

The Report of the

Ohio

Commission

on

# racial fairness

Commissioned  
by  
the  
Supreme  
Court  
of  
Ohio



and the Ohio State Bar Association



The Report of the  
Ohio Commission on Racial Fairness

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Final Report

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# DEDICATION

Any effort to examine an area as controversial as racial fairness in an institution as all-encompassing as our legal system does not just happen. Someone has to have the vision to see the need. An independent judicial system is fundamental to our democratic system of government. Fairness is fundamental to our system of justice. The Ohio Commission on Racial Fairness owes its existence to three individuals.

Judge Carl J. Character determined that there was a need to review the complaints of those who sincerely believed that they were unable to receive justice from our state's legal system. Judge Character, past president of the National Bar Association, heard the complaints of many lawyers of color who sometimes felt that, institutionally, the cards were stacked against them. As a practicing attorney, and later as a judge of the Cuyahoga County Court of Common Pleas, he frequently found himself in situations that caused him to wonder if these laments were based in fact.

Judge Character became aware that in other states, including New York, New Jersey, Florida and Minnesota, commissions of inquiry were examining the issues of racial fairness.

Judge Character became convinced that Ohio should undertake the same type of review. To that end he initiated a number of conversations with the Chief Justice of the Supreme Court of Ohio, Thomas J. Moyer.

Efforts to reform and improve Ohio's legal system mark Chief Justice Moyer's tenure as Ohio's top judge. He continually spearheads efforts by the Ohio Supreme Court to present an accurate image of the legal profession in the eyes of the public. He has insisted that the public's concerns about the legal system be addressed. These concerns include integrity, quality and fairness in the delivery of legal services and legal education in Ohio.

It is not surprising, then, that Judge Character found in Chief Justice Moyer a willing ear for his concerns about the public's perception of the fairness of Ohio's legal system. After talking to community leaders across the state, Chief Justice Moyer concluded that the level of public concern on this issue was sufficient to warrant a full-scale investigation.

With great care, the chief justice recruited the partnership of the Ohio State Bar Association and assembled the membership of this Commission to examine the pertinent issues. Among those recruited was Attorney James M. Kura, a renowned criminal defense attorney and the state's public defender. Jim brought a unique perspective and an uncommon energy to this Commission's work. No task was too large or too small for Jim to tackle. He favored the Commission with his incisive observations and his keen sense of what was right and what was wrong, a sense honed by years of working for those whose concerns and issues were most likely to receive little or no attention.

Jim Kura was one of this Commission's hardest working members. He chaired the subcommittee that explored the important issues facing people of color in the state's criminal justice system. We continued to benefit from his hard work long after he was diagnosed with terminal cancer. Jim continued to believe in the need for this Commission and to work for its successful completion until the day he died.

The vision and the efforts of these three men informed and shaped the efforts of the Ohio Commission on Racial Fairness. They supported the Commission's approach to the issues it confronted in an even-handed, deliberate way. They demanded that the Commission accept nothing at face value. They required that the Commission examine every allegation—those suggesting the propriety of the status quo and those outlining the need for change—with the same dispassionate eye.

We dedicate this final report to the commitment to fairness of these three men and to the memory of our friend and colleague, James M. Kura.

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Special recognition is due Kady vonSchoeler, a person of strength and character, whose faith in and commitment to this work brought the Commission through the best of times and the worst of times.

# INTRODUCTION

## Reviewing the Fairness of Ohio's Legal System

The Ohio Commission on Racial Fairness was created as the joint initiative of the Ohio State Bar Association and the Supreme Court of Ohio. The Court and the State Bar presented the Commission with the following mandate:

“...to identify racial bias where it exists and propose methods for eliminating it from the legal profession and the justice system. This will include gathering information about the perception and reality of disparate treatment towards African-Americans, Hispanics, Native Americans and Asian-Americans, and recommending methods of addressing and eliminating those perceptions and realities.

The commission is charged to: (1) study every aspect of the state court system and the legal profession to ascertain the manner in which African-Americans, Hispanics, Native Americans and Asian-Americans are perceived and treated as parties, victims, lawyers, judges and employees; (2) determine public perceptions of fairness or lack of fairness in the judicial system and legal profession; and (3) make recommendations on needed reforms and remedial programs.

To complete its mission, the commission may study:

- civil, criminal, juvenile and family law issues
- the bail process
- jury selection
- sentencing practices
- state statutes and rules of court
- employment and contracting practices in the court system
- courthouse perceptions and treatment of litigants, witnesses, victims and attorneys
- fee-generating court appointments
- law school admissions and retention
- attorney admission and discipline
- judicial selection and election
- professional opportunity and development in the legal profession .”

## The Public Hearings

The Commission took the position that its initial task was to determine how Ohioans felt about their legal system; to establish how fair it was perceived to be. In order to carry out this part of the charge, the Commission felt it was imperative that those perceptions be heard directly from the citizens of the state of Ohio. The Commission wanted to know not only their actual experiences, but also their perceptions and concerns with Ohio's legal system. The Commission determined that the best way to gather the information was through public hearings held strategically around the state. Those hearings occurred over the course of 10 weeks in the fall of 1994.

The sites for the public hearings were selected carefully to reflect not only the racial but also the other diverse factors that distinguish Ohio. Public hearings were held in locations that had high concentrations of minority populations and in those where minority populations were nearly non-existent. The Commission received public testimony in areas of the state in which significant portions of the population did not speak English as their first language. The Commission heard from citizens who reside in large cities and small towns, as well as from those who reside in areas of the state that are rural in character.

In all, the Commission held 12 public hearings at 10 sites across the state:

Akron  
Athens  
Cincinnati  
Cleveland  
Columbus  
Dayton  
Lima  
Lorain  
Toledo  
Youngstown

The public hearings were generally well-attended and received the active attention of broadcast and print journalists. As a result, the experiences of many of Ohio's citizens regarding questions of race, fairness and the legal system received a wide audience across Ohio.

