: termination of parental rights and final parole revocation hearings.[86] New York State also requires that counsel be appointed in a variety of surrogate court and family court proceedings.[87] Absent a constitutional or statutory right to counsel, the court has discretion to appoint counsel to serve without compensation.[88]

While there exists no clear constitutional mandate for providing civil legal services to the poor, recent studies have detailed the strong policy reasons for the provision of such services. A 1985 news article by Archibald Murray, Executive Director and Attorney-in-Chief of LAS, detailed the statistics on the unmet civil legal needs of the poor as follows:

1. There are approximately 2,000,000 poor persons in the City of New York who are eligible for free civil legal service.

2. Approximately 400,000 of those 2,000,000 will actually require the service of a lawyer each year.

---

[84] See Gideon v. Wainwright, 372 U.S. 335 (1963).

[85] See Lassiter v. Dep't of Social Services, 452 U.S. 18, at 31 (1981).

[86] See Lassiter v. Dep't of Social Servs., id. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[87] See N.Y. Fam. Ct. Act §§ 261, 262, 1120 (McKinney 1983 & Supp. 1991); Surr. Ct. Proc. Act § 407 (McKinney Supp. 1991). There may be exceptions to this requirement in support proceedings and for the petitioner in paternity proceedings. In these proceedings, the prevailing party may be entitled to an award of attorney's fees.

[88] See N.Y. Civ. Prac. L. & R. § 1102 (McKinney 1976).

3. The combined resources of all legal services agencies in the City of New York involved in providing the poor with legal services, allow them to help less than 60,000 poor people per year.[89]

In a 1989 study by the New York State Bar Association (NYSBA), surveys by mail of civil legal service programs, telephone surveys of a sample of low-income households, and on-site interviews with persons involved in the delivery of civil legal services, were conducted to determine the most pressing problems among those poor persons who had experienced more than one civil legal problem in a given year. The survey was designed to ascertain the statewide unmet civil legal needs of the poor. In excess of 60% of the problems were reported to have occurred more than once during the year, and repeat occurrences were not included in the total on which the statewide average for unmet legal need was calculated. The figure is characterized by the researchers as "a conservative estimate of the unmet civil legal need of the poor in New York."[90]

The most frequently reported problems of unmet legal need included:[91]

1. housing (reported by 34.4% of the respondents)
2. public benefits (reported by 22.1%)
3. consumer (reported by 15.4%)
4. health (reported by 15.2%)
5. utility (reported by 13.4%)
6. discrimination (reported by 11.1%)

The Commission, in cooperation with the Spangenberg Group, analyzed the data from the NYSBA's surveys to determine the unmet needs of the minority poor. The data allowed for

---

[89] Murray, Private Bar is Offered Opportunities to Provide Legal Services to the Poor, N.Y.L.J., May 1, 1985, at 27, col. 1.

[90] The Spangenberg Group, New York Legal Needs Study Draft Final Report 197 (Oct. 11, 1989) (report prepared for the New York State Bar Association) [hereinafter The Spangenberg Group].

[91] See id. 24-26. The categories of problems reported to be the most serious unmet legal needs in order of frequency with which they were reported included: housing (35.7%); public benefits (13.7%); health (11.8%); consumer (7.2%); utility (6.5%); discrimination (5.9%). Id. at 26-27.

analysis only of black-white comparisons. In each category, the black head of household reported significantly more unmet legal needs, on average, than Whites.[92]

As part of the Commission's survey of judges, questions were asked regarding the frequency with which minority and white litigants are unrepresented by counsel. Judges' ratings are shown in Table II.2.2.

Table II.2.2
Judges' Ratings as to the Frequency With Which Litigants Are In Court Without Legal Representation[93]
(Numbers in parentheses are percentages)

	WHITE JUDGES			MINORITY JUDGES			TOTAL JUDGES		
	Often/ Very Often	Some-times	Rare-ly/ Never	Often/ Very Often	Some-times	Rare-ly/ Never	Often/ Very Often	Some-times	Rare-ly/ Never
Minority litigants are not represented.	50 (13.0)	72 (18.8)	262 (68.2)	21 (41.2)	12 (23.5)	18 (35.3)	71 (16.3)	84 (19.3)	280 (64.4)
White litigants are not represented.	26 (6.7)	94 (24.1)	270 (69.2)	4 (8.2)	18 (36.7)	27 (55.1)	30 (6.8)	112 (25.5)	297 (67.7)

There are significant differences in the perceptions of white and minority judges on this question. Among white judges with civil court experience, 68% stated that minority litigants are "rarely/never" unrepresented, and 69% said the same of white litigants.

Fifty-five percent of minority judges said that white litigants, and 35% said that minority litigants, are "rarely/never" unrepresented. Conversely, among white judges, 7% stated that white litigants, and 13% stated that minority litigants, are "often/very often" unrepresented; among minority judges, 8% responded in this manner regarding white

---

[92] See Internal Memorandum from John Bassler to Edna Wells Handy (June 12, 1990) (regarding Report of Analyses on Unmet Legal Needs vs. Ethnicity) [hereinafter Legal Need Memo].

[93] For the purposes of this analysis, only the 384 white judges and the 51 minority judges who reported experience presiding over civil cases were included.

litigants, while 41% said that minority litigants are "often/very often" unrepresented. Whereas white judges saw no disparity between white and minority litigants, minority judges perceived a significant disparity. Minority judges stated that minority litigants are more often unrepresented than white litigants. While white judges reported no differences between white and minority litigants in terms of the frequency with which they lack counsel, minority judges reported a major difference.

Several judges commented on the lack of representation for minority litigants. For example, one white judge wrote:

> I believe the situation in the landlord-tenant parts of the Civil Court of the City of New York is outrageous. I believe minority pro se litigants are denied equal protection of the law on a daily basis there. They are opposed by highly skilled landlords' attorneys who regularly take unfair advantage of them. Many default judgments are obtained and minority respondents evicted from their homes without due process of law. The situation is horrendous.[94]

In fact, judges presiding over New York City Housing Court and Civil Court were more likely to report lack of representation for both minority and white litigants than were judges in the Civil Term of Supreme Court.[95] Among New York City "ghetto" court judges, 52% said that minority litigants lack legal representation "often/very often." The comparable statistic for white litigants is 22%. Among Supreme Court judges with civil court experience, 16% reported that minority litigants are unrepresented "often/very often." The comparable percentage for white litigants was 4%. These data support the findings presented in Chapter 1 regarding the adverse impact of "ghetto" courts. Not only are the physical conditions

---

[94] Judges' Questionnaire, supra note 79.

[95] Judges' Survey: Report of Findings supra note 80.

worse in these courts, but persons appearing in these courts are less likely to have an attorney.

Table II.2.3 contains results from the Commission's survey of judges reporting the frequency with which litigants appear in court with inadequate representation.

Table II.2.3
Judges' Reports as to Frequency With Which Litigants are in Court With Inadequate Representation
(Numbers in parentheses are percentages)[96]

	WHITE JUDGES			MINORITY JUDGES			TOTAL JUDGES		
	Often/ Very Often	Some-times	Rare-ly/ Never	Often/ Very Often	Some-times	Rare-ly/ Never	Often/ Very Often	Some-times	Rare-ly/ Never
Minority litigants have inadequate legal representation.	50 (10.0)	163 (32.6)	287 (57.4)	35 (48.6)	20 (27.8)	17 (23.6)	85 (14.9)	183 (32.0)	304 (53.1)
White litigants have inadequate legal representation.	20 (3.9)	192 (37.9)	295 (58.2)	4 (5.9)	36 (52.9)	28 (41.2)	24 (4.2)	228 (39.7)	323 (56.2)

There are significant differences between white and minority judges in terms of the reported frequency of inadequate representation of white and minority litigants. White judges perceive little difference between the representation of minority and white litigants. Approximately one third of white judges stated that both white (38%) and minority (33%) litigants "sometimes" receive inadequate representation.

Minority judges have a very different view regarding both white and minority litigants. A much larger proportion of minority (53%) than white (38%) judges reported that representation received by white litigants is "sometimes" inadequate. Minority judges reported a greater frequency of inadequate representation for minority litigants. Whereas

[96] For the purposes of this analysis, only the judges who reported experience presiding over civil cases were included.

only 6% of the minority judges surveyed responded that white litigants "often/very often" receive inadequate representation, 49% answered that minority litigants "often/very often" receive inadequate representation.

Significantly more litigators in all groups rated lack of representation of minority litigants in civil cases as a more frequent phenomenon than lack of representation of white litigants.

Table II.2.4 shows the litigators' assessments of the representation in civil cases for white and minority litigants.

Table II.2.4
Litigators' Assessments of the Representation in Civil Cases for White and Minority Litigants
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NYC						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
Minority litigants are unrepresented in civil cases.	20 (24.6)	23 (28.2)	38 (47.2)	55 (53.4)	34 (33.0)	14 (13.6)	58 (65.9)	15 (17.0)	15 (17.0)	22 (40.0)	25 (45.5)	8 (14.5)	27 (27.3)	29 (28.5)	44 (44.3)	33 (42.3)	34 (43.6)	11 (14.1)	215 (42.6)	159 (31.6)	130 (25.8)
White litigants are unrepresented in civil cases.	9 (10.6)	31 (37.0)	44 (52.4)	7 (7.1)	31 (31.6)	60 (61.2)	10 (11.8)	30 (35.3)	45 (52.9)	6 (10.5)	29 (50.9)	22 (38.6)	15 (13.8)	39 (36.7)	53 (49.5)	3 (4.1)	38 (51.4)	33 (44.6)	50 (9.8)	198 (39.3)	257 (50.9)

Among white litigators in New York City, more than twice as many reported that lack of representation of minority litigants, as contrasted with lack of representation of white litigants, happens "very often/often" (25% as compared to 11%). Among black litigators, 53% stated that minorities are "very often/often" unrepresented, while only 7% stated that Whites are similarly unrepresented. Among Hispanic litigators, 66% stated that minorities are unrepresented, and 12% stated Whites are unrepresented, "very often/often." Among Asian-American litigators, 40% gave this response for minority litigants, and 11% for white litigants. Among white litigators outside New York City, 27% gave this response for minorities and 14% for Whites. Finally, among minority litigators outside New York City, the comparable figures are 42% for minorities and 4% for Whites.

Litigators in all groups are in agreement regarding the frequency with which white litigants are unrepresented in civil cases, and there are no significant differences among groups. There are, however, significant differences among groups in terms of their ratings of the frequency with which minority litigants are unrepresented. White litigators reported such lack of representation for minorities as being less frequent than did black, Hispanic, and Asian-American litigators in New York City or minority litigators outside New York City.

Taken together, these findings support the conclusion that the absence of civil representation falls disproportionately upon minority litigants. A large proportion of litigators in all groups are in agreement that minority litigants are more likely to lack representation than are white litigants. Litigators made several comments regarding this problem. For example, an Asian-American litigator in New York City wrote:

> Judge . . . told a poor Hispanic female pro se tenant that he was going to give her more time to pay the amount owed and then something to the effect [that] a good looking woman like her could get a waitressing job and have no problem getting good tips.[97]

An Hispanic litigator outside New York City stated:

> In family court minority families tend to have poor legal representation and therefore many times must wait longer to have their children returned to them.[98]

Another Hispanic litigator in New York City stated:

> For poor people in general, and African-Americans and Latinos in particular, a bottom line issue . . . is access to the courts for dispute resolution, and/or adequacy of representation. Minorities generally have limited access to the courts, or cannot obtain the 'best possible' representation, because of limited monetary resources. The justice system as a whole continues to work most favorably for those with the most money and/or status.[99]

IV. LACK OF REPRESENTATION IN HOUSING COURT

The NYSBA's survey identified housing as the most frequent and the most serious unmet legal need.[100] Housing was the most frequently reported problem of unmet legal need in every region in New York State except upstate rural counties, where public benefits was ranked as the most frequent problem.[101] In New York City, unmet legal needs in housing were reported most frequently, with 41% of the respondents reporting at least one unmet housing legal need.[102] The Commission's further analysis of the NYSBA survey

---

[97] Litigators' Questionnaire, supra note 1.

[98] Id.

[99] Id.

[100] The Spangenberg Group, supra note 90, at 198.

[101] Id.

[102] Id.

data reveals that more Blacks than Whites experienced at least one housing-related problem.[103]

Housing court presents a vivid example of what is wrong with the court system's treatment of minorities and the minority poor. The following comments illustrate how the absence of counsel exacerbates the problem of the treatment of minority litigants in housing court. An Hispanic litigator in New York City commented:

> Essentially, my comments relate to the manner in which minorities, particularly poor pro se defendants are treated in Housing Court. Although I have found some court staff, clerks, law assistants wh[o] have endeavored to be helpful, I have also found unsympathetic judges and in some cases judges who apparently go by some rather offensive stereotypes. Although there have been instances of judges making sexist or racist statements, the unfair and prejudicial treatment is often more insidious and subtle. It is often evident in cases where a judge impatiently discounts the veracity of a pro se tenant's complaint because the tenants may be inappropriately attired, perhaps not fluent in English whereas the agent for the landlord is appropriately attired and almost invariably appears with an attorney.[104]

Another Hispanic litigator in New York City commented:

> [Judge]s speaking to pro se minority litigant: "Ms. X you have to demonstrate both an excusable default and meritorious defense in this [ ] hearing." [The] litigant has a blank look on her face. She obviously doesn't understand what the judge is talking about and the judge just looks at her and says "proceed [with] your case."[105]

Another Hispanic litigator in New York commented that:

> In Brooklyn's Housing Court, unrepresented minority litigants are routinely treated disrespectfully by certain court personnel and attorneys (and sometimes by the judges).[106]

---

[103] See Legal Need Memo, supra note 92.

[104] Litigators' Questionnaire, supra note 1.

[105] Id.

[106] Id.

A white litigator in New York City recalled:

> A judge telling his court clerk not to explain to a pro se minority litigant what an adjournment was.[107]

In New York City, only 20.8% of the tenants who appear in housing court for any type of proceeding (e.g., pretrial, mediation, judge-heard cases, etc.) are represented by counsel.[108] Irrespective of the type of proceeding, groups are represented in the following percentages: 17% of black tenants, 19% of Hispanic tenants, and 33% of white tenants.[109] Representation in judge-heard cases follows a similar pattern (18% of blacks, 17% Hispanics, and 38% Whites).[110]

The Commission's secondary analysis of the City Wide Task Force report, discussed in Chapter 4 (on civil outcomes), provides evidence of racial disparities caused by the absence of counsel. That analysis demonstrates that a relationship exists between tenant race and certain procedural or outcome variables, and where the relationship was altered when the tenant was represented by counsel.[111] For instance, in cases before a mediator, the relationship between tenant race and the party writing the stipulation was observed; and in cases heard by a judge, the relationship between tenant race and the adjourning of cases, and the granting of requests for rent abatements was analyzed.[112]

---

[107] Id.

[108] Citywide Task Force on Housing Court, 5 Minute Justice or "Ain't Nothing Going On But The Rent 34 (Nov. 1986) [hereinafter 5 Minute Justice.]

[109] Id.

[110] New York State Judicial Commission on Minorities, Analyses of Data from Housing Court Task Force Study 24-25 (Dec. 22, 1989) (internal report) [hereinafter Housing Court Data].

[111] See id.

[112] See id. at 4-7 for a full explanation for the procedural and outcome variables analyzed.

A. Writing Stipulations

In cases heard by a mediator, it was discovered that the mediator wrote the stipulation more often for black and Hispanic tenants than for white tenants.[113] The percentages were 47% for black tenants, 40% for Hispanic tenants and 14% for white tenants.[114] The landlord or the landlord's agent wrote the stipulation more often for white tenants than for black or Hispanic tenants (81% versus 51% and 54%).[115] When the tenant did not have an attorney, the mediator wrote the stipulation in 60% of the cases in which the tenant was black, 44% in which he or she was Hispanic, and 18% in which the tenant was white.[116] Similarly, in instances in which tenants were not represented, the landlord or the landlord's agent wrote the stipulation in 79% of the cases in which the tenant was white, in 39% of the cases in which they were black, and in 50% of the cases in which they were Hispanic.[117]

On its face, it would appear that the mediator, by intervening to write the stipulation more often in the cases of minority tenants, was acting to protect the interests of such tenants.[118] More needs to be known, however, about the nature of the content of these stipulations before it can be concluded that this intervention was aimed at protecting the

---

[113] See id. at 8-9, 17-19. The stipulation has the effect of fully disposing of the action as if the terms of the stipulation had been entered as a decision rendered by a judge. See also id. at 17 (noting the significant relationship between tenant race and the party writing the stipulation when the tenant did not have an attorney, as compared to when the tenant was represented by counsel).

[114] Id. at 8-9.

[115] Id.

[116] Id. at 17-18.

[117] Id.

[118] Id. at 18-19.

interests of the minority tenants. Some of the data that are available support the hypothesis that such intervention is not beneficial to the tenant.[119]

B. Adjournment of Cases

When an adjournment is granted, the tenant is allowed to remain in the apartment until the case is heard, and the judge enters a final ruling. Thus, the tenant gains additional time in which to prepare a defense or to obtain the necessary rent. However, white tenants fare much better than minority tenants in obtaining adjournments of their cases (55% for white tenants as compared to 38% for minority tenants).[120] The data did not differentiate between these cases in which the tenants were represented and those in which they were not, but 55% of the white tenants had their cases adjourned, while only 40% of the black tenants and 35% of the Hispanic tenants were able to obtain adjournments.[121]

C. Abatement of Rent

Many tenants do not know that the Housing Court has the power to "abate" or reduce the amount of rent to be paid into an escrow account until the landlord has made required repairs.[122] The City Wide Task Force data showed that such abatements are rare, with only 13.2% of all agreements including an abatement when notices of violations

---

[119] 5 Minute Justice, supra note 108, at 60-61. Seventy-eight percent of the cases in mediation were settled, with 60% of them being settled in 15 minutes or less. In 12% of the cases in mediation, one of the parties requested a hearing before the judge, 73% of which were requested by the landlord and 27.3% of which were requested by the tenant. That the quality of the justice meted out in mediation may be strained is further supported by data showing that in 72.2% of the cases settled by mediation agreement, the agreement to pay rent was not conditional even when the tenant claimed that violations existed (something that was alleged in 62.7% of the nonpayment cases). Moreover, in 23.3% of the mediation stipulation cases, the tenant moved out of her or his apartment at the suggestion of the landlord, the landlord's attorney, or the mediator. Finally, observers noted that mediators did not explain the seriousness of the consequences of agreeing to having a case converted from one of nonpayment to one of holdover.

[120] Housing Court Data, supra note 110, at 27-28.

[121] Id.

[122] 5 Minute Justice, supra note 108, at 77. An abatement serves the purpose of compensating the tenant for past conditions of disrepair and acting as a deterrent to future negligence on the part of the landlord.

were outstanding.[123] Judges granted abatements in only 9.4% of the cases during the pretrial conference, and at trial, 24% of the agreements provided an abatement.[124] Without consideration of ethnicity, tenants represented by attorneys requested abatements in 23% of the cases, but in only 10% of the cases in which the tenant was not represented.[125]

Black and white tenants who were unrepresented by attorneys requested abatements significantly more often than did Hispanic tenants (black and white tenants made such a request in 13-14% of their cases but Hispanics never did).[126] Language may be a significant barrier to equal treatment, raising again the issue of the need for interpreters. However, these differences between Blacks and Whites, on the one hand, and Hispanics, on the other, disappeared when the tenants were represented by counsel.[127]

V. EFFORTS TO INCREASE THE AVAILABILITY OF COUNSEL

There are several efforts being undertaken to improve legal representation for the poor. The Pro Bono Project of the Association of the Bar of the City of New York is one that has addressed the need in housing court. That project involves 58 associates from five New York City firms who have handled 158 landlord-tenant cases during 1986, 1987.[128]

---

[123] Id. at 79.

[124] Id.

[125] Housing Court Data, supra note 110, at 35.

[126] Id.

[127] Id.

[128] Committee on Legal Assistance, Association of the Bar of the City of New York, Housing Court Pro Bono Project 1 (Nov. 1988) [hereinafter Pro Bono Project].

In all of the cases handled, the indigent tenants avoided eviction.[129] In nearly 50% of the cases, needed repairs were obtained for tenants' apartments.[130] Partial abatements of rent were either agreed to by the landlord or were ordered by the court in 30% of the cases.[131] The finding that families who are evicted would not be if represented by counsel[132] is particularly important to minorities, who represent 81.8% of housing court litigants, the vast majority of whom are unrepresented (83% of Blacks, 81% of Hispanics), and many of whom face eviction.[133]

A second effort culminated in the report of the "Marrero" Commission, which recommended that all practicing attorneys provide 20 hours per year of pro bono time.[134] The New York State Defenders Association has also designed a course for certification of public defenders to enhance the competence and racial sensitivity of public defenders. Its curriculum, which provides for detailed training and reeducation, may provide a model for other agencies that provide legal assistance to the poor.[135]

Finally, the Commission notes that the New York State Bar Association recently endorsed mandatory continuing legal education (CLE) requirements.[136] Course offerings

---

[129] Id. at 20.

[130] Id. at 21.

[131] Id.

[132] Id. at 36.

[133] See 5 Minute Justice, supra note 108, at 31-35; see also Pro Bono Project, supra note 128, at 6.

[134] This Commission takes no position on the Marrero Commission's recommendation.

[135] See New York State Defenders Association, New York State Defenders Association Defender Institute 1988 Basic Trial Skills Program: Tools and Materials for Teaching Client-Centered Representation (Rens. Poly. Inst. June 12-18, 1988).

[136] See New York State Bar Association, 1989-90 Report to the Membership 6 (reprinted in New York State Bar Association Journal, July 1990).

for attorneys representing indigents to enhance their ability to provide effective service could be viewed as a means to satisfy any mandatory CLE requirements.

FINDINGS

1. Since minorities are disproportionately represented among low-income segments of the population, the availability of legal representation to individuals with low incomes significantly affects the availability of legal representation to such minority group members.

2. There has been a growing recognition in New York State of the importance of persons being represented by competent counsel in both criminal and civil matters.

3. Nevertheless, measures currently in place are inadequate to ensure competent, let alone equal, legal representation for the minority poor.

4. Evidence from Commission surveys of judges and litigators also supports the conclusion that minorities are more likely than Whites to suffer from inadequate legal representation.

5. On the civil side, the growth of the Legal Services Corporation (LSC) during the late 1960s and 1970s held promise for extending a range of basic legal services to the poor, but cutbacks in its funding and range of permissible activities during the 1980s have enlarged the gap between available resources and existing needs.

6. Laudable efforts have been made within the state to make up for lost federal funding, but they have not been sufficient to close the existing deficit in services.

7. On the criminal side, and in some civil matters, attorneys are provided as a matter of right to indigent defendants, either by government contract with providers of legal services such as the Legal Aid Society, or by court appointment of individual attorneys.

8. In recent years, the share of all such legal services provided by court appointed counsel has grown.

9. A concerted effort is needed to expand the quantity and improve the quality of legal services available to minorities.

RECOMMENDATION

The Commission was not able to agree upon a recommendation regarding court appointed counsel in civil cases. However, it did agree on the following.

1. Attorneys who represent the indigent on an ongoing basis--public defenders, the Legal Aid Society, and 18-B attorneys--should be certified for such representation. This certification would require completion of specified courses, including courses on criminal procedures and general litigation. A course in diversity sensitivity training would also be required. Commercial organizations, such as the Practicing Law Institute, should be encouraged to provide such courses at reduced rates for those seeking certification and for those who have been certified who are seeking renewal.

CHAPTER THREE

PRETRIAL PROCESSING AND CRIMINAL PENALTIES

CHAPTER 3

PRETRIAL PROCESSING AND CRIMINAL PENALTIES

CHAPTER OVERVIEW

Minorities are significantly overrepresented within the prison populations nationally and in New York State. Current statistics show that on any given day, nationally, one out of every four black males is incarcerated, on probation or on parole.[1] In New York State, over 80% of the prison population is comprised of minorities, and in New York City, minorities comprise over 90% of the prison population.[2]

Some believe that the overrepresentation of minorities in prison is due largely to socioeconomic and other factors that may not themselves reflect discrimination within, but may be affected by discrimination outside of, the criminal justice system.[3] There is, however, a widely held perception that discrimination accounts for some portion of the overrepresentation.[4] The points at which racial bias can infect the criminal justice system

---

[1] M. Mauer, Young Black Men and the Criminal Justice System: A Growing National Problem 3, 8 (Table 1) (1990).

[2] See Correctional Association of New York, Prisoner Profile (Dec. 1989). Compare with the report of the Division of Criminal Justice Services: the arrestee population in New York State for felony or misdemeanor charges only in 1988 was 39.2% white, 41.1% black, 18.4% Hispanic and 1.3% "other" or unknown. New York State Division of Criminal Justice Services, Bureau of Statistical Services, data supplied to the Williams Commission on May 26, 1989. The imprisonment data available to the Commission do not allow for this precision: the New York City Department of Corrections reports that of its 14,694 average daily prison population in 1987, approximately 9.2% were white, 55.8% were black, 34.6% were Hispanic, and 0.4% were "other." New York State Commission of Corrections, data supplied to the Williams Commission on May 22, 1989. The average daily population in New York County jails and penitentiaries was 9,299 in 1987 and consisted of 54.9% white, 36.5% black, 7.7% Hispanic and 0.9% "other" inmates. Finally, on May 1, 1989, the population of non-New York City prisons was 46,004: 18.1% white, 49.5% black, 31.9% Hispanic, and 0.6% "other." Id.

[3] See Bridges & Crutchfield, Law, Social Standing and Racial Disparities in Imprisonment, 66 Social Forces 699 (1988).

[4] This negative perception was exemplified in testimony before the Commission:

> It is significant to note that if you go to any prison in the State of New York and begin to count, something like seven of every ten heads that you count will either be black or Hispanic. Nobody can tell me, and make me believe it, that 25 to 30 percent of the people of the State of New York . . . commit 70 to 80 percent of all of the jailable crimes.

are as numerous as they are subtle. As a white litigator commented in response to the Commission's survey:

> Most racial discrimination in the courts is not overt. Rather, it is manifested by decisions which are influenced by attitudes which may not even be consciously held. . . . To prove in any particular case that these attitudes have influenced a decision is well-nigh impossible; to deny the phenomenon in the face of years of courtroom experience would be blindness.[5]

In its investigations, the Commission found enough evidence of biased treatment to warrant the initiation of corrective action.

Section I of this chapter examines racial disparities which occur early in the criminal justice process. The bail determination process receives special attention because the treatment of minorities at this stage of the court process may be an important indicium of the overall treatment of minorities by the criminal justice system.[6] Section I briefly reviews

---

1 New York State Judicial Commission on Minorities, New York City Public Hearing 26 (June 29, 1988) (testimony of Hon. Kenneth Browne) [hereinafter New York City Hearing].

[5]New York State Judicial Commission on Minorities, Responses to Questionnaire for Litigators in New York State on Issues Relating to Professional Experiences and Perceptions of Fairness and Sensitivity in the Courtroom [hereinafter Litigators' Questionnaire].

While subtle racism may infect decision-making in the criminal justice system, witnesses before this Commission also asserted the presence of overt racism--manifested in utterly disrespectful behavior towards minority litigants and defendants--as a factor still infecting the criminal justice system. See, e.g., 2 New York City Hearing, supra note 4, at 309-310 (testimony of Michael Letwin, Esq.); id. at 424-425 (testimony of Kimberly Detherage, Esq.).

[6]Numerous witnesses testified that minorities are overarrested. One witness complained that police tend to arrest Blacks and Hispanics in situations--such as domestic disputes or street fights--where the officers either mediate (in the case of domestic disputes) or leave discipline of a juvenile to the parents (in the case of street fights) if the principals are White. 2 New York City Hearing, supra note 4, at 429 (testimony of Kimberly Detherage, Esq.). The same witness continued with the accusation that arrest volume is affected by such irrelevant factors as officers' desire to earn overtime pay, upcoming holidays (for which officers want extra money), and scheduling of promotional examinations (i.e., the theory is that officers studying for a sergeants examination will avoid making arrests so as to avoid overtime which would diminish their free time to study). Id. at 430. Commissioner Suarez confirmed these allegations. Id. at 438-439 (statement of Commissioner Suarez).

While abuses in the use of arrest power are technically beyond this Commission's purview, they are part and parcel of discriminatory treatment of minority defendants in the criminal justice system. While procedures exist for examining the validity of arrests, the sufficiency of the evidence, etc., it was also alleged numerous times before this Commission that judges and prosecutors demonstrated more concern for quickly disposing of matters than for doing justice. Thus, in the often-mentioned situation of a minority defendant being coerced into a guilty plea under threat that a contrary stance would "make things worse," there is a very real possibility that a questionable arrest will result in a conviction, a guilty plea being the most expedient course for the defendant to regain liberty. While the Commission recognizes the unusual strain placed on the court system by a burgeoning case load, justice must not be sacrificed in the name of efficiency.

the Enforth Corporation Report, then examines the effect of racial factors on how prosecutors and defense attorneys view individual cases and the susceptibility of the plea bargaining process to racial bias. Section II addresses sentencing disparities, drawing on research undertaken by other groups and individuals, and on data from the Commission's surveys of judges and litigators.[7]

I. PRETRIAL PROCESSING

A. Evidence of Disparate Treatment In Pretrial Processing

Most empirical research into racial disparities in the criminal justice system has focused on racially disparate outcomes in criminal cases, without regard to disparities which occur earlier in the criminal process, e.g., whether bail is set, whether the defendant is released on recognizance (ROR) or incarcerated. However, since decisions made at every stage of the criminal process necessarily affect the decisions made later, the Commission examined the earlier stages of the process to ascertain where other disparities might occur.

Some studies have shown that arrestees who are not released on bail have a greater likelihood of receiving a sentence of incarceration.[8] In testimony before this Commission it was asserted that:

---

[7]The Commission considered three approaches to its investigation: (1) a record-based study of outcomes associated with criminal proceedings in New York State; (2) a critical evaluation of existing studies, i.e., a social science literature review, and (3) surveys of the experiences of judges and litigators. Because the DCJS was engaged in a large scale, methodologically sophisticated study of pretrial processing and sentencing disparities, the Commission decided not to undertake a record-based study. The Commission, therefore, proceeded with the two remaining methods listed above.

[8]See Bernstein, Nagel, Kelly & Doyle, Societal Reaction to Deviants: The Case of Criminal Defendants, 42 Am. Soc. Rev. 743 (1977); Hagan, Nagel & Albonetti, The Differential Sentencing of White-Collar Offenders in Ten Federal District Courts, 45 Am. Soc. Rev. 802 (1980); Kemph & Austin, Older and More Recent Evidence on Racial Discrimination in Sentencing, 2 J. Quantitative Criminology 29, 43 (1986) (sentencing decisions may be based on view that time served in jail is sufficient for incarceration) [hereinafter Kemph & Austin]. Compare with Holmes & Daudistel, Ethnicity and Justice in the Southwest: The Sentencing of Anglo, Black, and Mexican Origin Defendants, 65 Social Science Quarterly 265, 273 (1984) (study of case disposition for white, black, and Mexican burglary or robbery defendants in El Paso, Texas and Tucson, Arizona, showed that all but black defendants were advantaged by obtaining bail).

> a first offender who is detained in lieu of bail is more than three times as likely to be convicted, and almost twice as likely to get a prison sentence as a recidivist with more than 10 prior arrests who is released.[9]

Thus, pretrial release criteria profoundly influence whether minorities are treated differently than Whites within the criminal justice system.

One study examined three pretrial release decisions (ROR, amount of bail set for those not "ROR'd," and the decision to offer a cash alternative to a surety bond--usually 10% of the surety figure).[10] The researcher examined all criminal cases first arraigned in one New York City county between December, 1974, and March, 1975, in an effort to determine how these decisions are affected by certain variables. The race of the defendant was found to have no effect on the decision to release the defendant on his or her own recognizance;[11] however, race was found to affect both the decision to release the defendant on bail, and the amount of bail offered. A defendant's race was similarly found to affect the decision to offer the cash alternative to bail.[12] Bail tended to be lower for Whites, and Whites were more likely to be offered the cash alternative option.[13] The conclusion reached was that "the evidence of some discrimination, however small, in favor

---

[9] 1 New York City Hearing, supra note 4, at 208 (testimony of Russell Neufeld, Esq., citing a study by the Columbia University Bureau of Applied Social Research). See Bail and Racial Discrimination: Testimony of the New York State Association of Criminal Defense Lawyers before the New York State Judicial Commission on Minorities (June 29, 1988) [hereinafter Bail and Racial Discrimination] (New York State Judicial Commission on Minorities, New York City Public Hearing, Exhibit 8)).

[10] Nagel, The Legal/Extra-Legal Controversy: Judicial Decisions in Pretrial Release, 17 Law & Soc'y Rev. 481 (1983) (analysis of state criminal defendants tried in New York to determine judicial bases of pretrial release decisions).

[11] Id. at 506. Nagel recognizes that consideration of the seriousness of the crime is statutorily permissible. Id. at 509.

[12] Id. at 506.

[13] Id. Nagel also stated that this effect, while in the direction predicted, was small. Id.

of Whites (as compared to Blacks and Hispanics) and against those whose primary language is Spanish suggests that discrimination . . . is still a problem with which to wrestle."[14]

Both judges and litigators were queried regarding pretrial release generally; i.e., both groups were asked to rate the frequency with which "a white defendant is released, with or without bail, pending trial, in a situation that would lead to detention for a minority defendant."[15] Judges' responses are presented in Table II.3.1.

Table II.3.1
Judges' Assessments of the Frequency of Racial Disparities in Pretrial Release
(Numbers in parentheses are percentages)

	WHITE JUDGES			MINORITY JUDGES			TOTAL JUDGES		
	Often/ Very Often	Some-times	Never/ Rare-ly	Often/ Very Often	Some-times	Never/ Rare-ly	Often/ Very Often	Some-times	Never/ Rare-ly
A white defendant is released, with or without bail, in a situation that would lead to detention for a minority defendant.	10 (2.4)	75 (17.6)	340 (80.0)	24 (40.7)	25 (42.4)	10 (16.9)	34 (7.0)	100 (20.7)	350 (72.3)

Forty-one percent of surveyed minority judges responded that Whites are "often/very often" released, with or without bail, where a minority defendant would not be. Only 17% of the minority judges stated that this "never/rarely" happens. White judges had quite a different perception. Eighty percent stated that greater pretrial detention of minorities "never/rarely" occurs.

---

[14] Id. at 510. It should be noted that this study was extremely limited in that it only examined criminal cases first arraigned in a New York City county over a period of four months. Id. at 488. This does not seem comprehensive enough to warrant any long-range conclusions.

[15] New York State Judicial Commission on Minorities, Questionnaire for Judges in New York State on Issues Relating to Judicial Selection and Perceptions of Fairness and Sensitivity in the Courtroom 16 (reproduced as Appendix A to the Report of Findings From A Statewide Survey of the New York Judiciary in vol. 5 of this report) [hereinafter Blank Judges' Questionnaire]; New York State Judicial Commission on Minorities, Questionnaire for Litigators in New York State on Issues Relating to Professional Experiences and Perceptions of Fairness and Sensitivity in the Courtroom 12 (March 16, 1989) (reproduced as Appendix A to the Report of Findings From A Survey of New York State Litigators in vol. 5 of this report) [hereinafter Blank Litigators' Questionnaire].

Litigators' responses to the same query appear in Table II.3.2.

Table II.3.2
Litigators' Assessments of Racial Disparities in Pretrial Release
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NEW YORK CITY						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
White defendant released with or without bail pending trial in a a situation that would lead to detention for a minority defendant.	25 (38.7)	24 (37.0)	16 (24.3)	56 (81.2)	9 (13.0)	4 (5.8)	44 (59.5)	17 (23.0)	13 (17.6)	8 (36.4)	6 (27.3)	8 (36.4)	15 (17.8)	34 (40.9)	35 (41.3)	41 (64.1)	13 (20.3)	10 (15.6)	189 (50.1)	103 (27.3)	85 (22.6)

Fifty percent of the questioned litigators reported that white defendants are released "often/very often" where minority defendants would be detained. Minorities outside New York City reported a significantly greater frequency of preferential treatment for white defendants than Whites outside New York City. Still, the overall proportion of litigators giving this response was high. Thus, 39% of white, 81% of black, 60% of Hispanic, and 36% of Asian-American litigators in New York City, and 18% of white and 64% of minority litigators outside New York City, reported that preferential treatment of white defendants occurs "often/very often." Only 23% of all the questioned litigators answered that bias in pretrial release "rarely/never" happens (24% of white, 6% of black, 18% of Hispanic, and 36% of Asian-American litigators in New York City, and 41% of white and 16% of minority litigators outside New York City). Fewer than half of the respondents in any given group perceived preferential treatment of white defendants as a rare occurrence.

Judges and litigators were also asked to rate the frequency with which "lower bail is set for white defendants than for minority defendants accused of similar crimes with similar records and similar community ties."[16] Judges' responses appear in Table II.3.3.

[16] Blank Judges' Questionnaire, supra note 15, at 15; Blank Litigators' Questionnaire, supra note 15, at 10.

Table II.3.3.
Judges' Assessments of Racial Disparities in Setting Bail
(Numbers in parentheses are percentages)

	WHITE JUDGES			MINORITY JUDGES			TOTAL JUDGES		
	Often/ Very Often	Some-times	Never/ Rare-ly	Often/ Very Often	Some-times	Never/ Rare-ly	Often/ Very Often	Some-times	Never/ Rare-ly
Lower bail is set for white than for minority defendants accused of similar crimes, with similar records and community ties.	7 (1.7)	42 (10.2)	363 (88.1)	22 (36.7)	17 (28.3)	21 (35.0)	29 (6.1)	59 (12.5)	384 (81.4)

Thirty-seven percent of the questioned minority judges but only 2% of white judges, believed lower bails are set for white defendants "often/very often." Only 35% of minority judges reported that lower bail is "never/rarely" set for white defendants, while 88% of white judges expressed this view.

Litigators' assessments of racial disparities in bail setting appear in Table II.3.4.

Table II.3.4
Litigators' Assessments of Differential Treatment of Criminal Defendants
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NEW YORK CITY						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
Lower bail set for white than minority defendants accused of similar crimes, with similar records and community ties.	19 (31.5)	18 (30.5)	23 (38.0)	53 (80.3)	9 (13.6)	4 (6.1)	37 (52.1)	19 (26.8)	15 (21.1)	8 (36.4)	7 (31.8)	7 (31.8)	10 (11.5)	26 (30.1)	50 (58.4)	33 (55.0)	19 (31.7)	8 (13.3)	160 (43.8)	98 (26.9)	107 (29.3)

Among litigators, 44% reported that lower bail is set for Whites "often/very often," but, again, there were significant differences among groups. Thus, 32% of white, 80% of black, 52% of Hispanic, and 36% of Asian-American litigators in New York City, and 12% of white and 55% of minority litigators outside New York City, gave this response.

Only litigators were asked whether white defendants are more likely to be released on their own recognizance than minority defendants.[17] Litigators' answers are shown in Table II.3.5.

[17] Blank Litigators' Questionnaire, supra note 15, at 9.

Table II.3.5
Litigators' Assessments of Frequency of Differential Decisions to ROR Similarly Situated Criminal Defendants
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NEW YORK CITY						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
White defendants more likely to be released on own recognizance than min. defendants accused of same crimes with similar records and community ties.	21 (32.4)	24 (35.9)	21 (31.7)	53 (79.1)	10 (14.9)	4 (6.0)	39 (52.7)	21 (28.4)	14 (18.9)	9 (37.5)	7 (29.2)	8 (33.3)	14 (16.3)	21 (24.9)	50 (58.7)	40 (62.5)	15 (23.4)	9 (14.1)	176 (46.4)	98 (25.8)	105 (27.8)

Overall, 46% of the litigators reported that Whites are "often/very often" released where minorities would not be. This response was given by 32% of white, 79% of black, 53% of Hispanic, and 38% of Asian-American litigators in New York City, and 16% of white and 63% of minority litigators outside New York City. Only 28% of the questioned litigators reported that preferential treatment of Whites "never/rarely" occurs. (Thirty-two percent of Whites, 6% of Blacks, 19% of Hispanics, 33% of Asian Americans in New York City, and 59% of white and 14% of minority litigators outside New York City, gave this response.)

The survey questions giving rise to the aforementioned data imposed several conditions that typically may occur. For example, respondents were asked to assess how frequently minority defendants, with "community ties" similar to those of white defendants, receive disparate treatment. Cultural and socioeconomic differences between minorities and Whites may adversely affect a positive assessment of "community ties" for minorities, if the existence of "ties" is assessed from a biased perspective. For example, bail is more often granted when "community ties" tending to ensure a defendant's return to court exist, and courts often use the defendant's employment status as an important indicator of "community ties." However, because more minorities than Whites are unemployed, they tend to be disadvantaged in seeking bail.[18]

---

[18] 1 New York City Hearing, supra note 4, at 214 (testimony of Russell Neufeld, Esq.). Cf. Comment by then Brooklyn District Attorney Elizabeth Holtzman, referring to the initiative of sentencing juvenile offenders to community service:

> We've discovered that for many of these young people this is their first experience in real work [,] [t]heir first experience in an environment that's not filled with drugs or crime[.] . . . [M]any of them want to go on.

Id. at 178.

From another perspective, the mere attempt to ascertain "community ties" may result in bias against minorities. It was asserted before the Commission that New York City's Criminal Justice Agency (CJA), which makes recommendations about the propriety of ROR or bail,

> only confirms community ties, including a defendant's residence, through telephone calls; therefore, if a defendant doesn't have a phone at home, as the majority of . . . defendants at Legal Aid don't, and the majority of poor defendants don't, the report will be marked ["]unverified community ties,["] and that marking will frequently dissuade a judge from releasing the defendant.[19]

The Commission also notes that minorities are disadvantaged at the bail stage of the criminal process because they generally earn less than their white counterparts.[20]

Comments by judges and litigators on their survey questionnaires, and testimony at public hearings, also point to problems in the current bail system. One white judge wrote:

> Black defendants were often less able to make bail even when the amount was relatively insignificant. The reasons for this may be unconnected with class or race but often attributable to a family having despaired of the recidivist.[21]

A black judge wrote:

> While the question of race is a factor in setting of bail and criminal disposition, there is a greater emphasis placed on other factors which may themselves be heavily affected by race. These are: employment history; family stability and community ties; educational background; any other prior contact with court; issuance of prior bench warrants; and conviction record.[22]

---

[19] Id. at 214 (testimony of Russell Neufeld, Esq.).

[20] See generally, Gaines, Tabulations from the Current Population Survey for New York State, Tables 3-12 (1988) (documenting disparities in poverty status, employment status, and individual income between non-Spanish Whites and all other groups).

[21] New York State Judicial Commission on Minorities, Responses to Questionnaire for Judges in New York State on Issues Relating to Judicial Selection and Perceptions of Fairness and Sensitivity in the Courtroom [hereinafter Judges' Questionnaire].

[22] Id.

A public hearing witness expressed the following view of the post-arrest procedure typically faced by a black defendant:

> Pretrial release or bail, which he probably can't meet, will be determined by a white judge who will use racially and culturally biased criteria to make the release decisions; that is, criteria such as education level, marital status, source of income, et cetera. Factors that define one's racial or social status, but not necessarily one's risk or likelihood of appearing in court.[23]

Another witness testified:

> [I]n making judgments about releasing a defendant on his or her own recognizance or setting bail, decisions about freedom or detention are all too often premised on middle class assumptions about family structure, aberrational behavior and resources available.[24]

One black judge intimated a risk of using irrelevant factors in setting bail:[25]

> [T]he only question that a judge should ever look at in making a determination in setting bail, as I see it, is whether or not the individual has roots in the community, and whether or not there is a likelihood that he will return. That's all. Because otherwise what that judge in his subconscious mind has already done is, he has deprived that accused person of his presumption of innocence . . . .

The comments of a white judge illustrate the tendency among judges to rely on culturally weighted factors in making pretrial decisions:

> Court statistics among people of different races may vary for reasons other than bias, i.e., cultural, custom, educational, moral and family differences. A judge often is expected to predict a person's responsibility and reliability (bail application) and the likelihood of rehabilitation (sentencing). In most cases the judge is forced to make such judgment almost instantly. For this reason it is almost inevitable that judges, in many cases, rely upon generalities formed over years of experience. The reality is that among persons charged with criminal conduct certain factors are found to be more prevalent in one group

---

[23] New York State Judicial Commission on Minorities, Albany Public Hearing 55 (April 28, 1988) (testimony of Alice Green, chairperson of the Legal Redress Committee of the NAACP) [hereinafter Albany Hearing].

[24] 1 New York City Hearing, supra note 4, at 95 (testimony of Archibald R. Murray, Esq.).

[25] Id. at 33 (testimony of Hon. Kenneth Browne).

than in another, i.e., broken family unit, extra-marital relationship with illegitimate children, alcohol and drug abuse, poor work history, to name some. The court that recognizes this reality and acts upon it is not indulging in a form of racism. To ignore it because of a defendant's race would be rank bias or racism. Some judges feel it presents them with a dilemma--to be torn between the desire to make the best, intellectually, decision on one hand, and to avoid even the appearance of bias.[26]

An attorney witness described what he referred to as:

> [T]he insidious nature of the bail system in the criminal justice system in New York . . . [discrimination] is built into the system and can only be overcome when judges understand it and act to correct it . . . [w]hether someone is in or out of jail prior to the disposition of their case is the single most important fact in determining whether they are convicted.[27]

Another white New York City litigator wrote:

> Clearly in the Criminal Term, bails are higher, plea offers are higher [and] jail terms are longer for minorities. It is a sick fact of life that almost invariably when a criminal defense attorney (or D.A.) hears of an unusually low bail or sentence, the first question is "Were they white?"[28]

A black litigator commented:

> Bail [is] used against blacks if the judge feels blacks shouldn't be on the streets. Drug bails are so high, they can't get out. Yet a white who has committed a murder can make bail - a low bail they can afford.[29]

An Hispanic litigator commented:

> During the arraignments, a defendant with similar charges, similar ties, similar criminal history, different race, will get different bail, i.e., ROR for white and bail for minority.[30]

---

[26] Judges' Questionnaire, supra note 21.

[27] 1 New York City Hearing, supra note 4, at 206-207 (testimony of Russell Neufeld, Esq.).

[28] Litigators' Questionnaire, supra note 5.

[29] Id.

[30] Id.

One retired judge commented that bail decisions are often made on the basis of administrative or clerical convenience.[31] According to this witness, the court system does not provide clerks and judges with forms and stamps that include all nine forms of bail permitted under section 520.10 of the Criminal Procedure Law.[32] Instead, arraigning judges have a stamp that provides only for an insurance company bond or cash bail. This decreases the likelihood a defendant will be offered any other form of bail. This witness also noted that defendants who cannot get a bondsman to put up an insurance bond, or who cannot "scrape up" cash, are most often black.[33]

---

[31] 4 New York City Hearing, supra note 4, at 874 (June 30, 1988) (testimony of Hon. William Booth).

[32] N.Y. Crim. Proc. Law § 520.10 (McKinney 1984 & Supp. 1991). This section provides that:

1. The only authorized forms of bail are the following:

   (a) Cash bail.

   (b) An insurance company bail bond.

   (c) A secured surety bond.

   (d) A secured appearance bond.

   (e) A partially secured surety bond.

   (f) A partially secured appearance bond.

   (g) An unsecured surety bond.

   (h) An unsecured appearance bond.

   (i) Credit card or similar device where the principal is charged with a violation under the vehicle and traffic law; provided, however, notwithstanding any other provision of law, any person posting bail by credit card or similar device also may be required to pay a reasonable administrative fee. . . .

2. The methods of fixing bail are as follows:

   (a) A court may designate the amount of the bail without designating the form or forms in which it may be posted. In such case, the bail may be posted in either of the forms specified in paragraphs (g) and (h) of subdivision one;

   (b) The court may direct that the bail be posted in any one of two or more of the forms specified in subdivision one, designated in the alternative, and may designate different amounts varying with the forms.

Id.

[33] 4 New York City Hearing, supra note 4, at 875 (June 30, 1988) (testimony of Hon. William Booth).

B. The Enforth Report

The Enforth Report summarizes a comprehensive study, complete with findings and recommendations, of the arrest-to-arraignment (ATA) process in New York City.[34] This process, the study found, is characterized by inordinate delays due to a combination of the following factors: increased arrests, holding space limitations, and an antiquated and overburdened system of record-keeping. It is generally conceded that a prearraignment delay in excess of 24 hours is not desirable. The recommendations set forth in the Enforth Report are too numerous to permit full discussion here. The Commission recognizes the self-analysis thus begun by New York City, and recommends its continuation in keeping with the purpose of the Report.

C. Plea Bargaining

The overwhelming majority of convictions is arrived at by pleas.[35] The off-the-record nature of plea negotiations may be vulnerable to racial bias. The most important outcome of the plea negotiation is the conviction charge on which the defendant and prosecutor agree. Since plea negotiations affect sentencing outcomes, the range of sentences a defendant faces is highly contingent upon the conviction charge. If minority defendants are offered less attractive plea bargains than their nonminority counterparts, any apparent similarity in sentences for comparable conviction charges will obscure discrimination at the plea negotiating stage of the criminal process.

---

[34] Enforth Corporation, A Systematic Analysis of the Arrest to Arraignment Process: Final Recommendations (1990) (report submitted to the Office of the Deputy Mayor for Public Safety, City of New York). The Enforth Corporation of Cambridge, Massachusetts, was selected to conduct the ATA study after a competitive procurement process. The study encompassed four New York City boroughs (Staten Island was found not to have an ATA problem).

[35] New York City Hearing, supra note 4 at 151 (testimony of Hon. Burton Roberts that 86% of the cases in Bronx County are decided by pleas).

Research regarding the negotiation and charge reduction phases of the criminal court process suggests that racial bias may exist in this area,[36] but the evidence of discrimination is not obvious. Judges surveyed by the Commission described racially discriminatory episodes of disparate plea negotiation handling. One black judge recalled an instance when:

> [p]lea negotiations were unfairly conferred by [the] Assistant District Attorney. [A] majority defendant received [a] better plea deal than [a] minority defendant with similar fact pattern[s] . . . [I] spoke with [the] supervising Assistant District Attorney to discuss same plea availability to [the] minority defendant.[37]

Another black judge recalled a similar episode:

> There was an invidious distinction in the offers for pleas to a white defendant versus a black defendant. I refused to impose the suggested sentences and insisted on a more equitable plea offer.[38]

Considering the relationship between the various stages of the criminal justice process lends credence to the perception that plea bargaining does result in disparate treatment. The inability to make bail, for example, may require defendants to accept otherwise unacceptable plea offers. Testimony was given at the Commission's public hearings that defendants are often pressured to accept pleas through abuse of the bail system: that misdemeanor defendants are routinely offered pleas in return for reduced charges and/or nonjail sentences. The message sent to the minority defendant is clear: "[I]f you plead guilty you

---

[36] See, e.g., Holmes, Daudistel & Farrell, Determinants of Charge Reductions and Final Dispositions in Cases of Burglary and Robbery, 24 J. Res. Crime & Delinq. 233 (1987) (study done to redress lack of information regarding inequities in presentencing decisions). The race of the victim as a potential variable was not considered in this study. See id. at 237.

[37] Judges' Questionnaire, supra note 21.

[38] Id.

can go home, if you assert your innocence you will stay in jail."[39] If such a plea is not accepted because the bail has been set, a poor minority defendant who misguidedly maintains faith in our criminal justice system by asserting innocence, will pay for it with jail time when unable to meet even "nuisance bail."[40]

Since the opinion of both prosecuting and defense counsel regarding the "winnability" of a case can have a profound effect on how the case is handled, differential race-based assessments could easily result in disparate treatment of similarly situated white and minority defendants. The Commission therefore asked both judges and litigators how frequently defense attorneys view a criminal case as more "winnable" because the defendant is white, and how often prosecutors view a criminal case as more "winnable" because the victim is white.[41] Their answers are shown in Tables II.3.6 and II.3.6a, respectively.

---

[39] See 1 New York City Hearing, supra note 4, at 209 (testimony of Russell Neufeld, Esq.). This witness continued:

> [A] significant percentage of criminal defendants, who might otherwise prevail in their cases, decide to plead guilty to avoid jail. The starkest recent example of this is the scores of transit police arrests--all of minority group members--for jostling and sexual misconduct, which [were] show[n] to be wholly fabricated, but w[h]ere--nevertheless, 71 percent of the defendants pleaded guilty.

Id. at 209-210. The witness was reading, verbatim, from Bail and Racial Discrimination, supra note 9, at 3, which cites, as the source for the assertion that the referred to transit arrests were all fabricated, a report, dated July 3, 1984, by N.Y.C. Transit Police Lt. Dargan. See also, 2 New York City Hearing, supra note 4, at 321 (testimony of Michael Letwin, Esq.) (assertion that judges counsel defense attorney to recommend to client that client take a guilty plea because things would be worse for the client if case went to trial).