The stories that the Commission heard at these hearings ranged from the questionable to the certifiably outrageous. They were often emotional and frequently thoughtful. After traveling throughout the state, the Commission recognized that many of Ohio's citizens, particularly its minority citizens, harbor serious reservations about the ability of Ohio's current legal system to be fair and even-handed in its treatment of all of the state's residents regardless of race. As the hearings progressed, it became increasingly clear that, no matter what empirical data was developed, it would be necessary to develop recommendations that effectively addressed the distrust reflected in these perceptions.

The individuals who made up the Commission came from diverse racial, gender, professional and political backgrounds. They were joined, however, in their common desire to assure that all Ohioans are afforded their rights under the constitutions of this state and of this nation. They were committed to making sure that the guarantees of equal justice and due process under law contained in those documents are there for all of our citizens, regardless of racial background.

## **The Commission's Focus**

The public hearings highlighted and confirmed one of the initial theories held by the Commission. Ohio's effort to provide a legal system that is fair to all of its citizens is complicated by very strong beliefs in both the white and minority communities as to the current system's ability to deliver justice.

As the research indicates, the Commission found an enormous chasm between the perceptions of our state's majority and minority communities on this issue. Whites were prone to believe that the current system was fundamentally fair. Members of the state's various minority communities, in large measure, found significant barriers to fairness in Ohio's courts, legal educational institutions and legal employment opportunities.

The Commission began its work aware of the fact that a number of other similar efforts were underway or completed in states across the country. Although the Commission recognized that unique issues existed in Ohio, a review of the interim and final reports issued by the other states engaged in the same inquiry allowed the Commission to conclude that many, indeed the vast majority, of the issues that were identified were the same as other states.

The Commission decided to maximize the use of state reports and other scholarly work and apply the lessons learned elsewhere, wherever appropriate, to the experience in Ohio.

Some obvious areas of inquiry may appear to be omitted. In many cases those omissions are purposeful. The Commission had to set priorities and make choices to concentrate efforts in those areas where it was most likely to accomplish the most meaningful impact.

In the review of the available literature, the Commission concluded that the perception of unfairness, regardless of empirical evidence, was such an impediment to fairness that the goal of addressing the perception required action. The Commission made a conscious decision to recommend such actions, recognizing that to do so may subject it to criticism. It is the Commission's view that these recommendations will return much more than they will cost in the increased confidence in the overall fairness in our legal system.

## **Implications of the Commission's Work**

The Commission acknowledges that there are many things that Ohio's legal system does reasonably well in assuring fundamental fairness to all of its citizens. This report attempts to underscore some of the most prominent of those efforts.

However, the Commission believes that its primary obligation is to point out those areas where our state's legal system can improve its performance and, wherever possible, recommend means that are least invasive or radical.

The Commission is cognizant of the costs involved in any effort to reform. Costs were considered, but they were not the driving consideration in Commission recommendations.

The Commission adopted a pragmatic approach. Much thought went into identifying the entity or individual responsible for implementing each recommendation and into determining the likelihood of implementation. In some instances, however, recommendations were included simply because the Commission concluded that they needed to be made — even if implementation is not likely in the near term.

The Commission believes that this report provides the basis for ongoing examination of, dialogue about, and meaningful improvement in the way the issue of race is addressed in the courthouses, law offices, law schools and other legal venues throughout our great state.

The report itself may appear quite spare, given the time we have taken to produce it. The action taken by the Commission to limit the verbage of this report is deliberate. We want this work to be readable by and accessible to all of the citizens of this state and elsewhere, not just to researchers and academics.

We note, however, that what we have done is only an initial step. Our work brings us to conclude that, in this area of endeavor, success is not a destination. It is a journey.

# PUBLIC HEARINGS

One of the initial tasks undertaken by the Commission was the scheduling of public hearings throughout the state. The Commission wanted to hear directly from citizens, including persons of color and other minorities to ascertain their experiences with and perceptions of the legal system.

The hearings were held in the following cities on the following dates:

Columbus

September 16 - 17, 1994

Dayton

September 24, 1994

Youngstown

October 1, 1994

Athens

October 8, 1994

Cincinnati

October 15, 1994

Toledo

October 27, 1994

Akron

October 29, 1994

Lima

November 5, 1994

Lorain

November 12, 1994

Cleveland

November 18-19, 1994

One phrase that can best summarize the volumes of testimony is the anonymous quotation that “the only place where you find justice in the Halls of Justice is in the halls.”

Most of those appearing before the Commission were convinced that our judicial system is biased in favor of white, wealthy citizens and against those of color and limited means. This perception goes beyond the court system itself.

Many of the complaints the Commission heard were directed toward law enforcement, an integral part of the legal system. The perception is that this is all part of the same system.

Witnesses in nearly all of the sites told of being stopped by the police for no apparent legal reason, only because of their color. (One black professional in Cleveland told of being detained and accused of car theft simply because he was driving an expensive foreign car. The police assumed that it was stolen. He opined that this would not have happened had he been white.)

The Commission also heard repeated testimony of racial prejudice in arrests. Many witnesses alleged that the percentage of black males under 25 arrested is inappropriately disproportionate to their percentage of the population.

The distrust of law enforcement was expressed in the poignant comment made by a black witness in Dayton. “I’m judged before I even go to court. I’m judged before you even pull me over and frisk me. I’m judged because of what you see; not because of what I did.”

The lack of trust in our law enforcement system carries over into the court system itself. A woman in Lima observed that, “Equal justice for too long has placed people at the mercy of the personality of the person on the bench.”

A number of witnesses remarked that upon coming to court, minority citizens are met by a sea of white faces, — the arresting officer, the court clerk, the defense attorney, the prosecutor and finally the judge. The Commission heard over and over again that no people of color were observed.

A witness in Athens said, “They were all friends. We know that the white judge, white prosecutor and white defense counsel go to the country club and golf together and that the case was closed before it started.”

A high level of distrust exists. Ohio’s minority citizens doubt that they will be treated fairly at any point during their judicial journey. As one stated in Cincinnati, “Unless you’re blind and even if you are blind, you can hear the dual treatment and inconsistency in the court system.”