[40] See 1 New York City Hearing, supra note 4, at 96 (testimony of Archibald R. Murray that "nuisance bail" is so called because it " . . . may truly be just a nuisance to a middle class defendant, but in the instance of a minority defendant who is poor, this is in fact a real impediment to his or her release.")

[41] Blank Judges' Questionnaire, supra note 15, at 14; Blank Litigators' Questionnaire, supra note 15, at 9.

Table II.3.6
Judges' Assessments of Extent to Which Race/Ethnicity of Defendant or Victim Affects Attorneys' Attitude Toward the Case
(Numbers in parentheses are percentages)

	WHITE JUDGES			MINORITY JUDGES			TOTAL JUDGES		
	Often/ Very Often	Some-times	Never/ Rare-ly	Often/ Very Often	Some-times	Never/ Rare-ly	Often/ Very Often	Some-times	Never/ Rare-ly
A criminal case is regarded by defense attorneys as more "winnable" because the defendant is white.	30 (8.5)	95 (26.9)	228 (64.6)	20 (35.7)	19 (33.9)	17 (30.4)	50 (12.2)	114 (27.9)	245 (59.9)
A criminal case is regarded by prosecutors as more "winnable" because the victim is white.	22 (6.4)	87 (25.4)	234 (68.2)	25 (43.9)	15 (26.3)	17 (29.8)	47 (11.8)	102 (25.5)	251 (62.8)

Table II.3.6a
Litigators' Assessments of Extent to Which Race/Ethnicity of Defendant or Victim Affects Attorneys' Attitude Toward the Case
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NEW YORK CITY						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
Defense attorneys view criminal case as more "winnable" when the defendant is white.	22 (32.9)	30 (44.5)	15 (22.6)	36 (53.7)	16 (23.9)	15 (22.4)	34 (47.2)	20 (27.8)	18 (25.0)	7 (30.4)	8 (34.8)	8 (34.8)	23 (27.6)	31 (37.2)	30 (35.2)	35 (59.3)	16 (27.1)	8 (13.6)	157 (42.2)	121 (32.6)	94 (25.2)
Prosecutor views criminal case as more "winnable" when victim is white.	27 (41.7)	22 (34.6)	15 (23.8)	48 (72.7)	8 (12.1)	10 (15.2)	33 (48.5)	20 (29.4)	15 (22.1)	7 (30.4)	9 (39.1)	7 (30.4)	23 (29.0)	25 (31.4)	32 (39.6)	39 (65.0)	12 (20.0)	9 (15.0)	177 (49.0)	96 (26.7)	88 (24.3)

Although minority and white judges responded differently to the first of these issues, it is striking that 40% of all judges reported that "sometimes" or "often/very often" cases with white defendants are viewed by defense attorneys as easier to win.. More than two-thirds of the minority judges expressed that opinion.

Litigators agree with even greater frequency that the "winnability" of a case is perceived differently depending on the race of the defendant. Differences between minority and white litigators with respect to this question are less striking than among judges. When asked about the frequency with which a criminal case is viewed as easier to win when the defendant is white, 42% of the litigators answered "often/very often," and 75% believed it was true "sometimes" or "often/very often."

In response to the second question, 12% of all surveyed judges and 49% of all surveyed litigators responded that prosecutors "often/very often" find criminal cases easier to win when the victims are white. Thirty-seven percent of the judges and 76% of the litigators thought this was true at least "sometimes." Again, there are significant differences among the surveyed groups. For example, 42% of white, but 73% of black, 49% of Hispanic, and 30% of Asian-American litigators in New York City, and 29% of white and 65% of minority litigators outside New York City, responded that prosecutors regard cases with white victims as easier to win "often/very often." Among minority judges, 44% believed this was true "often/very often;" only 6% of the white judges agreed.

II. DISPARITIES IN SENTENCING

A. The DCJS Study

There exists a widely held perception that minority defendants are given harsher sentences than white defendants.[42] The questionnaire response of one Hispanic judge was typical of many comments received by the Commission.

> I have often complained about disproportionate sentences meted out to minorities . . . when compared to sentences imposed on their white counterparts for the same crimes.[43]

Preliminary findings of studies on the relationship between race and sentencing conducted by the New York State Division of Criminal Justice Services (DCJS) provides some support for this perception.[44] It found that the criminal justice system does, in some instances, treat Blacks and Hispanics more harshly than Whites. The study sample included all persons charged with an offense in New York State in 1985 and 1986 (over 17,000 cases), except for those arrested for "A" felonies, driving-while-intoxicated, or prostitution offenses. The researchers examined the effect of the defendant's race upon the probability that he or she would be incarcerated, taking into account the arrest charge severity, prior criminal record, and county of arrest.

The study concluded that significant racial disparity existed in cases where 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.

---

[42] See, Simpson, White Justice, Black Defendants, Time, Aug. 8, 1988, at 17.

[43] Judges' Questionnaire, supra note 21.

[44] Nelson, The Identification of Racial Disparity in Processing Arrested Persons: New York State, 1985-1986 (1988) (New York State Division of Criminal Justice Services). As noted, the findings discussed herein are preliminary only.

The most consistent of the DCJS findings was the imposition of a fine as sentence for Whites, and the imposition of jail as sentence for Blacks and Hispanics with similar backgrounds for similar misdemeanors. This finding was noted statewide and was not found to be a function of economics.[45]

The DCJS study also found that when data for the ten most populated counties were separately analyzed, racial disparities that were obscured in the statewide data became apparent.[46] For example, although statewide figures did not show a significant difference in the treatment of white and minority felony defendants with prior criminal records, this difference did exist in certain counties. In Westchester County, for instance, white felony defendants with a prior criminal record had a 39% chance of being incarcerated while similarly situated minority defendants had a 52% chance of being incarcerated.

Overall, the study found that the probability of incarceration was generally higher for minorities than it was, under certain circumstances, for Whites. If Blacks and Hispanics were given the same treatment as similarly situated Whites, and if the probability of imprisonment were the same for minorities as for Whites, the overall percentage of minorities imprisoned for felony charges would decrease from 77.2% to 74.5% and the percentage of minority misdemeanants in jail would decrease from 73.6% to 66.7%.[47]

The DCJS study is particularly interesting because of its examination of the impact of defendants' prior criminal history on the sentencing process. A defendant with many prior convictions is generally treated more harshly than a defendant with few or no prior

---

[45] Id.

[46] Id. at 9.

[47] Id. at 10.

convictions.[48] Because of differential involvement in certain crimes, there is an arguably nonracial reason for sentencing disparities between white and minority defendants. If minorities tend to have more prior criminal involvement than Whites, they will tend to receive harsher sentences than Whites irrespective of any racial bias factor.[49] However, if the ostensibly greater prior involvement of minorities in criminal activity reflects a racially biased tendency to arrest or convict minorities in greater numbers than Whites, then studies that control for prior convictions may miss an important bias-induced effect. The DCJS study tried, to some extent, to take this into account.

The DCJS finding of disparate treatment of minorities in different regions of the state confirms the results of earlier studies. In a 1980 study of approximately 11,000 defendants eligible for probation, race was found to have a negligible effect on decisions to incarcerate in New York City, but a substantial effect in suburban and "upstate" jurisdictions.[50] A study of disparate treatment under the state's indeterminate sentencing policy, conducted by the New York State Committee on Sentencing Guidelines, discovered significant differences in sentencing depending upon the race, gender, and age of the defendant, but found only regional differences in the amount of time served beyond the court-imposed minimum.[51]

---

[48] Id. at 5-6.

[49] See Smith & Visher, Street-Level Justice: Situational Determinants of Police Arrest Decisions, 29 Soc. Prob. 167 (1981).

[50] Zimmerman & Frederick, Discrimination and the Decision to Incarcerate, in Criminal Justice System and Blacks, 315-34 (Daniel Georges-Abeyie ed. 1984). A similar conclusion was reached in a study of defendants in rural, suburban, and urban areas of Pennsylvania. See Kemph & Austin, supra note 8, at 38 ("Blacks with convictions for serious crimes are more likely to be incarcerated than are their white counterparts, especially for suburban jurisdictions.")

[51] New York State Committee on Sentencing Guidelines, New York State Sentencing Patterns: An Analysis of Disparity (1985).

B. Discrimination Based on Race of the Victim

The attention of researchers has also been drawn to the effect the race of the victim of a crime may have on a criminal prosecution.[52] As sociologist Guy Johnson wrote almost fifty years ago:

> If caste values and attitudes mean anything at all, they mean that offenses by or against Negroes will be defined not so much in terms of their intrinsic seriousness as in terms of their importance in the eyes of the dominant group. Obviously the murder of a white person by a Negro and the murder of a Negro by a Negro are not at all the same kind of murder from the standpoint of the upper caste's scale of values. . . . [I]nstead of two categories of offenders, Negro and white, we really need four offender-victim categories, and they would probably rank in seriousness from high to low as follows: (1) Negro versus white, (2) white versus white, (3) Negro versus Negro, (4) white versus Negro. . . . [I]f our hypothesis is correct, the differentials which we have suggested should show up in mass statistics based on offender-victim categories.[53]

For example, where the victim of the crime is white and the perpetrator is black, research has shown that prosecutors are more likely to upgrade the charges brought.[54] Black defendants, therefore, face more serious charges, more vigorous prosecution, and more severe sentences than white offenders when the victim is white.[55] In rape cases, one study found that where the victims knew the rapist, black defendants were nearly twice as

---

[52] See, e.g., Radelet & Pierce, Race and Prosecutorial Discretion in Homicide Cases, 19 L. & Soc'y Rev. 587 (1985).

[53] Johnson, The Negro and Crime, 217 Annals 93, 98 (1941) [hereinafter Johnson].

[54] Radelet & Pierce, supra note 52; Johnson, supra note 53.

[55] Johnson, supra note 53, at 101 ("the courts . . . are dealing out a double standard of justice").

likely to be incarcerated for raping white women as for raping black women (60% vs. 30.9%).[56]

The effect of the race of the victim on the sentencing process is also illuminated by a large body of capital punishment literature.[57] The studies done in this area point to a strong relationship between the imposition of the death penalty and the race of both the defendant and the victim.[58] These studies show that the likelihood a defendant will be charged with capital murder and sentenced to death is greater when he or she is black, and greater still when the victim is white.

A review of capital punishment studies conducted by the General Accounting Office (GAO) found evidence of racially disparate treatment of defendants, in the charging and sentencing phases of the criminal process, and in the imposition of the death penalty.[59] In 82% of the studies surveyed, the GAO found that the race of the victim influenced the likelihood a defendant would be charged with capital murder and sentenced to death.[60]

---

[56] Walsh, The Sexual Stratification Hypothesis and Sexual Assault in Light of the Changing Conceptions of Race, 25 Criminology 153, 166 (1987); see also Lafree, The Effect of Sexual Stratification by Race on Official Reactions to Rape, 45 Am. Soc. Rev. 842, 852 (1980) (sexual stratification of American society imposes more serious sanctions on men from less powerful social groups who are accused of assaulting women from more powerful social groups); Schwendinger & Schwendinger, Rape and Inequality (1983).

[57] See, for example, Baldus, Pulaski & Woodworth, Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 Journal of Crim. Law and Criminology 661-703 (1983); Radelet, Racial Characteristics and the Imposition of the Death Penalty, 46 Am. Soc. Rev. 918-927 (1981); See also, the GAO report, infra note 61, for a comprehensive bibliography of studies in this area.

[58] Id.

[59] United States General Accounting Office, Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing (1990). The study was performed pursuant to The Anti-Drug Abuse Act of 1988 (Public Law 100-690). The GAO examined 53 studies but determined that only 28 were sufficiently sound methodologically to warrant inclusion in the study.

[60] Id. at 5.

In particular, minority defendants charged with murder were more likely to be sentenced to death when the victim was white.[61]

New York State has no death penalty. Nevertheless, these findings are important for two reasons. First, they suggest that the charging decision may be susceptible to racial bias.[62] Second, they show a strong correlation between the victim's race and the severity of both the charge which will be brought and the sentence imposed upon conviction.[63] Most studies control for the seriousness of the crime when comparing the disposition of the cases of white and minority defendants. If racial bias affects the severity of the crime charged, however, studies which control for severity of charge, and find no racial bias, may simply fail to detect an important source of bias.

C. The Views of Judges and Litigators Regarding the Prevalence of Disparate Treatment

Additional evidence of disparate treatment in the sentencing phase of the criminal process was uncovered by the Commission in its surveys of both judges and litigators. Respondents were asked a series of questions regarding the frequency with which white defendants receive preferential treatment in the criminal courts.[64]

---

[61] Id. at 5-6.

[62] Id. at 6.

[63] Id.

[64] Blank Judges' Questionnaire, supra note 15, at 15; Blank Litigators' Questionnaire, supra note 15, at 9-10. Possible ratings were "never," 0%; "rarely," 1-5%; "sometimes," 6-25%; "often," 26-50%; and "very often," 51-100%.

Surveyed litigators were asked whether "white defendants are less likely to receive prison sentences than are minority defendants with similar records convicted of the same crimes."[65] Their answers are shown in Table II.3.7.

[65] Blank Litigators' Questionnaire, supra note 15, at 9.

Table II.3.7
Litigators' Assessments of Frequencies With Which Similarly Situated Criminal Defendants Receive Sentences of Incarceration
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NEW YORK CITY						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
White defendants are less likely to receive prison sentences than minority defendants given similar records and conviction.	21 (32.0)	23 (35.1)	22 (32.9)	50 (73.5)	13 (19.1)	5 (7.4)	34 (47.9)	22 (31.0)	15 (21.1)	5 (22.7)	9 (40.9)	8 (36.4)	13 (14.7)	21 (24.9)	52 (60.3)	42 (65.6)	14 (21.9)	8 (12.5)	165 (43.7)	103 (27.2)	109 (29.0)

Overall, 44% of the respondents answered that white defendants are "often/very often" less likely to receive a prison sentence than black defendants. Only 29% of the respondents stated that this "never/rarely" happens. Differences of opinion were found to exist among litigators from different racial/ethnic groups, but a substantial proportion of each group said that they had witnessed biased sentencing on a regular basis. Thus, 32% of white, 74% of black, 48% of Hispanic, and 23% of Asian-American litigators in New York City, and 15% of white and 66% of minority litigators outside New York City, reported that sentencing which favors Whites occurs "often/very often." Only 22% of all litigators surveyed in New York City (33% of white, 7% of black, 21% of Hispanic and 36% of Asian-American litigators), and only 40% of those surveyed outside of the city (60% of white and 13% of minority litigators) stated that this "never/rarely" occurs.

Comments offered by litigators on this subject included the following remark by a white litigator:

> I have seen Blacks, convicted of petit larceny and Class A misdemeanors get a full year in jail--but a White get off with probation.[66]

In addition, a black litigator commented:

> Minority criminal defendants are, without qualification, being treated differently than non-minorities, particularly at sentencing.[67]

The charge of racially biased sentencing was also raised repeatedly at the Commission's public hearings.[68] One witness stated:

---

[66] Litigators' Questionnaire, supra note 5.

[67] Id.

[68] Testimony was also offered on the question of mandatory, determinate sentencing. Retired Supreme Court Justice William Booth disagreed with the argument that this sentencing would provide equal treatment for all, and instead expressed fear that eliminating judicial discretion leaves judges as automatons. 4 New York City Hearing, supra note 4, at 877-878 (June 30, 1988) (testimony of Hon. William Booth). The Hon. Burton Roberts

> [T]here are times when the [Legal Aid Society] lawyers feel clearly that the minority defendant is being treated differently from his co-defendant who happens to be not a member of the minority group.[69]

Another witness expressed his concern as follows:

> [I]t is easy for [W]hites to get tough on crime, clamor for the death penalty or increase sentences; it is not mostly white people in prison, what do they care? Although more [W]hites commit imprisonable offenses, why worry, they mainly get probation.[70]

Disparate treatment in sentencing may arise because dispositional alternatives to incarceration are not considered with equal frequency in cases involving white and minority defendants. Both judges and litigators were asked the frequency with which "the court is encouraged by counsel to consider a wider range of dispositional alternatives (e.g., drug treatment programs, community service programs, and supervised home release) in the case of a white defendant/respondent (adult or juvenile) than that presented in cases involving minority defendants/respondents."[71] Judges' responses are shown in Table II.3.8. Litigators' answers are shown in Table II.3.8a.

---

echoed Judge Booth's fear when he stated: "We have a situation in this state where we have mandatory sentencing. This is the most draconian sentence structure in the world . . . other than possibly the Soviet Union and South Africa." 1 id. at 141 (June 29, 1988) (testimony of Hon. Burton Roberts).

[69] 1 New York City Hearing, supra note 4, at 96 (testimony of Archibald R. Murray, Executive Director and Attorney-In-Chief of the Legal Aid Society). While Murray spoke at the Commission's hearings on behalf of the New York State Bar Association, these comments, he said, reflected concerns related to him by Legal Aid Society lawyers. Id.

[70] Albany Hearing, supra note 23, at 116 (testimony of Jerry Lee, counsel to Arthur O. Eve, Deputy Speaker of the New York State Assembly).

[71] Blank Judges' Questionnaire, supra note 15, at 15; Blank Litigators' Questionnaire, supra note 15, at 10.

Table II.3.8
Judges' Assessments of Frequency With Which Attorneys Request Alternatives to Incarceration
(Numbers in parentheses are percentages)

	WHITE JUDGES			MINORITY JUDGES			TOTAL JUDGES		
	Often/ Very Often	Some-times	Never/ Rare-ly	Often/ Very Often	Some-times	Never/ Rare-ly	Often/ Very Often	Some-times	Never/ Rare-ly
The court is encouraged by counsel to consider a wider range of dispositional alternatives when the case involves white rather than minority defendants.	17 (4.2)	64 (15.6)	328 (80.2)	24 (39.3)	20 (32.8)	17 (27.9)	41 (8.7)	84 (17.9)	345 (73.4)

Table II.3.8a
Litigators' Assessments of Frequency With Which Attorneys Request Alternatives to Incarceration
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NEW YORK CITY						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
Counsel encourages court to consider a wider range of disposition alternatives more often for white than min. defendants.	22 (33.6)	16 (23.9)	28 (42.4)	43 (63.2)	15 (22.1)	10 (14.7)	30 (42.9)	24 (34.3)	16 (22.9)	6 (27.3)	9 (40.9)	7 (31.8)	8 (9.5)	27 (31.7)	50 (58.8)	30 (47.6)	20 (31.7)	13 (20.6)	139 (37.2)	111 (29.6)	124 (33.2)

Only 9% of surveyed judges reported that this disparate treatment happens "often/very often;" 27% reported that it happens "sometimes" or "often/very often." However, the views of minority and white judges were strikingly different. Of the minority judges surveyed, 39% reported that they had been asked to consider a wider range of dispositional alternatives for white defendants "often/very often," and 72% reported that it happened at least "sometimes." Only 4% of white judges reported it happened "often/very often," and 20% reported it happened "sometimes" or "often/very often."

Litigators believe this disparate treatment is much more common. Overall, 37% of the litigators surveyed stated that white defendants "often/very often" have a broader range of dispositional alternatives considered than their minority counterparts. While there were some significant differences among the questioned groups, the differences were not as great as among judges. Thus, 34% of white, 63% of black, 43% of Hispanic, and 27% of Asian-American litigators in New York City, and 10% of white and 48% of minority litigators outside New York City agreed that courts are encouraged to consider a broader range of dispositional alternatives for white defendants "often/very often." Only 33% of the litigators responded that this preferential treatment for Whites "never/rarely" occurred.

The perception that minority defendants are afforded a narrower range of dispositional alternatives was also expressed in hearing testimony before the Commission. One witness testified that Legal Aid attorneys in New York City have noted racial differences in the frequency with which defendants are offered probation rather than

incarceration.[72] Another witness expressed the view that alternatives to incarceration are frequently not even described to minority defendants:

> [T]he people that perhaps could benefit most from the service are not aware of the service and not being guided through assigned counsel or others to use it.[73]

Another witness commented:

> [I]t's my prediction that a close look at pretrial and alternative programs in effect throughout the state will discover much lower minority participation.[74]

---

[72] New York City Hearing, supra note 4, at 97 (testimony of Archibald R. Murray, Executive Director and Attorney-in-Chief of the Legal Aid Society).

[73] New York State Judicial Commission on Minorities, Buffalo Public Hearing, 155 (May 26, 1988) (testimony of Jan Peters, Executive Director, Buffalo Federation of Neighborhood Centers, Inc.). Peters described client-specific planning as an alternative to incarceration (ATI). Id. at 144. These plans are presented to the court at time of sentencing and often result in probation. Id. at 144-45. Many clients are nonminority. Id. at 147-48. Peters emphasized the importance of having judges, as well as other law enforcement officials, gain a better understanding of the ATI program. Id. at 148.

[74] Albany Hearing, supra note 23, at 183 (testimony of Jim Murphy, Director of the New York State Coalition for Criminal Justice).

FINDINGS

1. The Commission adopts the Enforth Report's findings that the present pretrial processing system, from arrest to trial, is characterized by inordinate delays due to the following factors: increased arrests, holding space limitations, and an antiquated and overburdened system of record keeping.
2. Bail considerations may be based, in part, on the value systems of judges who lack cross-cultural sensitivity to the familial and cultural realities of minority lifestyles.
3. The procedures required for the return of cash bail are so confusing and complex that it is unnecessarily difficult to obtain a return of cash bail.
4. There is a perception, supported in several aspects by research findings, that there is a race-based disparity in the conviction rate and the sentence type.

RECOMMENDATIONS

1. Judges should review their bail and sentencing decisions to ensure that they are fair and not influenced by racial or ethnic stereotypes.
2. The Office of Court Administration should adopt a judicial training program that reviews the bail statute and highlights the available alternatives to money bail.
3. Proof of exoneration should result in the automatic return of cash to the rightful party.
4. Judicial training programs should include a review of alternatives to incarceration, especially regarding circumstances common among minority defendants.

5. Sentencing statistics concerning the race of victim, defendant, and complainant should be maintained along with case outcome, and they should be published by the Unified Court System in cooperation with the New York State Division of Criminal Justice Services.

CHAPTER FOUR CIVIL CASE OUTCOMES

CHAPTER 4

CIVIL CASE OUTCOMES

CHAPTER OVERVIEW

In response to one question on the Commission's questionnaire, a white litigator outside New York City stated:

> [I]n Nassau [and] Suffolk county with regard to civil plaintiff[s], [t]he one thing I seek to avoid is a jury trial if I have a minority plaintiff. My experience is that a minority plaintiff will receive an unfair jury award.[1]

Compare this to the comment made by a black litigator in New York City:

> In Manhattan, Kings and Bronx counties, I don't see much discrimination . . . the three worst counties I have practiced in are Queens, Nassau and Westchester. I've had judges say, "If he wasn't a Black, he would be worth much more money." You get much less, especially in Westchester, for a Black or [H]ispanic.[2]

As these two comments indicate, the civil litigant's race may affect the outcome in his or her civil case. The nature of the influence of race varies from county to county. Since results vary dramatically among counties, based upon the number of minorities residing in each, the impact of race in civil cases should not be studied on a statewide level. In any attempt to examine racial bias in civil litigation, particular attention must be paid to the county or region in which the litigation is brought.

In the criminal context, the Commission reviewed both bail and sentencing because those processes necessarily affect the outcome in every criminal case. An analogous review of the processes which are unique to civil litigation is undertaken in this chapter. In civil

---

[1] New York State Judicial Commission on Minorities, Responses to Questionnaire for Litigators in New York State on Issues Relating to Professional Experiences and Perceptions of Fairness and Sensitivity in the Courtroom [hereinafter Litigators' Questionnaire].

[2] Id.

litigation these processes include case assessment, enforcement of judgments, and jury verdicts.

Unfortunately, little research has been conducted on racially disparate case outcomes in the civil context. What little research exists in this area is weakened by the fact that civil awards are usually based upon the loss of income suffered by the injured party. Because many minority litigants earn less than their white counterparts, they tend to lose less, monetarily, when injured. Existing research does not control for this disparity in earning history and its effect upon any comparison of case outcomes.

Section I of this chapter reviews "juror attitudes," as they may influence variations in awards given in different counties. Section II summarizes social science research on racial disparities in jury awards, and the results of the Commission's own surveys. Section III explores certain outcomes unique to housing court; and Section IV reviews other evidence of racial disparity in civil litigation.

I. JUROR ATTITUDES

The Commission, through its hearings and surveys, discerned a perception of disparity in civil cases. There exists the perception that, in certain counties, usually those with low minority populations, minorities receive less money in jury awards than similarly situated Whites. Conversely, there exists the perception that in certain counties, usually those with high minority populations, minorities receive jury awards in amounts higher than expected.

The administrative judge in Bronx County, Burton Roberts, recently noted the "Bronx is an experiment in urban living." Very substantial jury awards have recently been awarded

to minority plaintiffs there. One black litigator recognized: "Minorities do well with personal injury in the Bronx."[3] The litigator also stated, however:

> It's well known that if a minority is injured in Westchester or Rockland County, you might as well settle for what you can get.[4]

While there has been little research on racial disparities in civil litigation, the body of research on juror attitudes may help to explain the popular perception that there is a relationship between the size of the minority population in a given area and the amount of damages that juries will award.

The Commission examined a wide range of studies, including data from the social psychology of law, behavioral science research, and research on jury dynamics.[5] The studies examine juror attitudes toward minorities in general, and how these attitudes may have impact upon the treatment of minorities in civil courts.[6]

The social psychological research on juries' perceptions, deliberations, verdicts and sentencing, has a long and varied history. Factors such as gender, socioeconomic status, race, attitude similarity, moral character, and general attractiveness have all been examined under the heading "jury behavior."

---

[3] Id.

[4] Id.

[5] See New York State Judicial Commission on Minorities, Civil Outcomes: Background Briefing Paper #5, in vol. 5 of this report. Most research on jury attitudes and racial bias can be classified into two major categories: simulated jury experiments (mock juries), and archival research of court records (data collected from actual trial outcomes). This large and diverse body of research documents the significance of extra-evidential factors in the courtroom, such as demographics, and attitudes of defendants and jurors. In reviewing jury research, archival and simulated studies should be complementary to render the most exhaustive and inclusive view of jury behavior and trends.

Most of the studies reviewed here are simulated jury experiments because mock jury methodology focuses on, and is the best measure of, juror attitudes, which are the subject of this review. Archival research, on the other hand, is primarily valuable for documenting actual verdict, conviction and sentencing disparities. Sentencing disparities are addressed in vol. II, ch. 3.

[6] See id.