Some witnesses directed their ire toward the white court-appointed attorneys or public defenders. Many of the witnesses felt that these lawyers paid little or no attention to their cases and that they were forced to plead guilty or

no contest to charges when they had not committed a crime. One man from Delaware stated that his public defender plainly told him that a jury would not believe him and so he pled guilty to a crime he did not commit and spent four years in prison as a result.

A witness in Lima offered an emotion-packed account of his college-educated son who was accused of breaking and entering. Even though the evidence was clear that he did not cross the threshold of the home, and despite the fact that he had no prior arrests and convictions, he was found guilty, given the maximum sentence and denied shock probation. The witness stated that he was certain that, had his son not been black, at the most, he would have been placed on probation.

The disparity in the sentences handed down was a consistent criticism directed toward judges. One witness quoted a National Urban League study that found that a young black male first offender was twice as likely to be sentenced to prison or jail than a white person convicted of the same crime.

Judges were also taken to task for their rudeness and lack of sensitivity. A witness in Akron told us that it was “horrible the way the judge treated black people before him. He talked down to them and laughed at them.”

A Columbus witness asked, “Who are your overseers? In the inner city, white police officers tell you to move on and then when you get to court you’re dealing with white judges and attorneys who don’t seem to care. Where there is no sensitivity or concern, there is no true justice.”

Many of those testifying challenged the Commission to advocate change, to attempt to cure perceptions that our justice system lacks basic justice. As we were told in Lorain, “You have to change people’s minds. You have to change the way people think.”

As suspicious as most of the witnesses were of the justice system, they were appreciative of the Commission’s effort to come to their community and solicit and listen to their views. Many of them were pessimistic as to the likelihood of any meaningful change.

Even though some were frustrated, they held out hope that the Commission could initiate a dialogue that could begin to eradicate the perceptions of an unfair and biased justice system.

As we were told in Columbus, “We understand the where, but what we would like to know is when. When will justice be for all of us? When will justice reign with complete sovereignty in the courtroom? When will race and economic status take a back seat to fairness?”

Many valid concerns and reservations were expressed at the hearings. The challenge before the Commission is to bring them to the attention of those who can address them.

# JUDGES' AND ATTORNEYS' PERCEPTIONS

The court system is among the most sacred institutions in a democratic system of government. It touches everyone. From the CEO whose company is involved in a billion dollar merger to the restaurant worker who is fighting an eviction or seeking a divorce, each person turns to and is influenced by the courts many times in a lifetime. But each person sees a slightly different court system; each experience is unique. Public perception of the court system tends to be a reflection of the court system's perception of the public. Are the courts a help or a hindrance, a purveyor of justice or a catalyst for greater injustice, a system to set the world straight or a source of confusion and ultimate rejection?

Because they often enjoy certain privileges, lawyers, judges and laypersons working in the court and legal system should accept corresponding responsibility. To a great extent, they control how the public feels about the courts. Lawyers and judges play a significant role in the public's perception of the objectivity of the legal system and the resultant public respect and confidence placed in it. A system that is perceived by some to be racially biased can only lessen the confidence and trust in the courts. Ultimately, a perception of bias could weaken our democracy, the very system judges and lawyers are sworn to defend.

The Commission's survey undertook to find out what it could about the perceptions of the courts in this state. Do those who work most closely in the system see it as having a racial or ethnic bias? Before perceptions can be changed—if they need to be—they must be understood. To that end, the survey authorized a range of activities to take a measure of the Ohio courts, including a survey of judges and attorneys to discover whether or not any bias exists in this, the last decade of the 20th century.

Commissions that “find out about” and report upon racial and ethnic bias, perceptions of lawyers and judges, and their views of the legal profession are not new. Numerous state task forces have studied racial and ethnic bias. Further, task forces have been established in the First, Second, Third, Sixth and

Ninth Federal Circuit Courts and the D.C. Circuit Court. Like these other concerned legal communities, Ohio has now begun to evaluate its court system and set a course for the next century. This report and its recommendations are the first steps.

The recommendations of the various task forces from around the country are similar to our own. The lack of minority representation on the bench and bar is often mentioned; it is noted in this report as a disturbing trend. Increasing minority representation is a goal for which the entire legal system must continue to strive. The work has already begun in other jurisdictions, as these examples show:

- The **Arizona** Commission supported a constitutional amendment, now passed, that mandates broader diversity of membership in the trial and appellate court appointment commissions.

- **Connecticut**, like Ohio, examined professional opportunity issues, including law schools and bar exam matters, and reviewed the judicial selection process for minority representation.

- **Florida** adopted legislation establishing the composition of judicial nominating commissions, such as the Commission on Juvenile Justice, and requiring that at least one of three members be either a female or a member of a racial or ethnic minority group.

- In **Indiana**, the Judicial Nominating Commission sought out and appointed minority candidates for appellate-level judgeships.

Thus, the growing trend among many states is to increase minority representation at all levels of the bar.

Reports of other states' racial and ethnic bias commissions have led to other types of legislation:

- The **Oregon** legislature enacted a bill to establish certification of interpreters and to mandate a preference for certified interpreters over the appointment of those otherwise qualified.<sup>1</sup>

- The **Illinois** General Assembly created sub-circuits in Cook County to increase minority representation on the bench.

- As a result of the Racial Commission recommendations in **Minnesota**, all county and city attorneys receive mandated training on prosecuting crimes motivated by bias.

Ohio also recommends that judges, attorneys, and other courthouse personnel receive more education on racial and ethnic bias issues and perception differences (see Recommendation # 5). This need is supported by our own surveys, as well as the surveys and commission reports in other states, which show a divergence of opinion between white and minority attorneys. The **Arkansas** survey for instance, indicated that about 75 percent of black attorneys feel they are being adversely affected by discrimination; a much smaller percentage of white attorneys responded that such discrimination exists.

As noted earlier, many states conduct diversity awareness programs for judges, attorneys and other court personnel, a recommendation that the Commission strongly endorses. A few examples include:

- **Nebraska** has training for judges on diversity and cultural awareness in the Nebraska courts.
- In **New Jersey**, more than 75 percent of the judges have taken racial and ethnic diversity programs and courses offered at their judicial college each November.
- The **New York** Commission has conducted public hearings throughout the state to educate non-judicial employees about racial and ethnic bias.

Here, too, the public hearings of the Ohio Commission on Racial Fairness have increased awareness by the courts, bar and public about racial and ethnic bias issues.

Recommendation # 2 includes developing a formal means to receive complaints of racial bias. This recommendation is supported by these findings and follows the developments in other states:

- The **Alaska** Commission on Judicial Conduct for Judges includes a statewide human rights commission to receive and act on such complaints.
- In **Delaware**, complaints of bias can be filed

either with the state court administrator or with the Department of Labor or state EEOC.

- In **Michigan**, persons who have complaints can contact either the coordinator of the Access to Justice Program within the Supreme Court administrative offices or one of four regional Supreme Court administrative offices.

Also included in our Recommendation # 2 is an amendment of Ohio's code of conduct for judges and attorneys so that it addresses issues of racial and ethnic bias. Again, this is not a new or novel approach.

- The **Colorado** Judicial Code, for example, was amended to state that a judge should avoid impropriety and the appearance of impropriety in all activities and that a judge shall not hold membership in any organization that the judge knows to practice invidious discrimination on the basis of race, gender, religion or national origin.

- **Hawaii's** Revised Code of Judicial Conduct prohibits manifestations of bias or prejudice by a judge or the judge's staff, and further places a duty on judges to require lawyers appearing before them to refrain from manifesting bias or prejudice. The Hawaii Code and comments further prohibit expression of bias or prejudice outside a judge's judicial activities.

- In **Wyoming**, the Judicial Code provides that judges shall require lawyers appearing before them to refrain from manifesting bias or prejudice based on race against parties, witnesses or others.

Several states have included recommendations regarding court interpreters for non-English speaking persons involved with the courts. Like Ohio's Recommendation # 6, all of the various state interpreter recommendations involve efforts to accommodate persons who have limited knowledge of English. Such efforts also include the availability of multilingual court forms and brochures. Such increased access to our judicial system gives non-English speaking persons a greater sense of inclusion.

The Ohio Commission on Racial Fairness Report and its recommendations in connection with the judiciary and attorneys are not unique; they echo those of many states that have gone before us. They are only the first step, but they are designed to lead to a better use of our human resources and an increased perception that the legal system is fair to all.

## Research and Findings

Surveys went to judges and attorneys throughout the state, using mailing lists of the Ohio State Bar Association and local and minority bar associations. Questions probed the respondents' perceptions of racial bias in the legal profession, career advancement opportunities and treatment in courtroom environments. Questions also solicited responses on the effectiveness of formal and informal grievance procedures for reporting problems attributed to racial bias.

### Judges

A total of 436 judges responded to the survey. The respondents fell into the following categories:

**Whites** - approximately 96 percent

**Minorities** (Asians/Pacific Islanders, Blacks, Hispanics, Native Americans) - approximately three percent

**Unknown** - one percent

Of the judges responding to the question of gender, approximately 83 percent were men and approximately 17 percent were women. (Nine did not answer.) As with the attorneys surveyed, the judges were questioned about their perceptions of racial bias in their career development and in the treatment of peers, attorneys, witnesses and clients in criminal and civil cases. The surveys included questions on racial bias issues in court environments and in court activities such as jury selection. Minority judges registered greater dissatisfaction than white judges about career advancement opportunities. Do they feel connected in the "network"? Are they challenged in their positions to get opportunities beneficial to their careers? Minority judges were more dissatisfied than white judges with the treatment of minorities in judicial processes such as sentencing in criminal cases and financial settlements in civil cases. Do they view their jobs as burdensome in the criminal courts, sentencing many minority males to jail sentences the judges cannot control?

The questions also included the extent to which racially biased comments were heard in the courtroom, especially comments about someone of a racial background different from the judge reporting the comment.

Regardless of ethnic background, judges perceived little racial bias in judicial processes such as jury selection, setting bail and professional etiquette. Among those who filed for-

## Attorneys

mal or informal grievances, most were satisfied with the results, and few judges perceived retaliation for their actions.

The sample of attorneys surveyed came from lists drawn from the Ohio State Bar Association, minority bar associations and other attorney associations. A total of 2,339 attorneys responded to the survey, falling into the following categories:

**Whites** - 2,022 attorneys (86 percent)  
**Minorities** - 317 attorneys (14 percent)  
**Asians/Pacific Islanders** - 16  
**Blacks** - 278  
**Hispanics** - 11  
**Native Americans** - 0  
**Other Minorities** - 12

Nearly 79 percent (78.6 percent) of the white attorneys<sup>2</sup> were males, as were 55.8 percent of the minority attorneys. Respectively, 74.8 percent and 50.5 percent of the white and minority respondents were members of the Ohio State Bar Association.

The attorneys responding represented a broad array of careers in government, industry and private practice. Approximately 20 percent of the white attorneys and 25 percent of the minority attorneys claimed their practices “rarely” or “never” bring them into a state court, while over 33 percent of both sub-groups appear in a state court at least twice a week.

One of the survey’s findings that replicates those of other state commission reports is the considerable difference in how whites and minorities — especially blacks — perceive degrees and effects of racial bias.

- White and minority attorneys vary greatly in their perceptions of their career advancement chances. White attorneys are much more satisfied with career advancement possibilities than are minority attorneys.
- White and minority attorneys also differ in their perceptions of the racial bias problems of minority judges, attorneys, non-judicial court personnel and litigants. White attorneys tended to perceive fewer problems of racial bias than their minority colleagues saw.
- White attorneys are more likely than minor-

ity attorneys to assume there are at least as many employment and mentoring opportunities for minority attorneys as there are for white attorneys.