The Commission considered approximately sixty years of research on various aspects of juror behavior, including its role within the judicial process.[7] The data suggest that race tends to elicit from jurors certain expectations, preconceived ideas, and categorizations.[8] For example, black defendants tend to elicit negative responses from jurors.[9] It also seems that certain crimes may be generally associated as being committed by Blacks or by Whites.[10] According to one researcher, this type of juror bias significantly reduces the probability that a minority defendant will receive a fair trial.[11] Another researcher observed that to have a fair trial, a minority defendant

> requires a jury panel which understands, or is familiar with, black culture and black psychology because of the distinctive characteristics of black culture, and because of the general ignorance of the majority population with regard to minority culture.[12]

The data suggest that individuals rely upon stereotypes to categorize and evaluate even obviously dissimilar individuals. Two researchers, Grant and Holmes, conducted a study of personality assessments of the following ethnic groups prepared by undergraduate

---

[7]Too little data exist with respect to the experience of Asian Americans, Hispanics and Native Americans, as most of the literature focuses only on the interaction of Blacks and Whites. As Dane and Wrightsman point out, "[o]ne of the most glaring deficits in this body of research is the total disregard for races other than black or white." Dane & Wrightsman, Effects of Defendants' and Victims' Characteristics on Jurors' Verdicts, in The Psychology of the Courtroom 83, 107 (N.L. Kerr & R.M. Bray eds. 1982). The Commission does not extrapolate research relating to Blacks to Hispanics, Asian Americans or Native Americans. Each minority group experiences discrimination and racism in different ways.

[8]See Rokeach & Vidmar, Testimony Concerning Possible Jury Bias in a Black Panther Murder Trial, 3 J. Applied Soc. Psychology 19 (1973).

[9]Ugwuegbu, Racial and Evidential Factors in Juror Attribution of Legal Responsibility, 15 J. Experimental Soc. Psychology 133, 134 (1979) (citing Kalven & Zeisel, The American Jury 210 (1966)).

[10]Nickerson, Mayo & Smith, Racism in the Courtroom, in Prejudice, Discrimination, and Racism 255, 273 (J. Dovidio & S. Gaertner eds. 1986) (citing Sunnafrank & Fontes, General and Crime Related Racial Stereotypes and Influences on Juridic Decisions, 17 Cornell J. Soc. Rel. 1 (1981)).

[11]Cohen & Peterson, Bias in the Courtroom: Race and Sex Effects of Attorneys On Juror Verdicts, 9 Soc. Behav. & Personality 81, 81 (1981).

[12]Denno, Psychological Factors For the Black Defendant In a Jury Trial, 11 J. Black Stud. 313, 318 (1981).

students: Irish, Chinese and Indian.[13] They found that ethnic stereotypes played a significant role, not only in the way that minority individuals were perceived socially, but also in the kind of impression that a minority individual made upon the people he or she met. People, in general, can be said to disregard facts and heed stereotypes when they structure information and knowledge. What this means for the minority litigant is that he or she may be categorized according to ethnicity and treated in compliance with the stereotypes usually applied to his or her ethnic group.[14]

Research has shown that Whites commonly hold two classic stereotypes of Blacks: (a) that Blacks are prone to violent criminal behavior, and (b) that they are less intelligent than Whites.[15] Studies show that jurors apply these two stereotypes when deliberating over, and deciding cases.[16] The effect of these stereotypes is that: (1) when the evidence is marginal, Whites may be given the benefit of the doubt and Blacks are not,[17] and (2)

---

[13] See Grant & Holmes, The Integration of Implicit Personality Theory Schemas and Stereotype Images, 44 Soc. Psychology Q. 107 (1981); Grant & Holmes, The Influence of Stereotypes in Impression Formation: A Reply to Locksley, Hepburn, and Ortiz, 45 Soc. Psychology Q. 274 (1982).

[14] Denno, supra note 12. Based on her analysis of research, Denno found:

> [J]urors many [sic] not consider the multiple plausible causes which can dilute the impression strength of only a few units of information. Because cognitively simple individuals are ignorant of many situational behavioral cues (e.g., minority culture, ghetto life, need for self protection, and so forth), they tend to rely upon distortive personal behavior cues (e.g., the 'bad and evil' impression of minorities) which they attribute to a defendant to ease the decision-making processes.
>
> Id. at 322.

[15] G. Allport, The Nature of Prejudice (1979 ed.).

[16] See, supra notes 7-12.

[17] See Ugwuegbu, supra note 9, at 139-140, 143. The Ugwuegbu study found that when the evidence was strong or near zero, black and white subjects (mock jurors) evaluated the defendants, regardless of race, as equally culpable. However, when the evidence was marginal, white subjects tended to rate black defendants as significantly more culpable than white defendants. See also id. at 135, 143 (citing Kalven & Zeisel, The American Jury (1966) (hypothesizing that in cases where there is doubt concerning the evidence, the juror was actually "liberated" from the facts and therefore more easily influenced by "affective" factors)).

black attorneys may lack credibility in the eyes of jurors who believe that Blacks are intellectually inferior to Whites.[18]

This body of research concludes that racial bias held by jurors leads to dangerous stereotyping of minority litigants which then results in adverse outcomes in many cases. Clarence Darrow long ago suggested that the evidence in a case may be less important than whether or not the jurors like the defendant.[19] Psychologists have established that to a large degree,

> whether we like someone often depends on how similar to us that person appears to be in terms of shared values, attitudes, and beliefs. We also tend to prefer people who are similar to us in age, level of education, status of occupation, and political views.[20]

Thus, while there may be little empirical data to support the perception of disparity in civil outcomes based on the race of parties, jury research may well explain the perception.

II. OTHER RESEARCH ON DISPARITIES IN CIVIL CASES: THE RAND STUDY

Research into racial disparity in civil cases is often hampered by the absence of information in the case files about the race of the parties. However, a Rand Corporation

---

[18] See Cohen & Peterson, supra note 11. In their study, under the conditions of a mock jury trial, high school students evaluated the guilt or innocence of a defendant accused of murder, while the race (black or white) and gender of the attorney was systemically varied. The mock jurors viewed cases which were identical except for the race and gender of the attorneys. Notwithstanding debates about the methodology, Cohen and Peterson found that a defendant represented by a black attorney was more likely to be found guilty than a defendant represented by a white attorney. Id. at 86 (noting methodological problems). In the study, subjects were given a questionnaire booklet with general instructions, judge's instructions to prospective jurors, a summary of a criminal trial, a verdict sheet, and a questionnaire concerning their impressions of the persons involved in the trial to complete. Subjects were also presented with a set of slides corresponding to the attorneys and persons referred to in the booklet. Id. at 84-85 (discussing method used in study).

The authors also noted that the misconceptions held by jurors about black attorneys (as well as black defendants) may include that they are less well-educated, that they are of a lower socioeconomic background, and that they are prone to criminal behavior. Id. at 85. The third conception demonstrates the power of prejudice and stereotypes. Jurors' generalizations about the criminal behavior of Blacks included the black attorney in his or her professional capacity in the courtroom.

[19] Id. at 81 (noting comment by Clarence Darrow cited in E. Sutherland, Principles of Criminology (1966)).

[20] J. Dworetsky, Psychology 588 (2d ed. 1985).

study (the "Rand Study") did obtain information relating to race and civil jury trial outcomes.[21] Although the study is ten years old, was conducted in another jurisdiction, and did not consistently adjust for loss of income, it did conclude that race "seemed to have a pervasive influence on the outcomes of civil jury trials in Cook County, [Illinois]."[22]

The Rand Study involved an empirical analysis of how litigants fared in over 9,000 state and federal civil jury trials in Cook County, Illinois for the period 1960-1979.[23] By reviewing reports of jury verdicts compiled by the Cook County Jury Verdict Reporter (CCJVR), a private newsletter for law and insurance professionals,[24] the researchers explored the connection between trial outcomes and party characteristics (age, race, occupation, and gender).

The study found that among individual litigants, Blacks lost more often than Whites, both as plaintiffs and defendants, and black plaintiffs received smaller awards. It concluded:

> Even after we adjusted for differences in case type, injuries, and characteristics of other parties, we found that both liability decisions and awards differed significantly between black and white plaintiffs and between black and white defendants. Black plaintiffs won somewhat less often than white; 40 percent as opposed to 46 percent, for example, in automobile accident trials. And, when they won, black plaintiffs received smaller awards, only 74 percent as much as white plaintiffs received for the same injury.
>
> Black defendants also lost somewhat more often than Whites, with the differences again similar to that for plaintiffs. Liability decisions were about the same, then, when both parties were of the same race, but lawsuits between parties of different races produced substantial differences: White plaintiffs,

---

[21] See A. Chin & M. Peterson, Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials (The Rand Corporation Institute for Civil Justice, R-3249-ICJ, 1985).

[22] Id. at viii.

[23] Id. at 5.

[24] Id. at 63.

> for example, won 62 percent of slip and fall trials against black defendants, but black defendants won only 50% of such suits against white defendants.[25]

A statistically significant association was discovered between the plaintiff's race and the probability that he or she would be victorious.[26] The probability of a white plaintiff winning a lawsuit against a black defendant was 0.61, whereas the probability of a black plaintiff winning against a white defendant was 0.45.[27] White plaintiffs won a greater proportion of lawsuits and received substantially greater awards than Blacks with comparable injury, lost income, and type of legal claim:

> For example, a white plaintiff would receive an estimated median award of $6,300 for a slip-and-fall injury of moderate severity, when suing one individual (white) defendant. In a similar case, a black plaintiff would receive $4,600.
>
> These differences were greater for plaintiffs with major injuries. For example, the estimated awards against a single corporate defendant for a very serious workplace injury resulting in substantial lost income, was $46,600 for a white plaintiff and $34,500 for a black -- a $12,100 difference. Wrongful death awards were also considerably different, with estimated compensation of $79,000 for the death of a white in an automobile accident case involving a single business defendant but $58,000 for the death of a black in a similar case.[28]

The study cautioned that certain aspects of these trials, which were not examined in the statistical analyses, could have produced some of the results:

> The present statistical models are limited . . . . Perhaps most important, the analyses did not include information about liability issues -- that is, theories of liability or contributory negligence, factual claims about parties' conduct -- nor

---

[25] Id. at viii (footnote omitted). The study notes that its data only distinguishes between blacks and nonblacks. The term "Whites" is deemed to include Hispanics, Asians and American Indians. Id. at viii n.1.

[26] Id. at 37-41.

[27] Id. at 37. These estimates are for individual plaintiffs in automobile accident trials. The study advanced that the pattern was similar for other types of suits. Id. at 37-38.

[28] Id. at 38-39 (footnotes omitted).

about the quality of legal representation. The influence of these factors on jurors' decisions might have contributed to the findings reported here.[29]

The study demonstrated a consistent relationship between litigant characteristics and jury verdicts over a 20-year period in the same jurisdiction. The results were "statistically robust, stable over time, and consistent with widely held expectations about how juries treat different types of litigants."[30]

While the Commission cannot definitively conclude that differences in awards between black and white plaintiffs are racially motivated, these differences do exist, cannot be ignored, and should be studied as part of any systematic research agenda. These same patterns have not gone unnoticed by members of the New York State judiciary. One judge testified before the Commission that disparities often exist between Blacks and Whites in personal injury jury awards. He stated that "unfortunately, our judges are not sufficiently sensitive to be able to say this [the racially motivated disparity] is wrong and I will set it aside."[31] Another judge noted that injuries suffered by minority persons are not compensated at the same level as those suffered by nonminorities with one possible exception--in the Bronx, where the difference may be due to jury composition.[32]

The experiences of these two judges are supported by the results of the Commission's surveys. Nearly 40% of minority judges reported that "often/very often" "the relief awarded to a white plaintiff in a civil case is more than the relief awarded to a minority plaintiff in

---

[29] Id. at 58-59 (footnote omitted).

[30] Id. at vi.

[31] 1 New York State Judicial Commission on Minorities, New York City Public Hearing 32 (June 29, 1988) (testimony of Honorable Kenneth Browne) [hereinafter New York City Hearing].

[32] 3 id. at 526 (June 30, 1988) (testimony of Honorable Joseph B. Williams).

a comparable injury case." Four percent of white judges gave this response. Table II.4.1. shows the judges' responses to questions about civil outcomes.

Table II.4.1
Judges' Responses to Questions About Civil Outcomes
(Numbers in parentheses are percentages)

	WHITE JUDGES			MINORITY JUDGES			TOTAL JUDGES		
	Often/ Very Often	Some-times	Never/ Rare-ly	Often/ Very Often	Some-times	Never/ Rare-ly	Often/ Very Often	Some-times	Never/ Rare-ly
A civil case is regarded by attorneys or insurance companies as less "winnable" because the injured party is minority.	12 (4.4)	63 (23.3)	195 (72.2)	11 (28.2)	12 (30.8)	16 (41.0)	23 (7.4)	75 (24.3)	212 (68.3)
The relief award to a white plaintiff in a civil case is more than the relief awarded to a minority plaintiff in a comparable injury case.	10 (3.8)	44 (16.5)	212 (79.7)	15 (39.5)	11 (28.9)	12 (31.6)	25 (8.2)	55 (18.1)	224 (73.7)

Of all litigators responding to the Commission's questionnaire, 38% reported that "often/very often" "the relief awarded to a white plaintiff in a civil case is more than the relief awarded to a minority plaintiff in a comparable case" (emphasis added). This was the response of 8% of white, 68% of black, 34% of Hispanic, and 28% of Asian-American litigators in New York City, and 16% of white and 65% of minority litigators outside New York City. These data are shown in Table II.4.2.

Table II.4.2
Litigators' Responses to Questions about Civil Outcomes
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NYC						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
A civil case is regarded by attorneys or insurance companies as less 'winnable' because the injured party is minority.	8 (9.4)	22 (27.2)	51 (63.4)	37 (44.6)	26 (31.3)	20 (24.1)	22 (36.7)	20 (33.3)	18 (30.0)	6 (15.0)	14 (35.0)	20 (50.0)	15 (20.4)	20 (27.1)	39 (52.5)	32 (54.2)	12 (20.3)	15 (25.4)	120 (30.1)	114 (28.7)	164 (41.1)
The relief awarded to a white plaintiff in a civil case is more than the relief awarded to a min. plaintiff in a comparable case.	6 (8.4)	14 (19.1)	52 (72.5)	55 (67.9)	18 (22.2)	8 (9.9)	22 (34.4)	23 (35.9)	19 (29.7)	9 (28.1)	16 (50.0)	7 (21.9)	11 (16.1)	22 (33.0)	34 (50.9)	34 (65.4)	9 (17.3)	9 (17.3)	137 (37.3)	102 (27.7)	128 (35.0)
Child support awards more vigorously enforced for whites than for minorities in similar circumstances.	2 (7.5)	4 (12.5)	27 (80.0)	20 (34.5)	13 (22.4)	25 (43.1)	16 (32.0)	15 (30.0)	19 (38.0)	3 (21.4)	5 (35.7)	6 (42.9)	3 (3.9)	9 (13.8)	54 (82.4)	19 (31.1)	15 (24.6)	27 (44.3)	63 (22.4)	61 (21.7)	157 (55.9)
Domestic violence cases involving whites are treated more seriously by the courts than those involving minorities in similar circumstances.	12 (17.6)	24 (35.0)	3 (47.4)	38 (47.5)	19 (23.8)	23 (28.8)	32 (41.0)	18 (23.1)	28 (35.9)	7 (29.2)	6 (25.0)	11 (45.8)	8 (8.4)	13 (13.4)	76 (78.2)	28 (40.6)	15 (21.7)	26 (37.7)	125 (30.1)	95 (22.8)	196 (47.2)

Generally, then, a large percentage of those minority litigators who responded to the questionnaire reported frequent disparities in civil outcomes. While fewer white than minority litigators reported these disparities, it is noteworthy that nearly one in five Whites reported them "often/very often."

Litigators described how these disparities occurred in a variety of circumstances. For example, a white litigator in New York City observed:

> [I]n civil parts, minority litigants are offered less, pressured more to settle, [and are] more likely to have favorable verdicts reduced by Judges.[33]

A black litigator in New York City noted:

> In civil cases, sometimes the relief awarded a white plaintiff is more than the relief awarded a minority plaintiff in a comparable case. In cases of wrongful death, it becomes apparent that the lives of Whites are more highly valued than the lives of minorities.[34]

Another black litigator in New York City remarked:

> In civil cases, white plaintiffs are very often awarded more relief than minorities -- it is a socioeconomic issue because the white middle class has a higher income than the black middle class, and the courts take into account income factors. The only time a black plaintiff may receive a fair award is when the city is the defendant. Otherwise, in commercial litigation or malpractice, awards are based upon socio-economic status.[35]

A third black litigator outside New York City stated:

> I have always found that African-American and Hispanic clients have been viewed as less worthy of significant financial awards in personal injury cases than similarly situated white clients by judges and jurors. For some reason

---

[33] Litigators' Questionnaire, supra note 1.

[34] Id.

[35] Id.

> African-Americans and Hispanics just are not as valuable a resource as whites in the eyes of the legal system.[36]

An Asian-American litigator in New York City commented:

> In my early years, the judges usually dismissed issues of rent abatement or issues of habitability when raised by minorities more readily than for whites. My guess was due to a preconceived assumption that minorities should live in those kinds of situations, when whites shouldn't because [they] shouldn't expect better.[37]

III. DISPARITIES IN HOUSING COURT

The most compelling evidence supporting the perception that racial bias affects outcomes in civil cases was derived from the Commission's analysis of a Housing Court study conducted by the City Wide Task Force on Housing Court.[38] The study consisted of direct observation of certain events taking place at pretrial conferences before mediators, law assistants, and judges. The Housing Court studies were conducted in Brooklyn, the Bronx, Manhattan, and Queens. The Task Force study recorded information about the race of the tenant in the conferences, and concluded that race was only one of a number of variables affecting case outcomes.

The Commission's reanalysis of the Task Force data sought to determine whether there was a significant relationship between the race of the tenant and the outcomes obtained in Housing Court. The Commission found that statistically significant differences in outcomes can, at least in part, be attributed to the tenant's race.[39]

---

[36] Id.

[37] Id.

[38] See New York State Judicial Commission on Minorities, Analyses of Data From Housing Court Task Force Study (Dec. 22, 1989) [hereinafter Housing Court Data].

[39] See id.

The Commission also found that when a tenant is not represented by counsel, the disparity in outcomes between minorities and Whites is greater. In reexamining the data from the Task Force Study, the Commission examined the relationships between the race of the litigant, and various court procedures, and the effect of lack of legal representation on the case outcome. The study showed, that Blacks and Hispanics are disproportionately disadvantaged by lack of legal representation.[40] More importantly, the data clearly showed that when legal representation (or lack thereof) was constant across cases studied, minorities received less favorable Housing Court treatment, as a general matter, than Whites.

The Commission found that in those cases brought before a mediator, the tenant's race was a determining factor in the payment of court costs as well as in whether or not the tenant was informed of the "right to be heard."[41] In those cases brought before a judge, the tenant's race was found to determine whether cases were adjourned, consequences explained, certain evidence permitted, rent abatements granted, and whether rent was paid at the prehearing conference.[42] The key finding in this analysis was that even when the parties stand on equal footing, i.e., had counsel present, minorities experienced less favorable treatment and received smaller awards than similarly situated white litigants.[43]

---

[40] See vol. 2, ch. 2 of this report.

[41] See Housing Court Data, supra note 38, at 8-23.

[42] See id. at 23-37.

[43] See id. at 35-37.

A. Cases Heard Before a Mediator

1. Payment of Court Costs

Court costs are administrative fees (e.g., filings fees) imposed by the court which usually are awarded to the prevailing party. This means that the losing party must reimburse the winning party for whatever administrative fees that party paid to bring or to defend the action. Courtroom observers were asked to respond to two questions; whether costs were paid, and if so, by whom (the tenant or the landlord) were they paid? In cases involving black tenants, court costs were paid more often than in cases involving Hispanic or white tenants, and minority litigants were ordered to pay more often than white litigants. The percentages were 52% for Blacks versus 17% for Hispanics and 22% for Whites.[44] The data showed that if the case involved a black tenant, it was more than twice as likely that court costs, would be exacted than if the case involved an Hispanic or white tenant.

Black tenants, irrespective of whether they were represented by counsel, paid court costs, when they were paid, more frequently than did Hispanic or white tenants: 91% for Blacks versus 71% for Hispanics and 56% for Whites.[45]

B. Informing Tenants of Right to be Heard

If a case is not resolved through mediation, the parties may place their case before a judge. A party cannot, however, ask to be heard by a judge if unaware of the right to do so. The Task Force data showed that mediators generally failed to explain this right to tenants who were unrepresented by attorneys, and also failed to explain the process of

[44] See id. at 10-11.

[45] See id. at 12-13.

mediation to tenants. This resulted in some tenants believing that the mediator was the judge.[46]

Black and white tenants were more often informed of their right to appear before the judge when they were represented by counsel; for Hispanics it decreased the chance.[47] Even in those cases where counsel was present, there was an obvious discrepancy between minority and white tenants: 66.7% of Blacks, 28.6% Hispanics, but 100% of Whites were informed of the right.[48]

C. Explanation of the Consequences

During pretrial conferences with the judge, the tenant and the landlord may reach a settlement agreement. Only 24.8% of all tenants are represented by attorneys in these conferences before a judge, while landlords are overwhelmingly represented by counsel.[49] In 57% of the observed cases the judge did not explain to the tenant the nature of a final judgment or the consequences of a failure to abide by the terms of the settlement.[50] The Commission's analysis revealed that judges explained the consequences of failing to abide by the terms of the agreement in 82% of the cases involving white tenants, but in only 51% of the cases involving Blacks, and in 57% of the cases involving Hispanic tenants.[51] This dramatically disparate racial treatment occurred regardless of whether or not the tenants

---

[46] City Wide Task Force on Housing Court, 5 Minute Justice or "Ain't Nothing Going On But The Rent 54, (Nov. 1986) [hereinafter 5 Minute Justice].

[47] See Housing Court Data, supra note 38, at 16.

[48] See id. at 14-16.

[49] See 5 Minute Justice, supra note 46, at 37, 53.

[50] See id. at 55-56; Housing Court Data, supra note 38, at 30.

[51] See Housing Court Data, supra note 38, at 26-27.

were represented. Where there was no attorney, the judge explained the consequences in 90% of the cases involving white tenants, in 50% of the cases involving black tenants, and in 56% of the cases involving Hispanic tenants.

D. Permission to Present Evidence

Perhaps the most startling of all the statistics produced by the Task Force was the relationship between whether the judge grants permission to present evidence and the race of the tenants. In those cases in which tenants were not represented by counsel, 17% of the black, 26% of the Hispanic and 50% of white tenants were permitted to present evidence in support of their cases.[52]

E. Payment of Rent at Prehearing Conference

Nonpayment cases represented 71% of the pretrial conferences observed in which the tenant and landlord entered into a stipulation.[53] Tenants were represented in 17% and landlords were represented in 80% of these cases.[54] In 10.6% of the cases, the tenant or the tenant's attorney wrote the stipulation, and in 60% of the cases, the landlord or the landlord's attorney wrote the stipulation.[55] Without regard to race, 62% of the tenants who were not represented were ordered to pay rent, while only 38% of those persons who were represented were required to pay rent.[56]

---

[52] See id. at 32-33.

[53] See 5 Minute Justice, supra note 46, at 60.

[54] Id.

[55] Id.

[56] See Housing Court Data, supra note 38, at 36-37.

In this context, black and Hispanic litigants were ordered to pay rent significantly more often than were white litigants. In cases involving unrepresented tenants, 64% of black and 63% Hispanic tenants were ordered to pay rent, versus only 47% of white tenants. The order to pay rent was significantly affected by the presence of a lawyer, but more so for white than for black tenants.[57] When represented, 57% of black and 46% of Hispanic tenants were ordered to pay rent, but no white tenants were ordered to pay.[58]

IV. OTHER RACIAL DISPARITIES

A. Winnability of Cases

Of all the judges surveyed by the Commission, only 7.4% felt that "often/very often" a civil case is regarded by attorneys or insurance companies as less "winnable" because the injured party is a minority. This was the response of 28% of the minority judges and 4% of the white judges. (See supra Table II.4.1.)

Among litigators with civil court experience, 30% reported that "often/very often" a civil case is regarded by attorneys or insurance companies as less "winnable" because the injured party is minority. This was the response of 9% of white, 45% of black, 37% of Hispanic, and 15% of Asian-American litigators in New York City, and 20% of white and 54% of minority litigators outside New York City. (See supra Table II.4.2.)

B. Enforcement of Child Support Awards

Among litigators with family court experience, 22% stated that "often/very often" the court enforces a child support award for a white child more vigorously than it does for a

---

[57] Id. at 37.

[58] Id.

minority child in similar circumstances. This was the response of 8% of white, 35% of black, 32% of Hispanic, and 21% of Asian-American litigators in New York City, and 4% of white and 31% of minority litigators outside New York City. The responses of Whites and all minority groups, and black litigators, and Asian-American, and Hispanic litigators in New York City differ significantly, as do those of white and minority litigators outside New York City. (See supra Table II.4.2.)

C. Treatment of Domestic Violence Cases

Thirty percent of litigators who handle domestic violence cases reported that "often/very often" the court treats a domestic violence case involving a white couple more seriously than one involving a minority couple in similar circumstances. This was the response of 18% of white, 48% of black, 41% of Hispanic, and 29% of Asian-American litigators in New York City, and 8% of white and 41% of minority litigators outside New York City. The responses of white litigators, and black and Hispanic litigators in New York City, and of white and minority litigators outside New York City differ significantly. (See supra Table II.4.2.)

FINDINGS

1. There exists a widespread perception that minorities tend to receive smaller awards in civil cases than similarly situated nonminorities in counties with low minority populations.

2. An extensive body of social science research tends to confirm that juror behavior in civil cases is affected by racial considerations in ways that disadvantage minority litigants.

3. There is also one study conducted in Cook County, Illinois, that showed black litigants lose more often than white litigants in civil actions, both as plaintiffs and defendants, and that they receive smaller awards.

4. The Commission's analysis of data from a study of housing courts in New York City confirms the existence of significant disparities in the treatment of minority and nonminority litigants.

RECOMMENDATION

The Commission recommends that the Office of Court Administration collect racial data on litigants in civil cases (a) to prepare a study on this subject to determine whether there is a disparity in civil case outcomes and damage awards based on race, and (b) to consider distribution of the study to judges for the monitoring of the consistency of awards between minority and nonminority litigants in civil cases. [Commissioners Birnbaum and Nakano dissent from this recommendation. They believe that such a study is unlikely to uncover anything but differences in jury awards among counties, as acknowledged by the Commission; that recommendations by the Commission, with which they have joined, to

increase the numbers of minorities on juries, will ameliorate any outcome disparities; that the law requires juries to take into account differences in income; and that, in light of the speculative nature of the study, the courts' budget crisis militates against such a study.]

DISSENT OF COMMISSIONERS

SHEILA BIRNBAUM AND SERENE K. NAKANO

The majority recognizes the existence of the perception that, in certain counties with low minority populations, minorities receive less in jury awards than "similarly situated" Whites. It also recognizes the perception that, in those counties in the State of New York with sizable minority populations, amounts in damages awarded to minorities by juries are "higher than expected." It recommends the collection of racial data on litigants, and the preparation of a study, the contours of which it does not define, to determine whether these perceptions are real. We respectfully dissent from this recommendation.

The Rand Study,[1] the only empirical analysis of disparities in civil case outcomes disclosed by the majority's research, suffers from a fatal flaw -- the study did not control for differences in lost income between black and white plaintiffs. As the Rand Study itself conceded, by way of example:

> [W]rongful death awards are made primarily to reflect the economic loss suffered by persons economically dependent upon a decedent; they are not meant to reflect the value of the decedent's life. Because whites have greater average income than blacks, we would expect them to receive higher awards .... While we included available information on lost income in our analysis, our measures of lost income are uncertain and perhaps somewhat incomplete .... As a result, differences in awards to black and white plaintiffs may be partly due to differences in lost income for which we could not completely control.[2]

In addition, both the age of the Rand Study, which analyzed data on civil cases between 1960 and 1979 collected from the Cook County, Illinois Jury Verdict Reporter, a

---

[1] See A. Chin & M. Peterson, Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials (The Rand Corporation Institute for Civil Justice, R-3249-ICJ, 1985) [hereinafter The Rand Study].

[2] Id. at 39.

jury reporting service [3] and regional differences between Cook County and certain New York county juries, cast further doubt on the Rand Study's validity here. More recent New York data show that 73% of monitored cases in the Bronx, where juries are composed primarily of Blacks and Hispanics, were resolved in the plaintiff's favor, compared with 57% nationally. In addition, almost one in five verdicts in Bronx personal injury cases surpassed $1 million.[4]

These New York data suggest that, in counties such as the Bronx, the presence of minorities on juries has a discernable effect on jury awards. Indeed, the literature cited by the majority regarding the role race plays in the jury room is compelling. The answer to the question of race-related disparities in civil case outcomes therefore appears to be governed by several factors:

> First, enhancement of the numbers of minorities who serve on juries -- about which the Commission has already made several constructive recommendations;
>
> Second, rectification of the existence of societal income disparities -- about which the Commission's mandate lacks the power to redress;
>
> Third, change in existing law requiring juries to take lost income into account -- about which the Commission makes no recommendation of change.

The failure of the majority to take into account the phenomenon known as the "Bronx County jury," and its silence on existing law, cast doubt, in our view, on the usefulness of a racial-data study. It is questionable that a study would uncover anything other than differences among counties; or that it would control for the variable of income differences

---

[3] Id. at 5.

[4] Roberts, On Bronx Juries, Minority Groups Find Their Peers, N.Y. Times, May 19, 1988, at B1, col. 1.

-- differences that are societal, and that the law requires juries to take into account in awarding damages.

Throughout its report, the Commission identified many aspects of the court system that are in need of reform -- aspects that will require substantial monies to rectify. Although not a comprehensive list, the Commission has recommended the costly and badly needed implementation of the Court Facilities Act of 1987, to ensure the adequacy of facilities in courts frequented by minority litigants -- courts now aptly described as "ghetto courts"; the devotion of resources to correct the perception of "assembly line justice" in the "ghetto courts"; the development of numerous programs to ensure "cross-cultural sensitivity" in judges and nonjudicial personnel; the installation of an Office of Ombudsperson in each court to provide information to litigants and to receive complaints of racial bias; and the hiring of sufficient numbers of qualified language interpreters. The state of the economy dictates a measure of fiscal responsibility in the formulation of recommendations. Accordingly, we dissent from this recommendation that is both flawed in its reasoning and, at best, speculative about what the undefined study will find.

CHAPTER FIVE AVAILABILITY AND QUALITY OF LANGUAGE INTERPRETATION IN THE COURTS

CHAPTER 5

AVAILABILITY AND QUALITY OF LANGUAGE INTERPRETATION IN THE COURTS

CHAPTER OVERVIEW

A critical issue for members of Asian-American, Haitian and Hispanic communities statewide is the availability and quality of language interpretation. As discussed in Chapter 1, nonfluency in English deters some persons in these groups from using the courts of New York State. And of those who do, many find themselves disadvantaged by the inadequacy of the services provided. The absence of competent language interpreters in court proceedings inevitably contributes to the perception of bias held by these minorities. As stated by the Commission's late Chair, Franklin H. Williams: "Clearly if the . . . litigants do not understand what's happening in the courtroom, [they] can't possibly be considered to have gotten equal justice."[1]

Section I of this chapter reviews the question of the availability of interpreters. It examines the extent of the legal mandates to provide interpreters in both criminal and civil cases and presents the Commission's data on the extent to which the services are available. Section II considers the quality of the services provided and presents the Commission's data on the levels of satisfaction with the quality of interpretation among judges and litigators. Section III sets forth the practices of certain other jurisdictions with respect to the provision of interpreter services.

---

[1] New York State Judicial Commission on Minorities, Albany Public Hearing 246 (Apr. 28, 1988) (statement of Hon. Franklin H. Williams) [hereinafter Albany Hearing].

I. THE AVAILABILITY OF INTERPRETERS

Data collected by the Commission show the challenge facing the court system to meet the language needs of minority litigants and witnesses. The Commission surveyed administrative judges and found that interpretive services have been provided for persons speaking languages and/or dialects including: Burmese, Cambodian, Cantonese, Creole, Ethiopian, Haitian, Indian (Asia), Indonesian, Japanese, Korean, Laotian, Mandarin, Mongolian, Nigerian, Spanish, Tagalog, Thai and Vietnamese.[2]

The great variety of languages used by litigants complicates the ability of the courts to find qualified interpreters and therefore decreases litigants' chances of receiving the services of a professional interpreter. Thus, litigants must resort to other measures in order to understand what is happening in the courtroom. In its public hearings, the Commission received numerous reports of friends or family members -- even children[3] -- being used to interpret court proceedings, with such interpretation being accepted by the court. As one Buffalo witness put it:

> [It is a] common practice for Hispanics. . . to utilize friends, family members, and neighbors for legal translations. . . people who have no knowledge of the legal system, nor how to translate or interpret.[4]

The issue of the availability of interpreters takes on heightened importance in the criminal context, given federal and state constitutional requirements that a defendant fully

---

[2]New York State Judicial Commission on Minorities, Responses to Questionnaire for Administrative Judges [hereinafter Administrative Judges' Questionnaire].

[3]See, e.g., New York State Judicial Commission on Minorities Buffalo Public Hearing, 19, 22-23 (May 26, 1988) (testimony of Carmen Del Valle) [hereinafter Buffalo Hearing].

[4]Id. at 65 (testimony of Paula Rosner).

understand the nature of the proceedings.[5] The failure to provide an interpreter may violate a defendant's rights to have effective assistance of counsel, to confront witnesses and to participate in the preparation of his or her case. When a litigant is entitled to the services of an interpreter, those services may extend beyond simply interpreting the testimony of witnesses. The non-English-speaking litigant has the right, for example, to have his or her own interpreter sit at the counsel table to enable him or her to discuss the case meaningfully with the attorney.[6]

Although a right to a court-appointed interpreter is not explicit in courts of civil jurisdiction, at least one court has found that there is a duty at common law to make such an appointment where the necessity exists.[7] The right to appointment of an interpreter in the civil context is based on the litigant's need to understand the nature of the proceedings:

> Where the language spoken by a party or witness is not English but a foreign language, a court has the power and authority to appoint an interpreter. This is so because inherent in the nature of justice is the notion that those involved in litigation should understand and be understood.[8]

The availability of interpreters in New York State is governed by statute -- a statute which, in essence, leaves the distribution of interpreters to the discretion of local court administrators.[9] Section 386 of the Judiciary Law permits the appointment of one interpreter in each county (except Kings, New York and Queens counties), to be selected jointly by the county judge and the district attorney. Section 387 authorizes the temporary

---

[5] U.S. Const. amends. VI and XIV; N.Y. Const. art. 1, § 6.

[6] People v. De Armas, 106 A.D.2d 659, 483 N.Y.S.2d 121 (2d Dep't 1984).

[7] Santana v. New York City Transit Auth., 132 Misc. 2d 777, 505 N.Y.S.2d 775 (Sup. Ct. N.Y. Co. 1986).

[8] Id. at 778, 505 N.Y.S.2d at 776-77 (citation omitted).

[9] N.Y. Jud. Law art. 12 (McKinney 1983).

appointment of interpreters. Finally, the statutory scheme provides for court-appointed interpreters for Polish and Italian court users in Erie County;[10] no similar provision exists for Asian-American, Haitian and Hispanic court users.

Despite the existing statutory scheme, linguistic minorities remain stepchildren of the legal system of New York State. Numerous witnesses before the Commission described the inadequacies of the existing system. One Buffalo witness noted:

> [I]f an interpreter is not present, often times a[n] Hispanic may find himself incarcerated for a weekend or more until an interpreter can be provided.[11]

And another Buffalo witness remarked:

> On civil matters, the lack of Spanish-speaking attorneys and court personnel dramatically impact on potential litigation as a remedy for civil disputes . . . .[12]

Finally, an Albany witness attested to the need for certain Asian language interpreters in the state's capital.[13]

Interpreters currently employed by New York State courts are classified into two categories -- full-time and per diem. Despite the apparent need for interpreters in numerous languages, Spanish is the only language for which there are full-time interpreters.[14] Moreover, according to data provided to the Commission by administrative judges, there are no full-time Spanish interpreters in counties such as Erie, Nassau,

---

[10] Id. § 388.

[11] Buffalo Hearing, supra note 3, at 89 (testimony of Paul Volcey, Esq.).

[12] Id. at 65 (testimony of Paula Rosner).

[13] Albany Hearing, supra note 1, at 35-51 (testimony of Walter Kiang).

[14] Memorandum from Ann Pfau (Office of Court Administration) to Linda Chin (May 26, 1989) [hereinafter Pfau Memorandum].

Richmond and Westchester,[15] which have substantial Hispanic populations.[16] In at least one of these counties, hearing witnesses described a need for such services.[17] With the exception of the Seventh Judicial District (Cayuga, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne and Yates counties) and Suffolk County, all full-time Spanish interpreters are in New York City.[18]

An examination of 1980 census data and the responses to the administrative judges' questionnaire show that there is no relationship between the number of full-time Spanish interpreters and the number of language minorities residing within any given judicial district. The following examples, which compare the general language minority (rather than litigant) population with available full-time interpreters, should be read keeping in mind the discussion in Chapter 1 regarding the barrier that language may impose on potential court users. In Queens, where there are 93,972 Asian Americans, there is not a single full-time interpreter in any Asian language; by contrast, in Suffolk, where there are 58,689 Hispanics, there are three full-time Spanish interpreters.[19] The Ninth Judicial District, with a total Hispanic population of 75,723,[20] has no full-time Spanish interpreters, in contrast with

---

[15] Administrative Judges' Questionnaire, supra note 2.

[16] The United States 1980 Census shows Hispanic populations as follows: Erie, 14,390; Nassau, 43,286; Richmond, 18,884; and Westchester, 45,566.

[17] See Buffalo Hearing, supra note 3, at 18-26 (testimony of Carmen Del Valle); id. at 26-40 (testimony of Martin Sanchez); id. at 62-69 (testimony of Paula Rosner); id. at 87-97 (testimony of Paul Volcey, Esq.); id. at 191-97 (testimony of Magali Faccio Torres).

[18] See Administrative Judges' Questionnaire, supra note 2.

[19] United States 1980 Census; Administrative Judges' Questionnaire, supra note 2.

[20] The Ninth Judicial District includes the counties of Dutchess (5,853 Hispanics), Orange (11,260 Hispanics), Putnam (1,272 Hispanics), Rockland (11,772 Hispanics) and Westchester (45,566 Hispanics); see United States 1980 Census.

Suffolk, which, as noted, has three full-time Spanish interpreters for a Hispanic population of 58,689.[21]

The types of anomalies described above are a function of the discretionary power of individual administrative judges to retain full-time interpreters. Only three judicial districts (the First Judicial District, Supreme Court, Criminal Term, the Seventh Judicial District, and the Eighth Judicial District) maintain statistical data on the number of requests for specific language interpreter services.[22] However, absent such data on the number of cases requiring interpreters, it is impossible for administrative judges to engage in a meaningful planning process or to make substantiated representations regarding their need for additional interpreters. Thus, most court administrators cannot document the need for such services to the Office of Court Administration (OCA), which must approve any increase in the budget for such purposes.

The Commission's survey of administrative judges showed that unavailability of interpreters was one of the most frequently occurring problems. Asked to report on their major problems with respect to interpreters, nearly a third of the administrative judges cited unavailability as a major problem.[23] Another serious problem cited by some of these judges is the inadequacy of payment to both full-time and per diem interpreters.[24] The salaries of full-time New York City interpreters are fixed by the justices of the Appellate

---

[21] United States 1980 Census; Administrative Judges' Questionnaire, supra note 2.

[22] Administrative Judges' Questionnaire, supra note 2.

[23] Id. Of the 24 administrative judges surveyed, five presided over Surrogate's Courts in the counties of New York City, where available information suggests there is little minority use. New York State Judicial Commission on Minorities, Responses to Questionnaire for Surrogate Judges.

[24] Administrative Judges' Questionnaire, supra note 2.

Division in the First Department and paid by the City of New York.[25] Per diem compensation is fixed by statute at $25 per day.[26] A related problem is the lack of reimbursement for travel time or expenses to per diem interpreters.[27]

The Commission's survey of judges[28] (other than administrative judges) showed no significant differences in the proportions of white and minority judges who expressed dissatisfaction with the availability of interpreters. Responses from that survey are provided in Table II.5.1.

Table II.5.1.
Judges' Satisfaction with the Availability of Court-Appointed Interpreters
(Numbers in parentheses are percentages)

	WHITE JUDGES				MINORITY JUDGES				TOTAL JUDGES			
	Very Satisfied	Satisfied	Dissatisfied	Very Dissatisfied	Very Satisfied	Satisfied	Dissatisfied	Very Dissatisfied	Very Satisfied	Satisfied	Dissatisfied	Very Dissatisfied
Availability	94 (20.2)	256 (54.9)	90 (19.3)	26 (5.6)	11 (15.5)	37 (52.1)	20 (28.2)	3 (4.2)	105 (19.6)	293 (54.6)	110 (20.5)	29 (5.4)

Seventy-five percent of white judges and 68% of minority judges reported that they were "satisfied" or "very satisfied" with the availability of interpreters. One-quarter of white judges and nearly one-third (32%) of minority judges reported that they were "dissatisfied" or "very dissatisfied." The responses of the 16 Hispanic and three Asian-American judges in the

---

[25] N.Y. Jud. Law § 380 (McKinney 1983).

[26] Id. § 387.

[27] Administrative Judges' Questionnaire, supra note 2.

[28] New York State Judicial Commission on Minorities, Questionnaire for Judges in New York State on Issues Relating to Judicial Selection and Perceptions of Fairness and Sensitivity in the Courtroom 11 (reproduced as Appendix A to the Report of Findings From A Statewide Survey of the New York Judiciary in vol. 5 of this report) [hereinafter Blank Judges' Questionnaire].

sample, who could be expected to have the greatest awareness of the need for interpreters, were compared to the responses of all other judges. Hispanic and Asian-American judges were, in fact, significantly less satisfied with the availability of interpreters. Thus, 50% of Hispanic and Asian-American judges, as contrasted with 26% of all other judges, expressed dissatisfaction.

There was no statistically significant difference between civil and criminal court judges as to satisfaction with the availability of interpreters. Among New York City judges, those who preside over "ghetto courts" were significantly less satisfied than were other New York City judges (33% versus 18%). There were no significant differences when judges were grouped according to geographic region (New York City or outside New York City) or the proportion of minorities in the population of the county (high-medium-low).[29]

Litigators were also asked to report the frequency with which the unavailability of interpreters adversely affects Hispanic, Asian-American and Haitian litigants.[30] Data on this item are provided in Table II.5.2 below.

---

[29]For the purposes of this analysis, counties with "high" proportions of minorities are Bronx -- 67%; Kings -- 52%; New York -- 49%; and Queens -- 38%. Counties with "medium" percentages of minorities include Albany, Dutchess, Erie, Monroe, Nassau, Orange, Richmond, Rockland, Suffolk, Sullivan and Westchester, where the minority population ranges from 9 to 17%. Counties with "low" minority populations are all other counties in New York State with less than 9% minority populations. See United States 1980 Census. For further information about the distribution of white and minority judges across these three groups, see Report of Findings from a Statewide Survey of the New York Judiciary in vol. 5 of this report.

[30]New York State Judicial Commission on Minorities, Questionnaire for Litigators in New York State on Issues Relating to Professional Experiences and Perceptions of Fairness and Sensitivity in the Courtroom 8 (Mar. 16, 1989) (reproduced as Appendix A to the Report of Findings From A Survey of New York State Litigators in vol. 5 of this report) [hereinafter Blank Litigators' Questionnaire]. Frequency ratings were "never," 0%; "rarely," 1-5%; "sometimes," 6-25%; "often," 26-50%; and "very often," 51-100%.

Table II.5.2.
Litigators' Reports on the Availability of Interpreters
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NYC						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
The lack of readily available interpreters adversely affects Hispanic, Asian, and Haitian litigants.	32 (25.8)	29 (23.6)	63 (50.5)	49 (41.9)	31 (26.5)	37 (31.6)	57 (47.5)	31 (25.8)	32 (26.7)	33 (52.4)	15 (23.8)	15 (23.8)	24 (20.3)	31 (25.5)	65 (54.2)	38 (43.2)	23 (26.1)	27 (30.7)	233 (36.9)	160 (25.3)	239 (37.8)

Overall, 37% of litigators reported that lack of interpreters adversely affected their clients. There were significant differences in the frequency ratings of white litigators and all minority litigators. Thus, while 26% of white litigators in New York City reported that such adverse effects occur "often/very often," 42% of black, 48% of Hispanic, and 52% of Asian-American litigators made such a report. Outside New York City, 20% of white litigators but 43% of minority litigators reported frequent adverse impact on clients. It is striking that Asian-American litigators, whose responses were not significantly different from those of white litigators in New York City on most items in the survey, described adverse impact in this category in much higher proportions than did Whites; twice as many Asian-American (52%) as white (26%) litigators in New York City reported adverse impact associated with lack of interpreters.

A number of litigators commented both on the need for interpreters and the consequences of unavailable services. An Hispanic litigator in New York City wrote:

> Nonenglish speaking litigants/victims, etc. are on the whole treated insensitively and many times unfairly. Often they are forced to argue or settle on matter[s] which they truly do not understand and do not realize what they are agreeing to.[31]

An Asian-American New York City litigator commented:

> There are instances when impatience is exhibited due to the attorney's, litigant's or [witness'] inability to convey their messages and/or thoughts in English.[32]

Finally, another Asian-American litigator practicing in New York City noted:

---

[31] New York State Judicial Commission on Minorities, Responses to Questionnaire for Litigators in New York State on Issues Relating to Professional Experiences and Perceptions of Fairness and Sensitivity in the Courtroom [hereinafter Litigators' Questionnaire].

[32] Id.

> In a criminal trial involving a[n] Hispanic male, the defendant's father needed a translator to testify. [The judge] railed loudly and long against people who "come here and have no respect and can't learn English." I feel the defendant did not have a chance.[33]

II. QUALITY OF INTERPRETERS

A certification process and a statewide competitive examination for full-time interpreters have only recently been put in place.[34] In 1986, OCA sent thirteen such interpreters to a seminar sponsored by Montclair State College in New Jersey.[35] Thereafter, OCA solicited bids from New York State institutions and awarded a contract to John Jay College to teach full-time interpreters the skills and ethical standards pertaining to work in the courts.[36]

Prior to 1986, there was no system for the certification or training of full-time interpreters. Examinations for candidates for per diem interpreters include Cantonese, Haitian, Korean and Mandarin.[37] Ultimately, there will be two per diem registries furnished to the courts -- one for New York City and one for the rest of the state. OCA intends these lists to facilitate the identification of qualified per diem interpreters, especially for infrequently used languages.[38]

Many administrative judges expressed dissatisfaction with the existing quality of interpreters. They cited the absence of a uniform screening mechanism, the lack of

---

[33] Id.

[34] Pfau Memorandum, supra n. 14.

[35] Id.

[36] Id.

[37] Id.

[38] Id.

adequate testing before hiring, the failure to provide literal translation and the necessity for improved training.[39] In addition, their responses to the Commission's questionnaire disclosed the absence of a uniform procedure for the evaluation of interpreters. In some districts, there is no formal evaluation procedure at all, and the competence of an interpreter either is not judged or is informally determined by the "parties involved," the trial judge or court personnel.[40] In the Civil Court, the Family Court and the Criminal Court in New York City, Spanish language interpreters are tested or observed and evaluated by senior interpreters.[41] Similar evaluations are performed in the Supreme Court in New York and Queens Counties, while Kings County has a one-year probationary period under the supervision of a senior court interpreter.[42] Outside New York City, however, procedures for the evaluation of interpreters either do not exist or are casual and informal.

The Commission asked judges (other than administrative judges) to rate their satisfaction with the quality of court-appointed interpreters.[43] Data are provided in Table II.5.3.

---

[39] Administrative Judges' Questionnaire, supra note 2.

[40] Id.

[41] Id.

[42] Id.

[43] Blank Judges' Questionnaire, supra note 28, at 11.

Table II.5.3.
Judges' Satisfaction with the Quality of Court-Appointed Interpreters
(Numbers in parentheses are percentages)

	WHITE JUDGES				MINORITY JUDGES				TOTAL JUDGES			
	Very Satisfied	Satisfied	Dissatisfied	Very Dissatisfied	Very Satisfied	Satisfied	Dissatisfied	Very Dissatisfied	Very Satisfied	Satisfied	Dissatisfied	Very Dissatisfied
Quality	108 (23.8)	282 (62.1)	53 (11.7)	11 (2.4)	12 (17.9)	43 (64.2)	10 (14.9)	2 (3.0)	120 (23.0)	325 (62.4)	63 (12.1)	13 (2.5)

For both white and minority judges, satisfaction with the quality of interpreters was somewhat higher than satisfaction with the availability of interpreters; differences between white and minority judges on this item are not statistically significant. Eighty-two percent of minority judges and 86% of white judges reported that they were "very satisfied" or "satisfied" with the quality of interpreters. There were no significant differences in the proportions of Asian-American and Hispanic judges expressing dissatisfaction with the quality of interpretation. Moreover, there were no statistically significant differences between civil and criminal court judges, between "ghetto" and "non-ghetto court" judges, between judges in New York City and judges outside New York City, or between judges in counties with varying proportions of minorities.

Litigators were similarly asked to report the frequency with which low skill levels of interpreters adversely affected Hispanic, Asian-American, and Haitian litigants.[44] The results are provided in Table II.5.4.

[44] Blank Litigators' Questionnaire, supra note 30, at 8.

Table II.5.4.
Litigators' Ratings of the Quality of Interpreters
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NYC						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
The low level of interpreter skills, when available adversely affects Hispanic, Asian, and Haitian litigants.	35 (28.5)	29 (24.1)	58 (47.3)	34 (30.9)	27 (24.5)	49 (44.5)	58 (48.3)	33 (27.5)	29 (24.2)	30 (46.9)	17 (26.6)	17 (26.6)	11 (9.6)	26 (23.0)	75 (67.4)	25 (31.6)	22 (27.8)	32 (40.5)	192 (31.7)	154 (25.4)	260 (42.9)

Substantial proportions of litigators reported that the low skill levels of interpreters adversely affected their clients "often/very often." Thus, 32% of all litigators gave this response; 29% of white, 31% of black, 48% of Hispanic, and 47% of Asian-American litigators in New York City gave this response and 10% of white litigators and 32% of minority litigators outside New York City gave this response. Not surprisingly, Hispanic and Asian-American litigators made greater reports of adverse effect on their clients.

Many litigators gave examples of the lack of quality among available interpreters. For example, an Hispanic litigator observed:

> The most significant problem that I perceive is the lack of qualified interpreters. It is my experience that judges and other court personnel make the mistake of assuming that fluency in languages is the equivalent of competency as an interpreter. This is not the case because of the legal "concepts" that must be interpreted.[45]

Another Hispanic litigator stated:

> I feel it is important to have translators who are not only familiar with the language, but also as to the culture . . . associated with the individual's particular community.[46]

One black litigator noted:

> The interpreter problem is especially serious for Spanish and Chinese defendants (Chinese because there are so many dialects). Lack of communication and problems because of colloquialisms adversely affect minority defendants. Even if an interpreter is certified, he or she is not necessarily qualified.[47]

Interpreters themselves point to their work environment as one reason for this state of affairs. At the request of certain interpreters in New York City, the Commission held a

---

[45] Litigators' Questionnaire, supra note 31.

[46] Id.

[47] Id.

focus session to discuss their experiences.[48] Common among these interpreters was the view that they are treated as "second-class" employees. As evidence of their maltreatment, they identified such problems as the lack of supervisors who themselves are interpreters, the absence of locker rooms or offices, and even the frequent failure to provide a place for them to sit during court proceedings.

III. EFFORTS BY SOME OTHER JURISDICTIONS

Faced with comparable issues of interpreter availability and quality, New Jersey, Washington State and the federal government have responded by creating comprehensive plans to rectify the problems. A New Jersey task force concluded that linguistic minorities feel that they are foreclosed from access to the court system which, in turn, results in their lack of confidence in the judiciary.[49] The task force cited the lack of interpreter skills, including familiarity with legal terminology; the absence of translated forms and documents; the lack of defined qualifications for interpreters; and the absence of guidelines for interpreting court proceedings.[50]

The Washington study came to similar conclusions.[51] The outgrowth of the studies in New Jersey and Washington was a series of recommendations as follows:

1. The [s]tate's highest court should prescribe the qualifications of persons who interpret or translate in or for the courts.

---

[48] Commission staff met informally with a group of interpreters on February 14, 1990.

[49] See New Jersey Supreme Court Task Force on Interpreter and Translation Services, Equal Access to the Courts for Linguistic Minorities 102-03 (May 22, 1985) [hereinafter New Jersey Task Force].

[50] Id. at 82-103.

[51] See Office of the Administrator for the Courts, State of Washington, Initial Report and Recommendations of the Court Interpreter Task Force 15-18 (1986).

2. The legislature should establish a State Board of Court Interpreting and Legal Translating to ensure a uniform certification process.