- Both white and minority attorneys expressed the opinion that minority attorneys are given hiring preferences over “more qualified” white attorneys.<sup>3</sup>
- Concerning civil and criminal cases, minority attorneys tended to be much more pessimistic than white attorneys about the negative impact of being a minority defendant.
- In general, minority attorneys were more likely than white attorneys to view the judicial system as treating minorities unfairly—perhaps even applying a “guilty until proven innocent” standard.

When asked about courtroom environment factors, the vast majority of minority and white attorneys agreed. Minority attorneys, litigants, expert witnesses and lay witnesses are not inappropriately addressed and are not interrupted more than their white counterparts. Most respondents claimed not to have heard inappropriate comments or jokes about their race in their presence by another attorney, judge or court personnel. However, many of the attorneys did say they frequently heard inappropriate comments about *another person’s race* in their presence.

Although many attorneys reported hearing racial comments of one sort or another, few filed either formal or informal grievances of racial bias. Approximately 78 percent of the minorities who filed informal grievances were very or somewhat satisfied with the results of their actions, while 26 percent of whites were somewhat or very dissatisfied. Twenty-nine persons (22 whites and seven minorities) felt they were retaliated against for their informal grievance filings.

Most of the attorneys, especially the minority attorneys, expressed awareness of and dissatisfaction with court interpretation services.

One disturbing finding stands out: while most white attorneys expressed faith in the courts and the distribution of justice, minority attorneys expressed deep dissatisfaction.

Public hearing testimony, focus groups of attorneys such as Ohio State Bar Association Board members and individual meetings between judges and bar association officials also revealed differing opinions regarding the career opportunities of minorities in legal professions in

## Recommendations

the state of Ohio. Many participants mentioned the declining number of black judges elected to the bench in major cities as a disturbing trend. In addition, the judicial election process was viewed by some as a challenge if anti-racial bias incentives are to be developed in court systems.

If the state of Ohio is to have the court system it deserves, initiatives in promoting the following steps to achieve that goal are recommended:

**1. The Supreme Court should establish an implementation task force on racial bias in the legal profession to consider and implement recommendations suggested in this report, as well as other methods to eradicate racial bias problems in the legal profession and courts.** The task force should be composed of judges, attorneys, law school deans, law students and lay citizens.

**2. The Supreme Court should revise the Code of Professional Responsibility similarly to the Code of Judicial Conduct, specifically Canon 3(B)(5) and (6).** The responsibility of attorneys and judges should be to avoid all behavior that tends to denigrate public respect and confidence in the legal system, including avoiding discriminatory conduct on the basis of any person's race, gender, religion, national origin, disability, age, sexual orientation or economic status. The revisions should also include the formal means of receiving complaints, investigating and disciplining judges and attorneys who engage in racially biased language or behavior.

**3. Bar associations and the Court should develop more effective working relationships with minority attorneys, such as: (1) joint minority and bar association career related activities; (2) joint sponsorship of a centralized placement service targeting the recruitment of minority attorneys in private industry, government, firms, non-profit organizations and law schools; and (3) the availability of recruitment and job placement information on the OSBA Web site and in other professional media and publication networks. Various bar associations, local and state clerkship and mentoring programs should continue.** The goals of such programs include assisting colleagues in becoming involved in the informal as well as formal organization and culture of the local and Ohio State Bar Association.

**4. The Supreme Court should include in the attorney registration materials questions soliciting information on ethnic status.** For the purpose of monitoring progress.

**5. The implementation task force should develop an anti-racism workshop curriculum that would be implemented by the Ohio Judicial College, OSBA and the Ohio Continuing Legal Education Institute as an annual workshop offered to judges, attorneys and courthouse personnel.** This should be part of mandatory continuing legal education and for credit, just like substance abuse, ethics and substantive law.

**6. The Supreme Court should conduct a survey of county and appellate court administrators throughout the state to determine the language needs of non-English speaking court participants.** If the results establish a need, the Commission recommends a court interpreter certification program be developed in conjunction with the foreign language and ethnic studies programs and departments of universities and colleges in the state. In 1990, about five percent of Ohio's population were non-English speakers (over half a million persons). Public hearings, professional correspondence and survey data point to the need for a court interpreter program for the state's growing non-English speaking population. The data will be used to determine how many interpreters of a particular language will be needed and which foreign language and ethnic studies departments and programs will need to be involved in the program. The implementation task force should determine the credential program criteria and incentives.

# EMPLOYMENT AND APPOINTMENT PRACTICES IN THE COURTS

An important area in which much progress must be made is employment and appointment practices in the courts and judicial system. Some of the recommended actions and programs can be implemented by the Supreme Court alone, some by administrative rules and some by legislation.

We reiterate that no institution in Ohio is more dear and more essential to freedom and democracy than the judicial system.

“Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered or because they are non-conforming victims of prejudice and public excitement.” *Chambers v. Florida*, 309 U.S. 227, 241 (1940)(Black, J., for the Court).

By virtue of its mission to dispense justice, the entire court system must reflect fairness and sensitivity in all respects, including the complexion, demeanor and diversity of its workforce.

The judicial and court system is, by its very nature, unlike other governmental institutions. The fundamental goal of our judicial system is to uncover truth and dispense justice, to act as the ultimate arbiter of what the law is and to apply the law equally to all people.

The court system encompasses all courts and divisions, all judges and employees of Ohio’s appellate and trial courts. It also includes prosecuting attorneys’ and public defenders’ offices. The Supreme Court has certain rulemaking authority even in the absence of legislation. The Rules of Superintendence, Rules for the Government of the Bar, and Rules for the Government of the Judiciary could be used to accomplish many of the recommendations that follow (and throughout this report).

Clerks of the courts are elected county officials who serve as the recorders and custodians of all public records within the counties in which they serve. Each appellate district also has its own staff. Because these employees are part of the broader court system in the eyes of the public, the diversity of these employees is an important goal to the credibility of the courts

and to the popular acceptance of their decisions. Efforts must be undertaken to recruit, hire and retain minority court personnel, from both inside and outside the state, for positions within the court system. Otherwise, the failure to address the significant underrepresentation of minorities in court employment will continue to tarnish the image of the entire court system.

## Research and Findings

As part of the Commission's effort to investigate the Ohio legal system for issues of racial bias, an investigation of employment practices in Ohio's state courts was undertaken.

A review of the existing body of research was conducted with a particular emphasis placed on the research conducted by similar commissions in other states. The public hearings held by the Commission during 1994 provided important insight into particularly sensitive areas of state court employment practices. Consultations were made with Commission members and others whose experiences and interests were suited for the employment project.

A number of issues arose during this preliminary investigation resulting in three primary research objectives that were addressed as the following questions:

1. How do Ohio courts hire, promote, compensate and fire employees?
2. What is the employment record of Ohio courts as it relates to issues of racial fairness?
3. What are the perceptions of court employees regarding workforce issues such as diversity training, satisfaction, working environment and other issues?

As with other aspects of the Commission's work, the lack of a centralized court system in Ohio proved to be an impediment to an exhaustive statewide examination of hiring practices. Indeed, in Ohio, policies are designed at the local level with regard to employment — often at the departmental level, not at the court level. Thus, the Commission decided to look at a small sample of Ohio courts in an effort to obtain an understanding of how some courts handle employment issues.

The Commission selected seven jurisdictions after considering the following factors:

1. *The percentage of minorities in the jurisdiction.* Because a complete statewide study of em-

ployment would not be feasible given the time and staff constraints of the Commission, we were interested in examining jurisdictions with high percentages of minorities. This factor would enable us to report findings about jurisdictions impacting large numbers of minorities.

2. *Conduct the project in the jurisdictions in which the Commission had held public hearings.* This would enable the Commission to compare the testimonial evidence collected at the public hearings with empirical evidence of employment practices in the respective jurisdictions.

3. *Maintain the statewide appeal of the Commission's goals.* Thus, we were interested in selecting counties outside the traditional venues of political power in the state; namely counties in addition to Cuyahoga, Franklin and Hamilton — the three largest counties and arguably the three most powerful counties politically.

With these factors in mind, the Commission selected the three largest counties in the state, two medium-sized counties (medium = population between 200,000 and 800,000), and two small counties (small = populations less than 200,000). The Commission's final list of jurisdictions is as follows:

1. Franklin County Common Pleas Court
2. Cuyahoga County Common Pleas Court
3. Hamilton County courts
4. Lucas County courts
5. Mahoning County Common Pleas Court
6. Van Wert County courts
7. Ross County courts

To address the first research objective (How do Ohio courts hire, promote, compensate and fire employees?), personal interviews were arranged with the court administrators of each of the selected jurisdictions. A pre-arranged agenda was faxed to the court administrator, and then researchers met with the administrator to go over the points of the agenda. From these meetings, the Commission was able to determine the policies used in the employment process in the various jurisdictions.

To address the second research objective (What is the employment record of Ohio courts as it relates to issues of racial fairness?), the Commission consulted documents collected by the Ohio Civil Rights Commission that detail the race, com-

pensation level and job classification of court employees. Distributions obtained from these documents can be compared to 1990 census data for the distribution of working age residents by race.

And finally, to address the third research objective (What are the perceptions of court employees regarding workforce issues such as diversity training, satisfaction, working environment and other issues?), the Commission constructed a brief attitudinal and attribute survey to be distributed among court personnel in the selected jurisdictions. This survey was distributed along with the employees' regular paychecks to ensure that employees received a copy of the survey and we included a pre-addressed, postage-paid envelope for them to return the survey. Data from the survey was entered into a database as it arrived at the Commission's offices.

The court employee survey reveals that whites overwhelmingly dominate the three top levels of court employment including judgeships, while most minorities are in protective services or in administrative support positions. Research in other states indicates that the same pattern of court employment, in which most minorities are in support, rather than leadership roles, is a common trend in American employing court institutions.

In addition, even though most court employees (56 percent) are very satisfied or somewhat satisfied with their work environments, a large number (44 percent) are either somewhat or very dissatisfied. Broken down ethnically, 56 percent of black employees and 64 percent of white employees are very satisfied or somewhat satisfied, and 44 percent of black employees and 36 percent of white employees are somewhat dissatisfied or very dissatisfied.

While over half of the black employees (67) marked being unsatisfied with their present professional situation, most of the white (229) and other (Hispanic, Asian, Indian, other, (14) marked satisfied. Overall, most court employees (60 percent) marked dissatisfied with opportunities for advancement. The ethnic distribution indicates that the range of skepticism is disproportionately marked in the attitudes of minority employees. The following are the raw numbers: 53 out of 66 black employees; four out of seven Hispanic employees; one out of two Native American employees; and 124 out of 228 white employees, indicated that they were either somewhat dissatisfied or very dissatisfied with opportunities for advancement, with most being very dissatisfied.

Among black employees (the top three occupational tiers), one reported being "very satisfied" with opportunities for ad-

vancement while the remaining six marked “somewhat dissatisfied” (5) or “very dissatisfied” (1). On the other hand, among the white professional employees (48), 10 marked “very satisfied,” 19 marked “satisfied,” nine marked “somewhat dissatisfied,” seven marked “very dissatisfied” and three marked “don’t know.”

Considering that most surveyed court employees registered satisfaction, the largest group to express discontent with career advancement were those in protective services followed by those in administrative support staff positions. The ethnic breakdown of career advancement skepticism in protective services is: blacks (33): six “somewhat satisfied,” 20 “very dissatisfied,” and one “don’t know;” whites (77): 10 “very satisfied,” 18 “somewhat satisfied,” 14 “somewhat dissatisfied,” 28 “very dissatisfied,” and seven “dissatisfied.” “Others” (3): two “somewhat satisfied” and one “somewhat dissatisfied.” This same ethnic pattern of career advancement skepticism is similar in the administrative support staff categories, especially in the administration level II category. For instance, 16 out of 18 black and 27 out of 70 white administrative staff level II indicated that they were very dissatisfied with career advancement prospects.