3. The [s]tate's highest court should prescribe the qualifications of appropriate bilingual and multicultural court support personnel to ensure effective communication.

4. The Department of Higher Education should designate several public institutions of higher education as centers for the training of court interpreters and legal translators and developing the requisite skills of present court personnel.

5. The [s]tate's highest court should recognize the need for ongoing training and provide for continuing professional education.

6. Canons of ethics should be adopted by the [s]tate's highest court, to be binding on all persons who interpret or translate in or for the courts.

7. The legislature should establish a comprehensive statutory basis providing adequate court interpretations and legal translation services for all linguistic minorities.

8. Uniform standards should be adopted to govern all phases of court proceedings and determine responsibilities for paying the related costs.[52]

Federal law also supplies an instructive model for New York State. It sets forth a comprehensive plan relating to interpreters established under the Court Interpreters Act, 28 U.S.C.A. § 1827. Under that act, the Director of the Administrative Office of the United States Courts is empowered to establish a program to facilitate the use of interpreters in federal courts.[53] Such program requires certifying the qualifications of interpreters and prescribing the requirements for certification.[54] Each federal district court is required to

---

[52] Id. at 18-19; New Jersey Task Force, supra note 49, at 202-16.

[53] 28 U.S.C.A at § 1827(a).

[54] Id. at § 1827(b)(1).

maintain on file a list of all certified interpreters.[55] Under one portion of the statute, even if the presiding judge refuses to appoint an interpreter, the litigant may nevertheless request assistance from the clerk of the court or the Director of the Administrative Office of the United States Courts in obtaining a certified interpreter.[56]

[55] Id. at § 1827(c)(1).

[56] Id. at § 1827(e)(2).

FINDINGS

1. There is a wide variety of languages spoken by linguistic minorities, whose access to the courts or opportunities for full integration in the courtroom processes in many courts is significantly impaired by the unavailability of interpreters.

2. The existing statutory scheme commits to the discretion of local court administrators the responsibility to determine the interpreter needs of their respective courts. There is no central entity that monitors the availability of interpreters or the planning process in which local court administrators engage in order to determine the numbers of interpreters needed.

3. Most courts maintain no data on the numbers of litigants requiring interpretation of court proceedings in different languages and therefore are unable to document the need for such services in submitting budget requests.

4. The quality of both full-time and per diem interpreters is reported to be low in many courts.

5. The Office of Court Administration in 1986 sought to rectify the problem of poorly qualified interpreters through training sessions and development of competitive examinations for some languages. Lists of qualified interpreters are being disseminated to local courts.

6. Nevertheless, the evaluation of the competence of interpreters is all too often left to informal procedures, such as evaluation by judges, satisfaction of the parties and appraisal by court personnel.

RECOMMENDATIONS

1. The Chief Judge should encourage and the legislature should enact a comprehensive statute that ensures that linguistic minorities have access to interpreters in court proceedings.

2. The Office of Court Administration should require local court administrators to maintain such data as are necessary to determine and document the interpreter needs of minority litigants within their respective jurisdictions and to allocate resources accordingly.

3. There should be a state office that prescribes the qualifications of full-time and per diem interpreters, ensures a uniform certification process, and administers their training.

4. There should be a code of ethics to govern all persons who interpret court proceedings.

CHAPTER SIX MINORITY REPRESENTATION ON JURIES

CHAPTER 6

MINORITY REPRESENTATION ON JURIES

CHAPTER OVERVIEW

After observing the racial composition of juries in the state courts in Buffalo, New York, for 46 years, a black resident stated:

> When I first started this observation [in the Buffalo City Court, the County Court and the Supreme Court] I would perhaps see one black juror, but seldom on a criminal case where there is a black defendant. That was many years ago. What is the situation like today? Today[,] I see perhaps one or two black jurors [serving] as jurors but seldom in cases where the defendant is black. Has there been a change? Yes, but it appears to be for the worse, because as the black population has dramatically increased [the] incidence of black jurors has not.[1]

According to most sources, minorities are underrepresented on juries in certain New York State courts. Admittedly, the constitutional right to a jury of one's peers does not necessarily guarantee a defendant the right to be tried before a jury comprised entirely of his or her race. However, the underrepresentation of minorities on juries increases the likelihood that minority litigants will perceive that they have not had the opportunity to be heard by an impartial tribunal. The relative absence of minority jurors, especially in areas with significant minority populations, fuels the perception that there is racial bias at work throughout the jury selection process.

Section I of this chapter sets forth data describing the extent of minority under-representation on juries. Section II analyzes the jury selection "pipeline" to identify the

---

[1] New York State Judicial Commission on Minorities, Buffalo Public Hearing 206 (May 26, 1988) (testimony of J. Carl Bland, citizen) [hereinafter Buffalo Hearing].

points at which minorities may be excluded from the selection process. Section III discusses the importance of representative juries.[2]

I. MINORITY UNDERREPRESENTATION ON JURIES

The Office of Court Administration (OCA) does not maintain data on the number of minority jurors serving within the New York State Court system. However, the Commission collected data on minority representation on juries in its survey of judges and litigators.

The Commission's survey of judges shows that a minority litigant who does not live in Brooklyn, the Bronx, Manhattan or Queens has a high probability of having her or his case heard by an all-white jury. Judges were asked to rate the frequency with which a case involving a minority litigant is decided by an all-white jury and the frequency with which a case involving a minority litigant is decided by a jury that is predominantly minority.[3] For purposes of analysis, the surveyed judges were grouped into three categories based on 1980 census data for the counties in which the judges sit.[4] The results are provided in Table II.6.1.

---

[2] See vol. 2, ch. 4 of this report for a discussion of civil case outcomes.

[3] New York State Judicial Commission on Minorities, Questionnaire for Judges in New York State on Issues Relating to Judicial Selection and Perceptions of Fairness and Sensitivity in the Courtroom 14 (reproduced as Appendix A to the Report of Findings From a Statewide Survey of the New York State Judiciary in vol. 5 of this report) [hereinafter Blank Judges' Questionnaire]. Frequency ratings used in the survey were "never," 0%; "rarely," 1-5%; "sometimes," 6-25%; "often," 26-50%; and "very often," 51-100%.

[4] The first category (Group 1) is comprised of judges who sit in courts in counties where minorities represent 38-67% of the population. The second category (Group 2) is comprised of judges sitting in counties with minority populations ranging from 9-17% of the population. The third category (Group 3) includes judges sitting in the remaining counties of the State where the minority population is less than 9%.

Table II.6.1.
Judges' Reports On The Racial Composition Of Juries By Minority Population In County
(Numbers in parentheses are percentages)

	GROUP 1 JUDGES			GROUP 2 JUDGES			GROUP 3 JUDGES			TOTAL JUDGES		
	Often/ Very Often	Some-times	Never/ Rare-ly	Often/ Very Often	Some-times	Never/ Rare-ly	Often/ Very Often	Some-times	Never/ Rare-ly	Often/ Very Often	Some-times	Never/ Rare-ly
A case involving a minority litigant is decided by an all-white jury.	12 (6.1)	39 (19.8)	146 (74.1)	58 (38.7)	60 (40.0)	32 (21.3)	62 (57.9)	20 (18.7)	25 (23.4)	132 (29.1)	119 (26.2)	203 (44.7)
A case involving a minority litigant is decided by a predominantly minority jury.	73 (36.1)	75 (37.1)	54 (26.7)	9 (6.1)	25 (16.9)	114 (77.0)	3 (2.9)	8 (7.8)	92 (89.3)	85 (18.8)	108 (23.8)	260 (57.4)

As expected, Group 3 judges reported the highest frequency of minority litigants being tried before all-white juries. However, judges from Group 2 also reported that minority litigants routinely appear before all-white juries. Thus, 39% of Group 2 judges (in comparison to 58% of Group 3 judges) reported that minorities "often/very often" appear before all-white juries. Only judges serving in areas with substantial minority populations (Group 1) reported that minority litigants are rarely tried before all-white juries. Seventy-four percent of Group 1 judges stated that this happens "never/rarely." Only 6% of the Group 1 judges reported that minority litigants "often/very often" appear before all-white juries. Significantly, there was no difference of opinion on this issue between minority and white judges surveyed.

There were also significant differences among the three groups of judges in their perceptions of the frequency with which minority litigants appear before juries that are

predominantly minority. While only 27% of Group 1 judges stated that this "never/rarely" happens, 77% of Group 2 and 89% of Group 3 judges gave this response.

Numerous judges expressed their personal views as to the reasons for the substantial underrepresentation of minorities on juries in New York State. One black judge stated:

> Sequestration of jurors may influence minorities more because of greater family responsibilities.[5]

A white judge stated:

> Selected [b]lack jurors are difficult to keep awake as they frequently hold two jobs, one [being] jury duty. The second job creates a 17-18 hour day -- tiresome, but very necessary to juror.[6]

Another white judge stated:

> 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.[7]

In thinking about possible solutions to the problem, one white judge recommended:

> Increase jury fees to a realistic amount to ensure all income brackets could serve on a jury or require employers to pay employee's salary while on jury service.[8]

The litigators surveyed by the Commission provided further evidence of the underrepresentation of minorities on juries when asked to rate the frequency with which a case involving a minority litigant is decided by an all-white jury and the frequency with which

---

[5] New York State Judicial Commission on Minorities, Responses to Questionnaire for Judges in New York State on Issues Relating to Professional Experiences and Perceptions of Fairness and Sensitivity in the Courtroom [hereinafter Judges' Questionnaire].

[6] Id.

[7] Id.

[8] Id.

a case involving a minority litigant is decided by a jury that is predominantly minority.[9] These data are reported in Table II.6.2.

[9] See New York State Judicial Commission on Minorities, Questionnaire for Litigators in New York State on Issues Relating to Professional Experiences and Perceptions of Fairness and Sensitivity in the Courtroom 6 (Mar. 16, 1989) (reproduced as Appendix A to the Report of Findings From a Survey of New York State Litigators in vol. 5 of this report) [hereinafter Blank Litigators' Questionnaire]. See supra note 3 and accompanying text for frequency ratings.

Table II.6.2.
Litigators' Reports On The Racial Composition Of Juries
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NYC						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
A case involving a minority litigant is decided by an all-white jury.	13 (13.5)	19 (18.8)	67 (67.7)	36 (37.9)	29 (30.5)	30 (31.6)	24 (28.6)	16 (19.0)	44 (52.4)	5 (14.3)	9 (25.7)	21 (60.0)	49 (50.1)	29 (29.5)	20 (20.4)	62 (86.1)	7 (9.7)	3 (4.2)	190 (39.2)	109 (22.5)	185 (38.3)
A case involving a minority litigant is decided by a predominantly minority jury.	31 (29.8)	39 (37.8)	33 (32.4)	16 (16.5)	26 (26.8)	55 (56.7)	20 (22.5)	34 (38.2)	35 (39.3)	4 (11.1)	14 (38.9)	18 (50.0)	7 (6.9)	8 (8.6)	83 (84.5)	5 (7.0)	3 (4.2)	63 (88.7)	82 (16.7)	124 (25.2)	287 (58.1)

Even among New York City litigators, 25% reported that minority cases are "often/very often" tried before all-white juries. Significantly more black (38%) and Hispanic (29%) than white (14%) or Asian-American (14%) litigators in New York City reported this to be true. The number of all-white juries sitting in New York City counties-including those with large minority populations, Brooklyn, the Bronx, Manhattan, and Queens--strongly suggests that there are severe problems with the jury selection process. Minorities comprise 51.4% of the population of Brooklyn and 66% of the population of the Bronx.[10] Manhattan and Queens have minority populations of 50% and 38%, respectively.[11]

According to surveyed litigators, outside New York City, minority litigants face all-white juries even more frequently. Among litigators outside New York City, 86% of minority and 50% of white litigators reported that minority litigants are "often/very often" tried before all-white juries.

The litigators surveyed by the Commission were also asked how frequently a case involving a minority litigant is decided by a jury that is predominantly minority.[12] Among New York City litigators, Whites perceived this to be a much more common occurrence than did their minority counterparts. Thirty percent of white litigators, but only 23% of Hispanic litigators, 17% of black litigators, and 11% of Asian-American litigators reported that minority litigants "often/very often" are tried before predominantly minority juries. Litigators who reside outside New York City reported a less frequent occurrence of

---

[10] U.S. Dept. of Commerce, Bureau of the Census, 1980 Census of Population: General Population Characteristics, New York (PC80-1-B34), Table 15, at 38-39 (1982).

[11] Id. at 39.

[12] Blank Litigators' Questionnaire, supra note 9, at 6.

predominantly minority juries, and there was no significant difference in the responses of minority and white litigators: 85% of white and 89% of minority litigators responded that this happens "rarely/never."

Some litigators commented on the small proportion of minorities in the jury pool. For example, one white litigator outside New York City commented:

> The one thing that is clear to me is that the panels from which I choose juries are primarily [W]hite, with more women than men. Minorities probably have constituted less than 10% of the available panels.[13]

Another white litigator outside New York City stated:

> In Rockland County, where my office is located, there appears to be a disparity between the number of black and Hispanic persons chosen for jury duty versus the [percent]age of [B]lacks and Hispanics to the community overall. I don't believe this to be the result of an intentional scheme or plan; however, I do feel that some effort must be made to bring more black and other minority citizens into the jury pool. Because [the pool includes] so few black jurors to begin with, it is very difficult to select a jury with a black juror when representing a black plaintiff.[14]

Other litigators surveyed 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. The fear of having to face an all-white jury also weighs heavily on minority defendants as they make pretrial decisions. One white litigator outside New York City recounted:

> I recently represented a young black man who was indicted for murder and manslaughter as the result of a fight which occurred at [a] prison. This man strenuously protested his innocence of the charges and wanted very much to go to trial. If he exercised his right to a trial, however, he would be tried

---

[13] New York State Judicial Commission on Minorities, Responses to Questionnaire for Litigators in New York State on Issues Relating to Professional Experiences and Perceptions of Fairness and Sensitivity in the Courtroom [hereinafter Litigators' Questionnaire].

[14] Id.

before a rural, conservative, all-white jury in a case in which two white corrections officers were prepared to give testimony which was directly contrary to the defendant's version of what had occurred in the fight. Faced with this reality, my client elected to accept a plea bargain and was sentenced to 2-4 years in state prison. Although it is not possible for me to say with certainty that my client would not have received a fair trial because of his race, I can say that his apprehension was not unwarranted.[15]

II. JURY SELECTION

Mr. Chairman:	Thank you very much for taking time to come. Have you yourself served on the jury in the county?
Mr. Bowler:	No, I haven't.
Mr. Chairman:	Have you ever been called?
Mr. Bowler:	No, I haven't, sir.
Mr. Chairman:	Do you have any idea what the processes are here for the selection of juries as a businessman and a citizen?
Mr. Bowler:	No, I don't.
Mr. Chairman:	Have any of your employees -- minority employees asked for time off for jury service?
Mr. Bowler:	No, they have not, sir.
Mr. Chairman:	You have about 30 minority employees?
Mr. Bowler:	We have 30 employees, approximately 27 of them are minority. We have had up to 75 at one point.
Mr. Chairman:	And none of them have ever been called for jury service to the best of your knowledge?
Mr. Bowler:	To the best of my knowledge, sir, no.[16]

Given the evidence of minority underrepresentation on juries in New York State, the Commission examined the jury selection processes to determine at what points potential minority jurors are lost. The Commission looked at the methods by which juror source lists are compiled, the use of these lists by local commissioners, and the use of peremptory challenges.

---

[15] Id.

[16] New York State Judicial Commission on Minorities, Albany Public Hearing 145-146 (Apr. 28, 1988) (testimony of Peyton Bowler, owner of a cleaning service and member of executive board of directors of the Albany County Chamber of Commerce).

A. Compilation of a "Master" Juror List

New York law provides, in pertinent part, that:

> The commissioner of jurors shall cause the names of prospective jurors to be selected at random from the voter registration lists, and from such other available lists of the residents of the county as the chief administrator of the courts shall specify, such as lists of utility subscribers, licensed operators of motor vehicles, registered owners of motor vehicles, state and local taxpayers, and persons who have volunteered to serve as jurors by filing with the commissioner their names and places of residence.[17]

Presently, the Chief Administrator has authorized jury commissioners to use a "master" juror list compiled from three primary sources: lists of licensed operators of motor vehicles, voter registration lists, and address lists of persons to whom state income tax forms were mailed.[18] In compiling a master juror list, the Chief Administrator allows commissioners to develop procedures that will result in the selection of jurors from a fair cross-section of the community. Commissioners may consider many factors, including the size and transience of the population, the demand for jurors, response rates to questionnaires regarding a prospective juror's qualifications or entitlement to an exemption, qualification rates, and budgetary constraints. Commissioners may also use volunteers to identify prospective jurors, but budgetary constraints preclude the establishment of a rigorous identification program.[19]

---

[17] N.Y. Jud. Law § 506 (McKinney Supp. 1991).

[18] See N.Y. Comp. Codes R. & Regs. tit. 22, § 128.3(a) (1989); see also 73 N.Y. Jur. 2d Jury § 69 (1988). Except counties within cities having a population of one million or more, jury commissioners are appointed by county jury boards to administer the jury selection system and to enforce the law relating to the drawing, selection, summoning and impanelling of jurors. N.Y. Jud. Law §§ 502(d), 504(a) (McKinney Supp. 1991).

[19] See also People v. Waters, 123 Misc. 2d 1057, 476 N.Y.S.2d 429 (Suffolk Cty. Ct. 1984), aff'd, 125 A.D.2d 615, 510 N.Y.S.2d 8 (2d Dept. 1986). In a pretrial motion, defendant alleged that there was systematic exclusion of black youths from jury service. Testimony was given that while there were efforts by the Suffolk County Commissioner of Jurors to obtain the names of recent high school graduates from school principals, a substantial majority of the schools did not respond; a number refused to provide a list; and, of the schools which responded, qualification questionnaires to prospective jurors were not sent unless part-time clerical help were available to send them. There was no follow-up procedure for those schools which failed to respond and only those names accompanied by a current address were added to the list of potential jurors. Id. at 1058-59, 476 N.Y.S.2d at 431. The court denied the motion for the defendant failed to show that there was systematic exclusion of a recognizable group, although the court did note the poor administration of the county's jury

Yet, notably, many commissioners do not believe they could significantly increase the yield of qualified jurors, given the range of exemptions and qualifications.[20]

Commissioners identify prospective grand jurors from these same lists of qualified jurors. Commissioners may, however, interview and fingerprint prospective grand jurors as part of a background check because of the sensitive nature of the information to which grand jurors are exposed.[21]

Prospective jurors may seek to be excused or to postpone their service to prevent undue hardship or extreme inconvenience.[22] Throughout the state, commissioners automatically grant a prospective juror's first request for a postponement. However, wide variations exist among the counties regarding the ease with which a subsequent postponement can be obtained.[23] After the statutory two-year prior service disqualification

---

solicitation process.

[20]Jury Commissioners were informally surveyed by Commission staff on this issue. The judiciary law disqualifies members in active service in the armed forces and certain other elected, judicial and governmental officials. See N.Y. Jud. Law § 511 (McKinney Supp. 1991). Additionally, persons who are physically or mentally incapacitated or those persons convicted of a felony do not qualify as jurors. Id. § 510 (3), (4).

The following persons are exempted from jury duty, but the exemption must be claimed or it is waived: (1) clergy; (2) licensed physicians, dentists, pharmacists, optometrists, psychologists, podiatrists, registered or practical nurses, and embalmers, regularly engaged in the practice of the profession; (3) attorneys regularly engaged in the practice of law for their livelihood; (4) police officers, officials or corrections officers of a state correction facility and certain firepeople; (5) sole proprietors or principal managers of a business, firms employing fewer than three persons, not including a proprietor or manager engaged full-time in the operation of such business for his or her livelihood; (6) senior citizens age seventy or over; (7) a parent, guardian or other person residing with a child under sixteen, and whose principal responsibility is the daily care and supervision of such child; (8) a prosthetist, an orthotist; and (9) a licensed physical therapist regularly engaged in the practice of the profession. See N.Y. Jud. Law § 512 (McKinney Supp. 1991). See also, internal Commission memorandum on jury service in New York State [hereinafter Jury Memorandum].

[21]N.Y. Jud. Law § 514 (McKinney Supp. 1991). In addition, commissioners of jurors maintain records of individuals called for service as grand jurors and who are found not qualified, disqualified, or who are exempted or excused. Id.

[22]See N.Y. Jud. Law § 517(c) (McKinney Supp. 1991).

[23]See State of New York Unified Court System Jury System Management Advisory Committee, Interim Report of the Jury System Management Advisory Committee 40 (Dec. 1984) [hereinafter Jury System Committee Interim Report]. The report explains that eight counties permit one postponement before requiring a citizen to serve; thirty-two counties permit two; thirteen counties permit three; two counties permit four; two counties permit five; and five counties have no limits.

period, jurors who have served are returned to the list of qualified eligible jurors to whom summonses are randomly sent, whether or not there is a supply of citizens who have not yet served.[24]

The methods by which a "master" juror list is compiled raise questions regarding the inclusion of minorities on the three lists used by OCA. The use of these lists has been upheld by the courts, but they may be insufficient for the purpose of ensuring desirable levels of minority representation.[25]

There is no law expressly authorizing or prohibiting the use of inquiries about race on the questionnaires used by jury commissioners to identify citizens who qualify for jury duty. The questionnaires used by OCA provide gender information so that commissioners may monitor gender imbalance. For example, in New York County, when random summoning produces percentile differences between genders of more than 60/40, corrective steps are taken.

The questionnaires do not provide race information, so no mechanism exists to monitor the representativeness of juror pools; nor can juror pools which have a disproportionately low number of minorities be identified and corrected.[26]

Some jury commissioners, as well as the Unified Court System (UCS) Jury System Management Advisory Committee, have criticized the OCA "master" list because it is based on sources which may not include the economically disadvantaged, and thus, the OCA list

---

[24] Id. at 31-32.

[25] The Commission notes that an inequity may exist because some citizens may serve two or more terms before other citizens are called once.

[26] The inability to identify the percentage of minority representation in juror pools contrasts markedly with OCA's ability to monitor juror pools for gender representation.

may exclude a disproportionate number of minorities.[27] The net effect of the absence of race data and the use of lists which may discriminate on the basis of income, and by implication, race, is that the court system is marred by inequality which it may be powerless to remedy under existing policies.

B. Rate of Responses to Jury Notices

The notice to appear for jury duty is, in actuality, a questionnaire. The questionnaire asks for both personal and family information about the prospective juror, along with information about the prospective juror's family responsibilities, employment, citizenship, prior jury service, criminal record, civil judgment record, mental or physical conditions that would interfere with jury service, and preferences as to the month of prospective jury service.[28] The questionnaires are in English to ensure that only citizens who have some proficiency in the language are identified for jury service.[29]

The response rates of the general public to jury notices indicate serious problems within the jury selection process. The interim report of the UCS Jury System Management Advisory Committee notes that response rates vary by county from 33% to 99%.[30] In 1983 the percentage of eligible citizens who were available upon the completion of the qualification and summoning processes was 30%.[31] The low response rate may contribute

---

[27] See New York, Jury System Committee Interim Report, supra note 23, at 15-18.

[28] See N.Y. Jud. Law § 513 (McKinney Supp. 1991).

[29] Id. § 510(5).

[30] Jury System Committee Interim Report, supra note 23, at 58, 59 & Table 7. The cited figures are for 1983 and do not include all 62 counties.

[31] Id. at 25. The remaining possible eligible citizens were either disqualified, exempted, excused or never received or responded to the questionnaire or summons. Id.

to the underrepresentation of minorities on juries if disproportionately low numbers of minorities respond.

The failure to return a completed questionnaire can be met with contempt proceedings, but budgetary and practical constraints limit the use of such judicial remedies. A number of counties have instituted steps to increase response rates. In Erie County, for example, a one-step qualification/summonsing procedure is used and people who fail to show up for service or return a questionnaire containing a request for an exemption or postponement are telephoned.[32] Kings and Queens Counties showed a substantial increase in the qualification rate when a second questionnaire was sent within a few months of the first questionnaire.[33] Most of the increases in response rates occurred before the Commissioner's office mailed more costly certified letters. Commissioners from both counties concurred that three mailings were sufficient to maximize the response rate.[34] New York County serves orders to show cause on about 60 or 70 nonrespondents two or three times a year to dramatize the citizen's duty to serve.[35] Such measures are useful. However, unless OCA begins to collect race data on jury pools, it will be difficult to establish whether efforts to improve participation rates have a positive effect on increasing the numbers of minorities serving on juries.

---

[32] Telephone interview with Ms. Meryl King, County Commissioner, Erie County.

[33] See Jury Memorandum, supra note 20, at 9.

[34] Id.

[35] Id. at 10.

C. The Voir Dire Process and the Use of Peremptory Challenges

Once a minority citizen is found to be qualified to serve as a juror, he or she may still be excluded during the voir dire process.

> One of the last vestiges of discrimination in the justice system is the use of peremptory challenges to dictate the racial make up of a jury. This practice is particularly abhorrent when juries are skewed in one way or another, they lose a balance of perspectives, which may impair their ability to engage in impartial fact-finding. The concept of a fair trial is destroyed, and whole segments of minority communities lose faith in the system.
>
> Rejected jurors suffer from this practice as well. [Several] years ago one black juror [detailed] his humiliating experiences in Brooklyn Supreme Court. The author was part of a mostly black pool of jurors who were systematically dismissed until the jury stood at 12 whites. As the rejected juror wrote . . ., "If we blacks don't have common sense and don't know how to be fair and impartial, why send these summonses to us? Why bother to call us down to these courts and then overlook us like a bunch of naive or[,] better yet[,] ignorant children? We could be on our jobs or in schools trying to help ourselves instead of in courthouse halls being made fools of."[36]

To guarantee a defendant's right to trial by an impartial jury, prospective jurors are subjected to interrogation before they are permitted to serve in a given case. In both civil and criminal trials, each side has an unlimited number of challenges for cause[37] and a specific number of peremptory challenges.[38] In Batson v. Kentucky, the United States

---

[36] 1 New York State Judicial Commission on Minorities, New York City Public Hearing 161-162 (June 29, 1988) (testimony of Elizabeth Holtzman, District Attorney, Kings County) [hereinafter New York City Hearing].

[37] See N.Y. Civ. Prac. L. & R. § 4109 (McKinney Supp. 1991); § 4110 (McKinney 1963).

[38] In civil trials each party is allotted three peremptory challenges plus one peremptory challenge for each alternate juror. However, where there are more parties on one side than the other, the trial judge has discretion, prior to the beginning of the examination of the jurors, to grant additional challenges to the side with the smaller number of challenges. N.Y. Civ. Prac. L. & R. § 4109 (McKinney Supp. 1991). The number of peremptory challenges allotted to criminal defendants is determined by the severity of the charged offense. If the highest crime charged is:

(a) a class A felony: twenty for regular jurors and two for each alternate juror to be selected;

(b) a class B felony or a class C felony: fifteen for regular jurors and two for each alternate juror to be selected;

(c) in all other cases: ten for regular jurors and two for each alternate juror to be selected.

Supreme Court held that the prosecution could not use its peremptory challenges in a racially discriminatory manner.[39] In People v. Kern, the New York State Court of Appeals extended Batson by requiring defense counsel to articulate racially neutral reasons for peremptory challenges in certain circumstances.[40]

Taken together, the rulings in Batson and Kern are intended to protect a defendant's right to a fair trial by an impartial jury of his or her peers.[41] Litigators responding to the Commission's survey, which was disseminated prior to the holding in Kern, however, reported that some judges still permit discriminatory use of peremptory challenges to exclude minorities from jury panels. A white litigator in New York City stated:

> Despite Batson, prosecutors usually exclude most or all black jurors from a trial of a black defendant expressing some non-racial grounds for the peremptory challenges.[42]

Another litigator complained of the "exercise of 8 or 9 peremptory challenges by prosecutor against black voir dire persons in panel that was 44% black."[43] A white attorney practicing outside New York City recounted the following:

> An ADA tried to use a peremptory challenge on the only black member of a jury panel, in a case where my client was black. I cited Batson v. Kentucky

---

The number of permitted challenges is not increased in cases in which there are multiple party defendants. N.Y. Crim. Proc. Law § 270.25 (McKinney 1982).

[39] 476 U.S. 79 (1986). Batson overruled that part of the opinion in Swain v. Alabama, 380 U.S. 202 (1965), concerning a defendant's evidentiary burden in a case where a defendant claims that he has been denied equal protection through the discriminatory use of peremptory challenges. The court in Batson held that a defendant may establish a prima facie case of discrimination in jury selection solely on evidence relating to the prosecutor's exercise of peremptory challenges at the defendant's trial. 476 U.S. at 96-97.

[40] 75 N.Y.2d 638, 555 N.Y.S.2d 647, 554 N.E.2d 1235 (1990).

[41] The Batson court refused to abolish peremptory challenges in recognition of the fact that the practice, if not abused, facilitates the selection of an impartial jury. 476 U.S. at 99 n.22.

[42] Litigators' Questionnaire, supra note 13.

[43] Id.

but the judge said he'd allow the challenge. The ADA withdrew the challenge after consulting with his superior, but the judge would have allowed it.[44]

Because of the belief that minorities are still being systematically challenged based solely upon their race, the Commission asked litigators whether they think that the voir dire process can effectively expose racial bias. Litigators were asked if voir dire is usually conducted by the judge, the litigator, the judge and the litigator, or whether it "depends on the judge"; whether voir dire is generally conducted with individuals, in groups, or both; whether they are satisfied with the voir dire process as a mechanism for excluding racially biased jurors; and finally, whether they believe jurors respond honestly to voir dire questions about race.[45] These findings are presented in Tables II.6.3. through II.6.6.

Table II.6.3.
Litigators' Report That Jurors Respond Honestly To Voir Dire Questions About Racial Bias
(Numbers in parentheses are percentages)

NEW YORK CITY				OUTSIDE NYC		
White (N=123)	Black (N=103)	Hisp. (N=96)	Asian (N=41)	White (N=123)	Min. (N=79)	Total (N=565)
42 (34.2)	11 (10.7)	20 (20.8)	11 (26.8)	37 (30.1)	10 (12.7)	131 (23.2)

Only 23% of the litigators questioned believe that jurors, on the whole, respond honestly to voir dire questions about racial bias. It is striking that only 34% of Whites in New York City and 30% of Whites outside New York City reported that jurors respond honestly to questions about racial bias. Among the minority litigators surveyed, the percentages were even lower. Only 11% of Blacks, 21% of Hispanics, and 27% of Asian

[44] Id.

[45] Blank Litigators' Questionnaire, supra note 9, at 10-11.

Americans in New York City, and 13% of minorities outside New York City, reported that jurors answer such questions honestly.

There was marked dissatisfaction with the voir dire process as a way of ensuring a bias-free jury. Overall, 44% of respondents reported that they are "dissatisfied/very dissatisfied" with the voir dire process as a way of ensuring that individuals who are racially biased are excused. There were significant differences in the responses among ethnic groups: 37% of white, 58% of black, 45% of Hispanic, and 39% of Asian-American litigators in New York City, and 29% of white and 60% of minority litigators outside New York City reported dissatisfaction.

Table II.6.4.
Litigators' Satisfaction With The Voir Dire Process As A Way Of Ensuring That Individuals Who Are Racially Biased Are Excused
(Numbers in parentheses are percentages)

NEW YORK CITY												OUTSIDE NYC						TOTAL		
WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
Very Satis-fied	Satis-fied	Dissat./ Very Dissat.	Very Satis-fied	Satis-fied	Dissat./ Very Dissat.	Very Satis-fied	Satis-fied	Dissat./ Very Dissat.	Very Satis-fied	Satis-fied	Dissat./ Very Dissat.	Very Satis-fied	Satis-fied	Dissat./ Very Dissat.	Very Satis-fied	Satis-fied	Dissat./ Very Dissat.	Very Satis-fied	Satis-fied	Dissat./ Very Dissat.
21 (16.5)	58 (46.9)	46 (36.6)	6 (5.8)	37 (35.9)	60 (58.3)	4 (4.2)	48 (50.5)	43 (45.3)	2 (4.9)	23 (56.1)	16 (39.0)	10 (8.4)	77 (62.8)	35 (28.7)	2 (2.6)	29 (37.2)	47 (60.2)	45 (8.0)	272 (48.3)	247 (43.7)

Table II.6.5.
Litigators' Reports On Participation In
The Voir Dire Process
(Number in parentheses are percentages)

	NEW YORK CITY				OUTSIDE NYC		TOTAL
	White	Black	Hisp.	Asian	White	Min.	
Only litigators participate.	51 (46.4)	32 (31.4)	32 (34.4)	12 (32.4)	49 (42.0)	17 (23.6)	193 (36.4)
Depends on the judge.	31 (27.8)	43 (42.2)	19 (20.4)	11 (29.7)	31 (26.7)	26 (36.1)	161 (30.3)
The litigator and judge participate.	27 (24.4)	24 (23.5)	39 (41.9)	12 (32.4)	32 (27.3)	28 (38.9)	162 (30.5)
The judge is the primary or sole questioner.	2 (1.4)	3 (2.9)	3 (3.2)	2 (5.4)	5 (4.0)	1 (1.4)	15 (2.9)

Research shows that because of social pressure, people are least likely to respond honestly to questions about racial bias that are (1) posed by someone in authority and (2) posed in a group setting.[46] For this reason, the findings about how voir dire is conducted are particularly noteworthy. Table II.6.5. shows that, overall, 31% of litigators said that the judge (a clear authority figure in the court) participates actively in the voir dire questioning; an additional 3% said that the judge is the primary or sole questioner. Consequently, one-third of the litigators said that, in their experience, the voir dire process customarily involves questions posed by an authority figure. The responses to this question differed significantly among groups: 26% of Whites, 26% of Blacks, 45% of Hispanics and 38% of Asian Americans in New York City, and 31% of Whites and 40% of minorities outside New York City, gave this response.

[46] See S. Nickerson, C. Mayo, & A. Smith, Racism in the Courtroom, in Prejudice, Discrimination, and Racism 255, 265-267 (Dovidio & Gaertner eds. 1986).

Table II.6.6.
Litigators' Report On Conduct Of Voir Dire
With Individuals Or Groups
(Number in parentheses are percentages)

	NEW YORK CITY				OUTSIDE NYC		TOTAL
	White	Black	Hisp.	Asian	White	Min.	
Individuals	11 (9.3)	16 (16.3)	14 (15.7)	3 (7.9)	18 (14.6)	5 (6.8)	67 (12.4)
Groups	49 (41.6)	40 (40.8)	32 (36.0)	13 (34.2)	37 (31.0)	27 (36.5)	198 (36.9)
Both	58 (49.1)	42 (42.9)	43 (48.3)	22 (57.9)	66 (54.4)	42 (56.8)	272 (50.7)

Regarding the issue of whether voir dire is conducted with individuals or in groups, 37% of the litigators questioned reported that, in their experience, voir dire is always a group process. Interestingly, there were no significant differences among groups. Thus, 42% of Whites, 41% of Blacks, 36% of Hispanics, and 34% of Asian Americans in New York City, and 31% of Whites and 37% of minorities outside New York City, reported that voir dire always takes place in a group. Again, given what is known about the way people respond to social pressure, it is unlikely that racial bias can surface in such a setting.

Some litigators commented on their experiences with the voir dire process. For example, a black litigator in New York City stated, "I have had white [j]udges ask very insensitive questions of potential minority jurors to discourage them from serving."[47] A white attorney in New York City criticized the voir dire process in the following terms:

> 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,

[47] Litigators' Questionnaire, supra note 13.

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.[48]

III. THE IMPORTANCE OF REPRESENTATIVE JURIES

> Nonrepresentation for any reason will probably affect the quality of jury decision making; it will certainly undermine representation of the community conscience, and it may serve to lessen public confidence in, and legitimacy of, the jury system.[49]

Juries should be comprised of a representative group of jurors which fairly represent the population in the community in which a given case is heard. Based upon its investigation, the Commission has concluded that the ethnic make-up of a jury can affect the deliberation process. A group of nonminorities will view and therefore discuss a minority defendant differently, depending upon whether a minority is present in the jury room. According to one Hispanic litigator surveyed:

> [W]hen trying cases, you need at least one minority on the jury . . . Otherwise the jury, when deliberating may say things like, "They all steal hubcaps" or "They all do this."[50]

This litigator's experience is consistent with the Commission's findings as to the extent to which "anti-minority" attitudes are brought into the courtroom and influence the way in which jurors integrate information and make decisions. Studies reveal that while blatant displays of racism are not common in today's courtrooms, jurors' racist attitudes, whether

---

[48] Id.

[49] Nemeth, Jury Trials: Psychology & Law, 14 Advances in Experimental Soc. Psychology 309, 325 (1981).

[50] Litigators' Questionnaire, supra note 13.

or not they are actually uttered aloud, still determine the outcome of cases involving minority defendants.[51]

Studies also show that hidden racial prejudices can distort a juror's perception of all evidence and events at trial.[52] More generally, one researcher suggests that "a fair trial of minority defendants requires a panel which understands, or is familiar with, black culture and black psychology because of the distinctive characteristics of black culture, and because of the general ignorance of the majority population with regard to minority culture."[53]

Other researchers have tested and confirmed several related hypotheses:

[1] A racially dissimilar defendant is evaluated more harshly than a defendant of like race, regardless of the victim's race.[54]

[2] When the evidence is ambiguous, the difference in punitiveness between racially similar and racially dissimilar defendants will be especially strong.[55]

[3] When a characteristic attributable to the defendant is perceived as typical of individuals who commit specific types of crimes, jurors will tend to attribute the crime in question to the defendant with the

---

[51] See Developments in the Law: Race and the Criminal Process 101 Harv. L. Rev. 1595, 1595 n.1 (1988) [hereinafter Racist Juror Misconduct]. (In a Wisconsin rape trial, a juror commented: "Let's be logical, he's a black, and he sees a seventeen year old white girl -- I know the type." (quoting State v. Shillcut, 119 Wis. 2d 788, 791, 350 N.W.2d, 686, 688 (1984))).

[52] See Racist Juror Misconduct, supra note 51, at 1603.

[53] Denno, Psychological Factors for the Black Defendant in a Jury Trial, 11 J. Black Stud. 313, 318 (1981).

[54] Ugwuegbu, Racial & Evidential Factors in Juror Attribution of Legal Responsibility, 15 J. Experimental Soc. Psychology 133, 135 (1979). Ugwuegbu conducted an extensive study using simulated rape trials to assess the behavior of all-white and all-black juries. The victim's race, the defendant's race, and the amount of evidence (strong, weak, or marginal) varied.

[55] Id.

> characteristic. On the other hand, when a characteristic of the defendant is not perceived as typical of individuals who commit a certain crime, the juror may be more likely to consider external or situational causes for the behavior. This latter pattern results in more lenient judgments regarding the criminal act.[56]

During the Commission's public hearings, a former black juror testified to his experiences during deliberations in the People v. Robert Chambers murder trial:

> The prejudice came in when my roommate asked the remaining jurors, he said, if this man [Chambers] was black, would any of you all have any difficulty convicting him of murder with intent. . . . He asked that in the jury room, and I'm here to tell you there was a hush sound in that jury room. Nobody spoke for five minutes. And right then we were convinced there was some prejudice because the young man was white, young, a lot of money was behind him.[57]

Another view of the impact of race in the jury deliberation process came from a white litigator, practicing outside New York City, who wrote:

> I also worry about the jury composed of all [W]hites and one single minority member--I worry that said individual will not have a truly equal 1/12th or 1/6th voice unless he or she is a very dominant-type personality, [and] will [not] "go

---

[56] Gordon, Bindrim, McNichols & Walden, Perceptions of Blue-Collar and White-Collar Crime: The Effect of Defendant Race on Simulated Juror Decisions, 128 J. Soc. Psychology 191, 192 (1987). This study tested the hypothesis that burglary is perceived as a blue-collar crime, embezzlement is perceived as a white-collar crime, and that "stronger associations exist between black defendants and blue-collar crimes and white defendants and white-collar crimes." Id. at 192. The investigators reasoned that when a crime is perceived as typical of the defendant's race, the reasons for the crime are perceived as dispositional rather than situational, and the defendant is judged more harshly. In fact, white embezzlers received longer sentences than white burglars, thereby affirming the hypothesis. Black defendants were perceived as significantly more likely to repeat a crime than white defendants, and "this difference was not qualified by interactions involving subject [mock juror] race or the type of crime." Id. at 195. The researchers attributed this particular result to the possibility that, overall, more situationally oriented attributions for white defendants and more dispositionally oriented attributions for black defendants led to more pessimistic perceptions regarding the future behavior of the black defendants. Id. at 196. While the study contains some methodological weaknesses, such as the fact that the tasks faced by the subjects lacked the complexity, degree of personal involvement, and the consequences of actual decision-making in the courtroom, the results are useful in indicating how the race of defendants and the type of crime they are charged with committing may shape juror perceptions of the severity of the crime, and their belief in the likelihood that the defendant will be a repeat offender. Id.

[57] 2 New York City Public Hearing, supra note 36, at 484 (testimony of Robert Nickey).

> with the flow" for whatever reasons, such as a feeling of isolation, and will, in effect, result in all-white jury with the appearance of racial mixing.[58]

Social science research supports these perceptions. Recent studies have found that discussion influences the formation of opinion and can also change opinions already held. General discussion in the jury room may be particularly influential in the case of minority opinion jurors who may be ignored or coerced by other jurors.[59] Moreover, investigators have reported that jurors were less likely to be influenced in their decision-making by actual proof than by perceptions of what would be "right" or "just" under the circumstances:

> All the jurors did not reach decisions through a logical analysis of the case; some could not explain or justify their conclusions. Thus several reported that they voted as they did because . . . "it just didn't seem right to me." An examination of the reports of the jury foremen reveals, however, that the jurors as a whole were well aware of the important issues in the case as set forth by the judge.[60]

Given the subjective factors which determine the outcome of a case, the question of who serves on juries is very important where the defendant is a minority.[61]

Both judges and litigators agree that representative juries are necessary for the proper and fair functioning of the legal system.[62] Data from the judges' survey on this issue are provided in Table II.6.7.

---

[58] Litigators' Questionnaire, supra note 13.

[59] Kerr, Atkin, Stasser, Meek, Holt & Davis, Guilt Beyond A Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors, 34 J. Personality & Soc. Psychology 282 (1976).

[60] Weld & Danzig, A Study of the Way in Which A Verdict Is Reached By A Jury, 53 Am. J. Psychology 518, 534 (1940).

[61] Racism or stereotyping may also be a predominant reason for poor eye-witness identification. See Aronstam & Tyson, Racial Bias in Eye-Witness Perception, 110 J. Soc. Psychology 177 (1980) (discussion of how prejudice can affect an individual's perception of an event).

[62] Blank Litigators' Questionnaire, supra note 9, at 12; Blank Judges' Questionnaire, supra note 3, at 16.

Table II.6.7.
Judges' Ratings Of The Importance Of Greater Minority Representation On Juries
(Numbers in parentheses are percentages)

WHITE JUDGES				MINORITY JUDGES				TOTAL JUDGES			
Very Important	Important	Somewhat Impor.	Not Important	Very Important	Important	Somewhat Impor.	Not Important	Very Important	Important	Somewhat Impor.	Not Important
88 (17.4)	179 (35.4)	136 (26.9)	103 (20.4)	35 (50.7)	21 (30.4)	12 (17.4)	1 (1.4)	123 (21.4)	200 (34.8)	148 (25.7)	104 (18.1)

Minority judges attached a significantly greater importance to increasing minority representation on juries than did white judges. More than half (51%) of the minority judges rated such increased representation as "very important," while only 17% of white judges expressed the same opinion. Only 53% of white judges rated such increased representation as "important" or "very important," while the comparable figure for minority judges was 81%.

In counties where fewer minorities reside, the judges surveyed perceived a greater need for increased minority representation on juries. On the other hand, there was no statistically significant difference between judges sitting in criminal court and those who preside over civil cases in their perceptions of the need for increased minority participation on juries.

Table II.6.8.
Litigators' Views On The Importance Of Greater Minority Representation On Juries
(Numbers in parentheses are percentages)

NEW YORK CITY												OUTSIDE NYC						TOTAL		
WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
Very Impor/ Impor.	Some-what Impor.	Not Impor-tant	Very Impor/ Impor.	Some-what Impor.	Not Impor-tant	Very Impor/ Impor.	Some-what Impor.	Not Impor-tant	Very Impor/ Impor.	Some-what Impor.	Not Impor-tant	Very Impor/ Impor.	Some-what Impor.	Not Impor-tant	Very Impor/ Impor.	Some-what Impor.	Not Impor-tant	Very Impor/ Impor.	Some-what Impor.	Not Impor-tant
49 (35.9)	35 (26.0)	52 (38.1)	119 (90.8)	9 (6.9)	3 (2.3)	106 (82.8)	10 (7.8)	12 (9.4)	41 (56.1)	22 (30.1)	10 (13.7)	80 (54.3)	44 (29.7)	24 (16.0)	95 (94.1)	5 (5.0)	1 (1.0)	490 (68.3)	125 (17.5)	101 (14.2)

Among litigators (see Table II.6.8.), 68% stated that it is "important/very important" to have greater minority representation on juries: 36% of the white, 91% of the black, 83% of Hispanic and 56% of the Asian-American litigators in New York City gave this same response. Outside New York City, 54% of the white and 94% of the minority litigators felt that increased minority representation on juries is "important/very important." White litigators practicing in New York City attach significantly less importance to greater minority representation on juries than any minority group of litigators in New York City. Outside New York City, minority litigators attached significantly greater importance to increased minority representation than did white litigators.

FINDINGS

1. Minorities are significantly underrepresented on many juries in the court system.
2. This underrepresentation contributes to public perceptions of unequal treatment of minorities by the courts.
3. There is reason to believe that minority underrepresentation affects jury outcomes in ways that disadvantage minority litigants.
4. The point or points at which minorities tend to be excluded from the juror-selection process are not well understood, in part because data concerning racial identity is not collected from potential jurors.
5. Just as OCA has no mechanism in place to monitor the racial representativeness of juror pools, it has no mechanism in place to correct juror pools with a disproportionately low number of minorities. This inability contrasts with OCA's ability to monitor juror pools for gender representation, an ability that has permitted New York County to introduce measures designed to ensure gender balance in such pools.
6. The net effect is that the court system labors under a perception of inequality in jury selection without means to refute or remedy the situation. Nevertheless, the Commission has identified several practices which it believes warrant corrective steps.
7. OCA relies on just three lists--operators of motor vehicles, registered voters, and individuals to whom state income tax forms are mailed--to compile its "master" juror list. While the use of these lists individually and exclusively has been held by the courts not to discriminate against minorities, as a practical matter it is not yielding

sufficient minority representation on jury pools. Commissioners of jurors already possess the discretion to develop additional procedures to ensure that juries will come from a fair cross section of the community, but such additional procedures are not widely used.

8. The Commission's review of the overall response rates of the general public to jury notices indicates that this is another point at which minority/nonminority disparities may arise. Overall response rates are very low, and differences in the response rate of minorities and nonminorities to jury notices may result in an underrepresentation of minorities in juror pools. Practical and budgetary constraints prevent extensive reliance on judicial remedies to increase the jury notice response rate, but administrative steps are available and have been instituted in a number of counties to increase the response rate.

9. Despite case law prohibiting the practice, a perception exists among some litigators that peremptory challenges in criminal cases continue to be used to exclude individuals from juries on account of their race.

10. In addition to being underrepresented on juries, there is reason to believe that minorities are disadvantaged as litigants and witnesses by the failure of the voir dire process to uncover racial bias among prospective jurors. Many litigators believe that questions about racial feelings are frequently answered dishonestly, and their perceptions are reinforced by social science research findings. Because of social pressure, people may be less likely to respond honestly to questions about racial bias that are posed by someone in authority or in a group setting. Many litigators report

that it is common for judges, who are clear authority figures in the court, to participate actively in voir dire questioning and for the questioning to be conducted in groups.

RECOMMENDATIONS

1. Additional source lists (e.g., utility bills, library address lists, high school graduate lists) should be used to identify potential jurors in order to insure that minorities are included on "master" juror list in proportion to their numbers in the population.
2. The Office of Court Administration should encourage appropriate entities to make public service announcements emphasizing the importance of jury service.
3. Jury commissioners should expand or adopt a practice which permits jurors to be on call by telephone to encourage jury service.
4. Commissioners of jurors should inquire about race and ethnicity in the questionnaires they send to identify citizens who qualify for jury duty. Data compiled from these questionnaires should be monitored to determine minority representation on the "master" juror list. If minority representation falls below levels roughly proportionate to their population in the community, special initiatives should be undertaken to correct the imbalance.
5. Judges should exercise heightened scrutiny to ensure that peremptory challenges are not used improperly in the voir dire process.
6. Judges should be discouraged from engaging in group questioning of potential jurors regarding their racial feelings, and they should be encouraged to permit counsel to conduct such questioning rather than doing it themselves.

CHAPTER SEVEN NATIVE AMERICANS AND THE COURT SYSTEM

CHAPTER 7

NATIVE AMERICANS AND THE COURT SYSTEM

> The condition of the Indians, in relation to the United States, is perhaps unlike that of any other two people in existence.[1]

CHAPTER OVERVIEW

The Commission acknowledges an important distinction between Native Americans and other minority groups.[2] Although Native Americans share many problems with other minorities, Native Americans have a unique set of legal concerns which requires separate discussion. While other minority groups typically seek greater inclusion in the institutions of mainstream society, including the courts and the legal profession, Indian nations with lands in New York State generally seek just the opposite. Their goal is self-governance separate and apart from both the federal and state governments, including the courts. There are, of course, Native Americans who do share the goal of inclusion; but their problems with the court system are similar to those of other minorities. The purpose of this chapter is to address the concerns of New York Indian nation governments.

The Commission received considerable testimony from Native Americans regarding their experience in the courts and the legal profession. The Commission also met with the Tribal Council of the Haudenosaunee (i.e., the native name for the Iroquois Confederacy).

---

[1] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

[2] Certain representatives of Indian nations within the state have indicated that the term "Native American" is no longer the term of choice. In this chapter, the terms Native American and Indian are used interchangeably.

Additional insights were gained from the responses of Native American lawyers to the Commission's survey of litigators.[3]

In Sections I and II of this chapter, the relevant history of the Indian nations is reviewed and current information is provided about their governments in New York State. In Section III, judicial issues of particular concern to Indian nations located in New York State are discussed.

I. HISTORICAL BACKGROUND

European settlers landing in what is now New York State encountered highly developed confederacies of Indian nations. In 1600, for example, there were approximately thirteen bands of Indians -- about 6,000 individuals, living in the area now known as Long Island.[4] The bands on the eastern shore were confederated under the leadership of the Montauks, and many of the bands on the western shore were part of a similar confederation.[5] The Haudenosaunee Confederacy, located in upstate New York, is even older.

The mature and stable models of government established by these confederacies provided a useful fund of ideas upon which the colonists could draw as they evolved their own political institutions.[6] In 1744, Canassatego, a Haudenosaunee chief, reportedly first

---

[3] See vol. 5.

[4] A. Trelease, Indian Affairs In Colonial New York: The Seventeenth Century 4-5 (1960).

[5] Id.

[6] The following account draws heavily on J. Weatherford, Indian Givers - How the Indians of the Americas Transformed the World 135 (1988). The book examines a variety of contributions made by the indigenous peoples of the Americas.

proposed that the colonists look to the Iroquois Confederacy as a model for unification.[7] The Confederacy, originally comprised of five separate Indian nations, was established around 1000 A.D. under the Kaianerekowa -- "the Great Law of Peace."[8] It was considered the most important political unit in North America[9] and occupied territories from New England to the Mississippi River.[10]

Despite the interaction in political ideas which occurred between the Indians and the settlers, there existed fundamental differences in their respective ways of living. These differences guided the treaties and agreements between natives and settlers. Frequently, these agreements were memorialized in wampum (beadwork),[11] and for the Haudenosaunee, the agreements are symbolized by the "Guswenhta," a wampum belt with two lines of blue beadwork, separated by three rows of white. The two blue rows represent the two rivers or ways of life of the Whites and the natives. The white rows represent the three basic laws by which the Haudenosaunee live: trust, respect, and honor.[12] "The

---

[7] Id.

[8] Id. For the text of this law, see Kaianerekowa -The Great Law of Peace of the Longhouse People (Hotinonsionne)(1977) [hereinafter Kaianerekowa].

[9] J. Weatherford, supra note 6, at 135.

[10] Id. at 137.

[11] See generally 5 Suffolk County Archaeological Ass'n, Readings in Long Island Archaeology and Ethnohistory 281 (1982) (discussion of the importance of wampum in the Indian culture and its role in history); see also Wilcox, The Manufacture and Use of Wampum in the Northeast, id. at 297. ("In its very essence wampum signified sincerity and truth . . . . It was also exchanged during treaties to symbolize good faith. Wampum became the symbol of the power of the word. Words spoken over wampum became embodied in the beads.")