In addition to the differences in job satisfaction between whites and minorities, whites are generally unaware of the perceptions of their colleagues of color regarding career advancement opportunities for minorities. The discrepancy in perception is greatest between blacks and whites. In responding to the question, “Advancement opportunities available to minorities are greater, the same as, or less than those available to whites,” the black responses (67) were: greater-2; the same-7; and less than-58, and the white responses (225) were: greater-65; the same-122; and less than-8.

One aspect of a healthy multi-ethnic work environment is a climate free from distasteful racial verbal or nonverbal language, be it ethnic jokes or negative racial comments and gestures. Another aspect is an atmosphere where employees, regardless of their ethnicity, feel comfortable enough to report incidents of distasteful racial language to supervisors and institutional authorities who in turn proceed to effectively resolve such problems. Needless to say, when negative racial language use is common or when informal and formal grievance procedures are ineffective, it not only affects the work performance of the victim but that of the entire institution. This is to say, that everyone in an institution gains when there are norms of respect applied to everyone and adequate mechanisms to assure that such norms are reinforced.

Issues of a healthy multi-ethnic work environment are best managed at the institutional rather than occupational level. Therefore, it would be useful to present and analyze data on distasteful racial language and grievance procedures with an institution-wide lens. This is done by looking at the total percentages of surveyed employees who answered never as opposed to very frequently, frequently, infrequently or very infrequently to the questions: “Inappropriate comments or jokes about my race have been made in my presence” (40.4 percent); and “Inappropriate comments or jokes about another person’s race have been made in my presence” (21.5 percent). Even though it is true that most employees marked infrequent responses (51.6 percent in the first instance and 61.1 percent in the second instance), the relatively low numbers of employees never subjected to negative racial language indicates serious race relations problems.

As survey responses reveal, the majority of these problems, though by no means all, of such multi-ethnic problems in courts as workplaces target minorities. This is in keeping with what social scientists know about socialization in racially diverse countries and communities. American media, schools, organized religion, politics and the legal system are all embedded with assumed racial stereotypes materializing in everyday language usage as well as behavior. As a consequence, few Americans escape from hearing, seeing and feeling racial slights made about themselves or about others. This is especially true with minority citizens and residents.

Unfortunately, the responses to the question “Taken informal action in response to racially inappropriate situations” have to be disregarded because it does not appear to have recorded valid responses. It appears that most sample members responded to this question, including those who did not take informal action. Of the respondents, 315 replied to the question, “Taken informal action . . .” but only 57 replied to the follow up questions regarding satisfaction with and realization as a result of informal action. Therefore, it is likely that the number of employees filing informal grievances is 57, not 315!

Of those 57 who actually appear to have taken informal action, only half of these employees indicated they were satisfied with their efforts to resolve their grievances informally. Twenty percent claimed to have suffered retaliation because of their informal claims. In addition to those who filed informal grievances, 17 employees filed formal grievances in response to racially inappropriate situations. Fifty-two percent indicated they were somewhat or very dissatisfied with the outcomes of their formal actions. Thirty-five percent felt that they had been retaliated against for their claims. A dispro-

portionate majority of the claims (10) were filed by blacks and the rest by whites (7).

The greater number of informal responses to inappropriate racial situations certainly indicates how much, as in other institutional sectors, there is a reluctance to make formal claims of discrimination. To do so is to risk being perceived as a troublemaker and as someone who does not go along with the program (not a team player). The high number of employees dissatisfied with the outcomes of informal and formal grievance procedures indicates serious work must be done to establish effective grievance reporting and resolution mechanisms.

The high incidence of inappropriate racial language and slurs and of dissatisfaction with efforts to resolve such problems is indicative of an institutional sector in need of more extensive cultural sensitivity training and, more importantly, norms and incentives. This is indicated in the fact that 57 percent of the respondents reported having no diversity training; 40 percent reported having some diversity training; and only eight percent had extensive diversity training.

Most of the professional employees in the top three tiers surveyed felt that there already exists a sufficient level of diversity training. In contrast, most of the other employees indicated they felt there was too little or insufficient training. The highest number of employees indicating a need for more diversity training were the frontline professionals of the courts — the protective services personnel. In addition, in each occupational category, more minorities than whites felt more diversity training was needed.

With respect to the issue of job entry, most surveyed court employees learned about the job they occupy through friends and colleagues, school and family rather than through the more impersonal means of media postings or job placement services. Survey data analysis also provided a fascinating insight into the different ways whites and minorities learn about available employment in the court system. Like most of their white co-workers and colleagues, most minorities learned about employment opportunities through friends and colleagues. However, not as many attributed their employment to family and school ties, and more were dependent on media postings. This finding is in keeping with the extensive literature documenting the fact that, in high status employment and employment in exclusive institutional sectors such as courts, minorities do not have the personal contacts, especially the close friendship connections, that whites have and use in securing employment.

## Recommendations

**1. The court system (beginning with the Supreme Court and with its requirements, where appropriate, of lower courts) should recruit, hire and retain increased numbers of minorities in all positions in the court system: appointive, administrative, managerial and professional personnel, especially in middle- and senior-management and policy-making positions.** This employment process should include these characteristics:

- a. The court system should establish policies designed for equal opportunity, recruitment and promotion of minorities. These policies should be reviewed regularly to determine if there are any impediments to hiring and promoting minorities at all levels of employment in the court system.
- b. The court system at every level should advertise all employment and court volunteer vacancies widely. To penetrate the informal and formal networks and institutions of minorities, emphasis should be placed on advertising in minority media and communities such as community media; churches, ethnic, civic and professional associations; and minority student organizations on university and college campuses.
- c. The court system should develop a system for adopting performance standards for all of its employees and for the employees of lower courts on the handling of racially, culturally and ethnically sensitive issues. Such performance standards should be included in job descriptions, orientations and performance evaluations.
- d. The Supreme Court of Ohio should require all courts in the state to periodically review employment testing procedures in all classifications to ensure fairness to all applicants, including eligible minority applicants. Furthermore, the Supreme Court of Ohio should encourage or require all of the states' courts to review and develop alternatives to conventional testing in certain job classifications, taking into account an individual's past performance, experience and cross-cultural competence.