[12] Id.

agreement is that we can live together as brothers, going down different paths, but the key word is TOGETHER. Our paths do not cross . . . ."[13]

II. INDIAN NATIONS AND THE STATE OF NEW YORK

> [The] principal point of dispute between white and Indian historically has been land. The greatest legal gap between the two cultures has been the respective attitudes towards [the land] . . . To whites, land is a "commodity" while to Indians it is the "sacred and inalienable mother."[14]

The Native American population in New York State was most recently counted at 43,987.[15] Approximately 9,000 of this total resided on ten reservations.[16] There is also a sizable urban population of Native Americans, particularly in New York City, where the 1980 census counted some 13,400.

There are six Indian nations in upstate New York--the Mohawk, Oneida, Tuscarora, Onondaga, Seneca and Cayuga (collectively the Haudenosaunee).[17] The Shinnecock and Poospatuck nations are located in Suffolk County.[18] There are also a substantial number of Ramapo Indians living in the Ramapo Mountains of Rockland and Orange Counties. However, the Ramapo are not recognized as an Indian nation by New York State or the

---

[13] Letter from Chief Kenneth Patterson, Tuscarora Nation to New York State Judicial Commission on Minorities (Feb. 5, 1990) (describing wampum belt presented as an agreement of co-existence between the Indian and non-Indian).

[14] Wilkinson & Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" - How Long a Time Is That?, 63 Calif. L. Rev. 601, 605 n.17 (1975) (citations omitted). Thus, the word "ownership," when referring to Indian land, is somewhat misleading. The role of caretakers or keepers more nearly captures the relationship of an Indian nation to its land.

[15] The Nelson A. Rockefeller Institute of Government, 1989-90 New York State Statistical Yearbook (15th ed. 1990) (this figure includes Eskimos and Aleutian Islanders).

[16] New York State, Executive Chamber, Preliminary Report To The Governor On State-Indian Relations 3 (May 1988) [hereinafter Prelim. Report].

[17] See id. at 3.

[18] Id. at 5.

federal government, although they do maintain a government-to-government relationship with New Jersey.[19]

Generally, Indian nations in New York State hold "Indian title" to their land.[20] This is different from most tribal lands in the United States, for which title is held by the federal government in trust.[21] Thus, issues relating to "ownership" and rights of governance over Indian lands tend to be more keenly felt by Indian nations in New York than elsewhere.[22]

A. The Haudenosaunee

> [The] Great Law was given to the People of the Longhouse many centuries ago, perhaps a thousand years. It unified nations who did not speak the same language into a United Nations - an alliance for peace.[23]

The Haudenosaunee (Hotinonsionne), the People of the Longhouse, or, more commonly, the French-named Iroquois Confederacy, is a six nation confederacy.[24] They are all federally recognized nations, although the Cayuga have no territory to govern, living

---

[19] D. Bray, A Summary Report On Discrimination In The Administration of Justice and Legal Assistance Against Indigenous People Throughout New York State; (unpublished manuscript on file with the Commission).

[20] "Indian title" is the right to occupy and use the land exclusively. See Oneida Indian Nation v. County of Oneida 414 U.S. 661 (1974).

[21] See Prelim. Report, supra note 16, at 5.

[22] The sovereignty of New York's Indian nations has been explicitly acknowledged by the state. "In the 1988 State of the State, Governor Cuomo recognized the importance of government-to-government communication between New York State and the nine recognized Indian nations located within its borders." Id. at 1 (emphasis added). The same report also notes: "Even an introductory understanding of State-Indian relations must recognize the legal and historical context within which they exist. Issues as basic as the very nature and scope of State jurisdiction as it pertains to the recognized nations have to be understood before specifics must [sic] be analyzed." Id. at 2. However, as will be explained later in this chapter, an acknowledgement of sovereignty does not always translate into an application of that doctrine, e.g., when a court is faced with "Indian related issues."

[23] See Kaianerekowa, supra note 8, at 1.

[24] It was originally a five nation confederacy composed of the Mohawk, Oneida, Onondaga, Cayuga, and Seneca. A sixth nation - the Tuscarora - joined the confederacy in the early eighteenth century. D. Ellis, J. Frost, H. Syrett & H. Carman, A Short History of New York State 12 (1957).

primarily on and around the Cattaraugus reservation (Seneca) in western New York.[25] These nations, which once occupied vast tracts of lands in New York and parts of Pennsylvania, have lived on these lands "since time immemorial."[26]

The Haudenosaunee traditional governmental and legal structures derive from, and are based on, the Great Law of Peace, which sets out the participatory roles, obligations and principles governing each of the six nations.[27] Originally, each nation of the Confederacy governed its own territory through an elected council of delegates (sachems).[28] There was also a Grand Council of the League which met to discuss common issues. Those members of the Haudenosaunee who still maintain traditional governments continue to follow this structure. The Haudenosaunee are matrilineal and matriarchal to the extent that selection of the leadership rests with Clan mothers.[29]

The Guswenhta is an agreement made between the Haudenosaunee and the Dutch in 1609, and subsequently honored by the French, English, and the United States. It holds

---

[25] Prelim. Report, supra note 16, at 4.

[26] Seneca Nation of Indians Judiciary Report To The New York State Judicial Commission on Minorities 1 (reproduced in vol. 5 of this report) [hereinafter Seneca Nation of Indians].

[27] See generally Kaianerekowa, supra note 8. The joining together of these nations under the Great Law is symbolized by the tree Tsioneratasekowa - the Great White Pine (the Tree of Great Peace). Id. at 2-3. The coming together of these nations under the Great Law has long been recognized as a singular achievement. See, e.g., J. Collier, Indians of the Americas 21 (1947).

[28] J. Weatherford, supra note 6, at 136-137.

[29] Kaianerekowa, supra note 8, at 44; see also 15 Handbook of North American Indians 489 (Bruce G. Trigger ed. 1978) (discussing membership being determined through the patriline in which women who marry lose their tribal status and their right to reside on the settlement or to own property, and discussing the use by the Oneidas of New York State to determine membership through the matriline); Tuscarora Nation of Indians v. Swanson, 437 N.Y.S.2d 603, 606 (Sup. Ct. Niagara County 1981).

that both Indian and settler nations will respect each other's laws, religion, and government, and that none will legislate against another.[30]

The Haudenosaunee identify four critical requirements for their way of life to survive. They are (a) the maintenance of their language; (b) the retention of sovereignty over their land base; (c) the continuation of their government; and (d) the preservation of their religion or spiritual beliefs.[31] Encroachments in any of these areas are perceived as threats to the Haudenosaunee's existence.[32] Actions that undermine an Indian nation's right to govern itself are naturally viewed as jeopardizing the nation's survival. It is in this context that issues of sovereignty relating to Indian nations must be understood. A lack of respect for these concerns inevitably leads to conflicts between Indian governments and the State of New York.

The Haudenosaunee have two forms of government -- traditional and elective. The selection of the leaders of the traditional governments derives from the Great Law of Peace.[33] The traditional governments also rely on three treaties which they believe expressly evidence Congress's intent to establish sovereign relationships between the Indian nations and the United States.[34] According to the Haudenosaunee, the State of New York

---

[30]Letter from Chief Irving Powless, Jr., Secretary, Onondaga Nation to Onondaga County Court (May 5, 1988) (discussing the issue of jurisdiction); see also 1 New York State Judicial Commission on Minorities, New York City Public Hearing 240 (June 29, 1988) (testimony of Chief Powless) (note that Chief Powless' name appears as "Palace" in the hearing transcript) [hereinafter New York City Hearing].

[31]New York State Judicial Commission on Minorities, Minutes of Focus Meeting with Members of the Haudenosaunee (Dec. 18, 1989) (statement of Chief Kenneth Patterson, Tuscarora Nation).

[32]Id.

[33]See generally Kaianerekowa, supra note 8.

[34]The three treaties are the Treaty of Fort Stanwix (1784), the Treaty of Fort Harmer (1789), and the Treaty of Canandaigua (1794). See Jircitano, Report to the New York State Judicial Commission on Minorities Representation: Indian Issues, 2, 8 (1989) [hereinafter the Jircitano Report].

merely serves as an agent of the United States.[35] Consequently, the Indian nations subscribing to this view do not acknowledge formal state jurisdiction over criminal matters, taxation, or the regulation of hunting or fishing.[36] This is in conflict with federal legislation enacted in 1948 granting New York State jurisdiction over all crimes committed on reservations except those related to hunting and fishing.[37] The Haudenosaunee believe this legislation violates the Treaty of Canandaigua.[38] Consistent with this position, those member nations of the Haudenosaunee that maintain traditional governments have declined to apply for state or federal programs unless provided as entitlements under the three treaties they recognize.[39] However, the six nations comprising the Haudenosaunee do not all maintain traditional governments. The following is a review of the governmental structure of each of the six nations of the Haudenosaunee.

The Tuscarora: The Tuscarora were the last nation to join the Confederacy in the early eighteenth century. They still maintain a traditional government.[40] Their lands are located in Lewiston, New York (Niagara County).

The Cayuga: The Cayuga also maintain a traditional government. They originally had a council of ten sachems which governed their territories.[41] They now live primarily

---

[35] Prelim. Report, supra note 16, at 3.

[36] Id.

[37] See Prelim. Report, supra note 16, at 25 (the legislation referred to is codified at 25 U.S.C. § 233 (1948).

[38] Id.

[39] Prelim. Report, supra note 16, at 6.

[40] Id. at 4.

[41] J. Weatherford, supra note 6, at 136.

on and near the Seneca's Cattaraugus reservation in western New York.[42] In treaties between New York State and the Cayugas, all Cayuga lands were taken over by the state.

The Onondaga: Under the Kaianerekowa, the Onondaga were named the Firekeepers of the Confederacy and had a council of fourteen sachems.[43] They maintain a traditional (nonelective) government pursuant to the Great Law. Clan mothers appoint the chiefs who administer the government.[44] They reside in upper New York State on the Onondaga Indian Reservation.

The Mohawk: The Haudenosaunee nations which have elective governments (the St. Regis Mohawk and the Seneca) maintain a more interactive relationship with the state. The St. Regis Mohawk have three elected chiefs who govern as a council, but there are also traditional chiefs, and on occasion the governing power has been shared.[45] Originally, under the Great Law, the Mohawk were the leaders of the Confederacy.[46] Today, the elective government does not participate in the Confederacy, but instead maintains a relationship with the New York State government.[47] Accordingly, the St. Regis Mohawk participate in various state and federal programs.[48] It is, for example, the only Indian nation that has used the state's housing programs.[49]

---

[42] Prelim. Report, supra note 16, at 4.

[43] J. Weatherford, supra note 6, at 136.

[44] Prelim. Report, supra note 16, at 4.

[45] Id. at 5.

[46] Kaianerekowa, supra note 8, at 6.

[47] See Prelim. Report, supra note 16, at 4-5.

[48] See id. at 13-16.

[49] See id. at 37.

The Seneca: In 1848 the Seneca established a constitution providing for an elective government and a judiciary made up of Peacemakers and Surrogate Courts.[50] Until that time New York State had related to the Seneca solely as part of the Confederacy.[51] Despite the change in the structure and form of government, however, the Seneca still maintain ties to the Confederacy and adhere to the principles of sovereignty set forth in treaties to which the Confederacy is a party.[52] The Seneca Nation holds title to three reservations, two of which are occupied and policed by the Seneca.[53] It also participates in some state programs, such as those provided by the State Department of Social Services.[54]

The Oneida: At one time the Oneida had an elective government. Internal disputes, however, led the federal government to withdraw its recognition of that government in 1975. Since 1987 the federal government has recognized the traditional government of the Oneida Nation.[55] At the time of the 1784 Treaty of Fort Stanwix, the Oneida occupied about five million acres of land in New York.[56] By 1842 the Oneidas had ceded all of its land to the state. Since the 1970s, the legality of these land transfers has been challenged in several suits.[57]

---

[50] Seneca Nation of Indians, supra note 26, at 3.

[51] Id.

[52] Id. at 3-4.

[53] Id. at 2.

[54] Prelim. Report, supra note 16, at 13.

[55] Id. at 4.

[56] C. Vecsey & W. Starna, Iroquois Land Claims 146 (1988).

[57] See id. at 146-49; see also L. Parker, Native American Estate 150-51 (1989).

B. The Shinnecock and Poospatuck

The Shinnecock and Poospatuck (Unkechauge) are of Algonquin, rather than Haudenosaunee, origin. Originally, the Shinnecock were governed by a sachem and a council of lesser chiefs. Situated on the coast of Long Island, they were hunters, farmers and fishermen. In the late eighteenth century, many Shinnecocks moved to Oneida County where they joined with the remnants of several New England tribes. In 1893 this larger group moved to Wisconsin.[58] Presently, there remain approximately 350 Shinnecocks living on the nation's Long Island reservation.[59] The Poospatuck have suffered even greater population losses. It was reported in 1875 that there were only twenty Poospatuck families still living on their lands on Long Island.[60]

Neither nation is now recognized by the federal Bureau of Indian Affairs.[61] However, they are recognized by the state as a result of treaties negotiated in colonial times. Both nations are governed by elected trustees.[62] The Shinnecocks are now engaging in internal debate as to whether or not to seek tribal status with the federal government, as

---

[58] Harrington, An Ancient Village Site of the Shinnecock Indians, 22 Am. Museum of Nat. History Anthropological Papers pt. 5 at 30 (1924), reprinted in 1 Suffolk County Archaeological Ass'n, Readings in Long Island Archaeology and Ethnohistory 60 (1977).

[59] See The Talk of the South Fork; Baymen Find No Warmth This Winter, N.Y. Times, Jan. 25, 1990, at B1, col. 3 [hereinafter Baymen Find No Warmth This Winter].

[60] Several Words given of the language of the Poospatuck tribe by Henry Clinton in Queries, 1884, 11 The Mag. of Am. History 252 (1884), reprinted in 4 Suffolk County Archaeological Ass'n, Readings in Long Island Archaeology and Ethnohistory 21 (1980) (traveler noted meeting remnants of the Poospatuck tribe who at the time numbered about 20 families).

[61] Prelim. Report, supra note 16, at 5. Consequently, they are ineligible for any of the programs sponsored by that agency.

[62] Id.

well as whether the traditional form of government, comprised of three male trustees, elected by the males of the tribe, is still tenable for the tribe.[63]

III. ISSUES INVOLVING NEW YORK COURTS

A. Tribal Government Decisions and State Courts

Although many of the problems confronting Native Americans in New York are outside the mandate of this Commission, there are several issues that do involve the judicial system. As noted previously, all of the nations have governments and long standing traditions of self-governance. Similarly, they are all recognized as nations by the federal government, the state, or both. The nations believe, however, that their right to govern their territories has been severely challenged in recent years by state court decisions. The most important of these decisions have involved the right of an Indian nation to remove or banish individuals from its land,[64] and its right to regulate entrepreneurial activities on Indian reservations. The latter cases have involved, among other things, the sale of tax-free gasoline and cigarettes.[65]

In the view of many of the nations' members, however, the most serious challenge to their sovereignty has arisen in connection with litigation over the operation of gambling casinos on Indian land.[66] Gambling has presented a particularly serious problem because

---

[63] See Baymen Find No Warmth This Winter, supra note 59, at B1, col. 3.

[64] See, e.g., Hennessy ex rel. Onondaga Nation v. Dimmler, 394 N.Y.S.2d 786 (Onondaga Cty. Ct. 1977). For a discussion of this case, and several other similar cases, see Jircitano Report, supra note 34, at 60-65.

[65] Jircitano Report, supra note 34, at 1.

[66] Id. at 90-101.

Indian governments feel that the casinos threaten their entire way of life.[67] They have therefore enacted and enforced laws limiting or banning gambling.[68] When affected "entrepreneurs" have challenged the tribal governments' decisions, the tribal governments perceive the state courts as not acknowledging their inherent right to make laws pertaining to their own territories.[69]

New York courts have been granted concurrent civil jurisdiction by the federal government over disputes between nation members and their governments.[70] Because of the existence of treaties, federal legislation, and case law relevant to sovereignty issues, an awareness of the rights of Indian governments and the cultures of their respective peoples necessarily forms a critical part of the decision-making process of the state courts.

B. Oaths of Office

Native Americans, in testimony and written submission, informed this Commission of their objection to the requirement of pledging allegiance to the state or federal constitution as a prerequisite to holding some jobs.[71] The issue was raised of whether oaths of office

---

[67] New York State Judicial Commission on Minorities, New York City Public Hearing (June 29, 1988) (Exh. 11 at 2) (testimony of the Tuscarora Nation).

[68] Jircitano Report, supra note 34, at 90-101.

[69] It is beyond the scope of this chapter to present an adequate factual and legal discussion of these cases. However, the Jircitano Report presents a comprehensive legal analysis and discussion of the cases at issue, as well as a discussion of the historical context in which Indian treaty rights must be understood. See id. at 60-101 (in particular pp. 90-101 for a discussion of cases involving the issue of illegal gambling); see also Prelim. Report, supra note 16, at 25-30; 2 New York City Hearing, supra note 30, at 291-94 (testimony of Chief Leo Henry). The Shinnecocks and Tuscarora have also complained of nonnative police forces exercising jurisdiction on their lands. See Prelim. Report, supra note 16, at 26.

[70] 25 U.S.C. § 233; see also Jircitano Report, supra note 34, at 60 et. seq.

[71] See New York State Judicial Commission on Minorities, Buffalo Public Hearing 172-73 (May 26, 1988) (testimony of Rick Hill); id. at 223 (testimony of N. Patterson); 2 New York City Hearing, supra note 30, at 283-86 (testimony of D. Bray (note that Mr. Bray's name incorrectly appears as Brey in the hearing transcript)); see also D. Bray, A Summary Report On Discrimination In The Administration of Justice and Legal Assistance Against Indigenous People Throughout New York State 11-15 (unpublished manuscript on file with the Commission).

in all applicable circumstances serve so strong an interest as to outweigh the individual's interest in pursuing the employment of his or her choosing.[72] As sovereign peoples and, individually, as citizens of distinct nations, Native Americans resent that the state, by the imposition of oaths as a prerequisite for some employment, forces Native Americans to choose between uncompromised allegiance to their nation and taking jobs for which they would otherwise be fully competent, the latter choice bearing the penalty of social stigmatization within their community.

C. The Indian Child Welfare Act

The Indian Child Welfare Act (ICWA)[73] was designed to promote the stability of Indian families and tribes.[74] It provides, among other things, that the appropriate Indian

---

[72] Given this Commission's concern with increasing minority representation among the attorneys practicing in the state courts, the following dialogue is particularly illustrative. (The speakers are David Bray (note that Mr. Bray's name appears as "Brey" in the hearing transcript), a member of the Seneca Nation and Affirmative Action Administrator at the Letchworth Developmental Center, and Franklin Williams.):

> MR. BREY: I will make two comments. One is in regards to . . . becoming a lawyer or even a judge in regards to the constitutional oath is that we have to swear allegiance or alliance to the United States and New York State constitutional oath . . . .
>
> I as a native American find it somewhat offensive to -- in a sense that my people have a constitution much older than New York State and the United States to have to swear allegiance to [those constitutions].
>
> In turn, my people will see me signing allegiance to a foreign government so to speak and what would happen is that I'm looked upon negatively . . . .
>
> MR. CHAIRMAN: What's the solution to that? If you're . . . a citizen of France and you come here, you have to swear allegiance to our constitution to be a member of the bar.
>
> MR. BREY: Okay. Does it make me a better lawyer to swear to that constitution?
>
> MR. CHAIRMAN: No, but everybody has to do that.
>
> MR. BREY: But it's just a procedural mechanism that's in place that really doesn't have any bearing on whether I'm going to be a good lawyer, whether I can represent my people to become a lawyer.
>
> And in a sense we're running into ethical problems of having lawyers that . . . from a native perspective maybe they're not really representing the interest of the [Native Americans].

2 New York City Hearing, supra note 30, at 283-84.

[73] 25 U.S.C. §§ 1901, 1963 (1978).

[74] Barsh, The Indian Child Welfare Act of 1978: A Critical Analysis, 31 Hastings L.J. 1287 (1980).

nation be notified when an Indian child is before a state court in an involuntary proceeding.[75] There have been complaints in New York that the state courts are not following the procedures set out in the ICWA, in particular the notice requirements.[76] An example of this is a statement by Judge Jeannie Jamison, of the Surrogate Court of the Seneca Nation, who commented that it was not until 1985 that the ICWA was recognized by the Chautaugua County Court.[77] The Surrogate Court of the Seneca Nation has intervened in six cases involving Seneca children between 1985 and 1987, despite not having been notified of the court actions.[78]

D. Bail

Since Indian land is held by Indian nations collectively, rather than by individual members of the nation, a unique problem develops when a nation resident tries to secure bail. A defendant who resides on Onondaga territory, for example, cannot put up his or her land as collateral for bail, and many courts will accept only cash or such collateral. Consequently, many Native American defendants are left in jail. The Onondaga Council of Chiefs has met with the district attorney of Onondaga County in an effort to work out

---

[75] Indian Child Welfare Act, 25 U.S.C. §§ 1911(c), 1912(a) (1978). "The Act also provides that state jurisdiction over child custody proceedings may be transferred to tribal courts at the tribe's or the parents' request. Both the tribe and the parents are given the right to notice and the right to intervene in state proceedings involving Indian children. The Act requires that higher standards of proof be applied in Indian child custody proceedings and mandates that placement of Indian children by state agencies be subject to special preferences for Indian families and communities." Barsh, supra note 74, at 1287-88 (footnotes omitted).

[76] See, e.g., 2 New York City Hearing, supra note 30, at 278-83 (testimony of Ronna Martel, a law school graduate certified to practice as a legal advocate in the Seneca Nation Courts); see also Seneca Nation of Indians, supra note 26, at 17-19; Prelim. Report, supra note 16, at 13-14.

[77] New York State Judicial Commission on Minorities, Minutes of the Focus Meeting with Grand Council of Chiefs of the Haudenosaunee 2 (Aug. 16, 1988). Judge Jamison noted that the Seneca Nation has lost several children through the State adoption process. Additionally, such children who might later return to the nation face great difficulties trying to establish their tribal affiliations. Id.

[78] Seneca Nation of Indians, supra note 26, at 18-19. The Seneca were successful in having the cases returned to their courts' jurisdiction.

alternative arrangements. The chiefs are willing to guarantee bail for Onondaga defendants, but the district attorney has taken the position that only a judge can accept an alternative arrangement.[79]

E. Native American Attorneys

According to the 1980 Census, there are only thirty-five known Native American lawyers in New York State.[80] There are no known Native Americans serving in the judiciary. A national survey for the 1977-78 school year showed that only 363 American Indians or Alaskan Natives were enrolled in 160 American Bar Association-approved law schools; a decade later, in 1988-89, 499 American Indians or Alaskan Natives were enrolled in 171 American Bar Association-approved law schools.[81]

The dearth of Native American lawyers practicing in the state has doubly unfortunate consequences. First, a strong Native American presence is needed in the profession for the same reasons mentioned elsewhere in this report in reference to racial and ethnic minority groups in general. In addition, however, the unique legal issues that arise in litigation involving members of Indian nations require attorneys who not only understand Native American concerns and have the confidence of Native American litigants, but who are also knowledgeable regarding Native American law, legal institutions and culture.

---

[79] 2 New York City Hearing, supra note 30, at 262-64 (testimony of Chief Vince Johnson).

[80] New York State Judicial Commission on Minorities, Albany Public Hearing 142 (Apr. 28, 1988) (statement of then Vice Chairman James C. Goodale); see also Bureau of the Census, U.S. Dep't of Commerce, Detailed Occupation of the Civilian Labor Force by Sex, Race, and Spanish Origin: 1980.

[81] ABA Section of Legal Education and Admissions to the Bar, A Review of Legal Education in the United States, Fall, 1988, Law Schools and Bar Admission Requirements 68 (1989). No state-by-state breakdowns were provided.

FINDINGS

1. Native Americans of the Indian nations located in New York State that are recognized by the federal and/or state government have established governments and a long-standing tradition of self-governance.

2. The governments of these Indian nations are concerned that their sovereignty be recognized, and in accordance with that desire, they manifest varying degrees of willingness to participate in programs and activities sponsored by the state government.

3. Representatives of these Indian nations believe that their right to govern Indian lands has been challenged in recent years by state court decisions.

4. Some Native Americans who came before the Commission are hesitant to take the oaths of office required for certain types of employment within the judicial system (as well as other professions). Based on their view of sovereignty, they fear that swearing allegiance to a "foreign" constitution, may undermine their status as Indian nation citizens.

5. Provisions of the Indian Child Welfare Act designed to protect the interest of Indian nations are not being uniformly honored.

6. Native Americans residing on Indian lands confront unique difficulties in meeting bail requirements, because they do not hold individual title to the land they occupy. Representatives of at least one Indian government have sought unsuccessfully to have special arrangements recognized wherein the Indian Nation would guarantee payment of bail in case of default.

7. There is a marked shortage of Native American attorneys practicing in New York State, and none are serving as judges. Also, there are also relatively few Native Americans enrolled in law schools. The number of Native American attorneys is unlikely to increase significantly in the near future.

RECOMMENDATIONS

1. A formal commission should be established and provided a broad mandate to study and develop ways to address issues of concern that arise between the state judicial system and Native Americans.

2. Educational materials and seminars should be developed for judges and appropriate nonjudicial personnel regarding the historical and legal bases of the sovereignty of Indian nations located in New York State.

3. Alternative methods should be explored for increasing the employment of Native Americans within the court system that are sensitive to concerns held by certain Native Americans regarding the taking of oaths of office.

4. The Chief Judge should notify all state court judges of the absolute necessity of their apprising themselves of and carrying out all provisions of the Indian Child Welfare Act. Judicial seminars on the Act are also recommended. In addition, a system of monitoring custody proceedings involving Indian children should be established to ensure that there is full compliance with the requirements of the Act.

5. A proposal should be developed, in consultation with Indian nation governments, for bail alternatives for Indian nation residents. Once developed, this proposal should be circulated to judges and the governments of the nations for their approval.

6. Concerted efforts should be undertaken to increase the number of Native American attorneys in the state. Those efforts should include the recruitment and encouragement of Native Americans at the high school and college levels to consider a legal career and to assist Native Americans engaged in legal study to successfully complete the process leading to admission to the bar. Qualified Native American candidates for judicial appointments should be identified and recommended.

7. Proposals and guidelines should be formulated to permit attorneys and advocates certified to practice in Indian nation court systems to be called on by judges as "friends of the court" when matters of Indian law or custom may be involved in a case. The Commission believes that the use of persons trained in Native American court systems, where appropriate, is needed to ensure that the requisite expertise on Native American issues and concerns will be adequately represented in New York courts faced with specific Native American legal questions.