- e. The court system should provide all employees with formal general management and leadership training to increase the likelihood of their success and promotion.
- f. The court system should increase the number of bilingual and multilingual court employees and encourage these employees to be trained in court interpretation.
- g. The court system should develop mechanisms to monitor employment opportunities for minorities in the court system.

**2. The diversity goal-setting plans of managers, and the extent to which their goals are met, should be strongly evaluated in their merit and promotion reviews.** All state courts should give supervisors and other managers financial and symbolic incentives (e.g. letters of commendation, award, etc.) for effectively mentoring, developing and managing an ethnically and racially diverse work environment.

**3. The Supreme Court should, by rule, require that each court within the state complete a written report each year, on a form prescribed by rule, listing statistics on the race and gender of all employees of the court system.** The reports should then be compiled, reported and published annually by the Supreme Court.

The Supreme Court should maintain and annually analyze and publish hiring, promotion and separation data of the work force in the court system, as well as data on composition of volunteer programs and composition of the legal profession.

**4. The Supreme Court should, by rule, require that all judges and lawyers use their best efforts to guarantee a bias-free workplace.** This could be accomplished in part by the following:

- a. The Code of Judicial Conduct should be amended to create sanctions for tolerating a racially hostile work environment.
- b. The Code of Professional Responsibility should be amended to encourage lawyers to recruit hire, promote and retain minorities.
- c. The statistics of the racial composition of each

court's employees shall be compiled and published as set forth above.

d. Local bar associations may establish committees to monitor local courtrooms and court offices and to file their reports of observations with the Supreme Court.

**5. The Supreme Court should instruct the Ohio Judicial College to develop an interactive diversity training class required for all court employees.**

**6. The Attorney General should create a position in the attorney general's office with legal authority and responsibility to bring lawsuits in the name of the state against individuals and state agencies, including law enforcement or court agencies, that engage in discrimination or harassment against minorities.**

**7. The Supreme Court of Ohio and the Ohio State Bar Association should:**

- a. Increase the representation of minorities among appointees to court boards and commissions to improve the judiciary's ability to relate effectively with culturally diverse groups.
- b. Assure adequate minority representation on judicial screening and nominating committees.
- c. Set standards in court appointments and court volunteer programs to more accurately reflect the population to be served. These standards should reflect representation of minorities using the judicial system, as well as the number of minorities within the community.
- d. Promote minority judges and lawyers into more responsible positions and policy-making assignments and promote the recruitment of minority law clerks, magistrates and judicial system personnel.

**8. Each appellate court district should establish a task force on the eradication of racial bias in court employment composed of: judges, attorneys, court administrators and other citizens.** The first charge of these task forces will be to review the recommendations of this report. The chairs of the task forces, who will be court administra-

tors, should meet quarterly to share information and policy recommendations and host an annual conference on anti-racism strategies for court employees with management responsibilities to be held in conjunction with the annual conference on anti-racism for judges, justices and attorneys. These district task forces and the council of task force chairs should:

- a. Develop district-wide anti-racism retreats, workshops and seminars for court employees;
- b. Recommend incentives for court employees to participate in and apply anti-racism practices in their workplaces;
- c. Receive and investigate reports on anti-racism issues from judges, state and federal court systems, bar associations, other professional associations and from citizen advocacy groups.

Each appellate district should establish permanent court employment anti-racism boards that will be empowered to receive and investigate racial bias complaints and recommend actions to administrators, judges or to higher authorities. A permanent council of board chairs would meet on a regular basis to review district activities, exchange information and provide support for district actions.

## **Summary**

In the course of developing the steps to implement these recommendations, some are likely to stumble on hurdles that cannot now be foreseen. Some confront serious political, even legal, obstacles. However, if our public, court staffs and other employees and appointees are to do their fair share in overcoming the historic legacy of racism and invest our court system with a bias-free environment, the work must begin.

# JURY ISSUES

“Trial by jury is a fundamental concept of the American system of justice and has been instrumental in the preservation of individual rights while serving the interests of the general public. The significance of the jury is not limited to its role in the decision-making process; jury service also provides citizens with an opportunity to learn, observe and participate in the judicial process. The jury system affords an opportunity for citizens to develop an active concern for and interest in the administration of justice. Education of the public in the role of the jury in the American legal system, therefore, is essential.”<sup>1</sup>

Because the American legal system is based upon peer decision making, it is imperative that criteria and procedures of jury selection and treatment of juries within the administration of justice be democratic and free from unfair treatment and bias. Exclusion and other kinds of bias deprive citizens of the benefits of a diversity of perspectives, especially if the perspective absent in a jury pool is that of a party’s community, class, age, race, ethnicity, gender or religion.<sup>2</sup>

As stated by the late Supreme Court Justice Thurgood Marshall: “When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class or to conclude...that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.”<sup>3</sup>

Thus, it is not surprising that every state supreme court task force investigating racial bias issues in courts and in the legal professions considers jury issues a cornerstone in their research designs. The major jury issues investigated involve questions regarding jury pool selection criteria, citizens’ attitudes about jury duty and their perceptions of their treatment in court systems, and legal procedures, principally peremptory challenges that have from time to time created jury representation problems such as racial exclusion. The scholarly literature on juries concentrates on representation problems and solutions. Rarely have commissions or scholars explored questions regarding the racial perceptions of jurors towards judges, attorneys and court employees, as well

as the problems of race relations in the deliberations of racially integrated juries.

## The Ohio Jury Study

The jury study of the Ohio Commission on Racial Fairness focused on citizens' attitudes toward jury duty and their levels of satisfaction with various facets of the administration of justice as jurors. These issues were addressed through surveys of jurors on their first day of duty and through public hearings in the following jurisdictions: Franklin County Municipal Court, Franklin County Court of Common Pleas, Cuyahoga County Court of Common Pleas, Lucas County courts, Hamilton County courts, Montgomery County courts, Allen County courts and Summit County courts.<sup>4</sup>

The most cogent data on racial bias concerns in Ohio juries came from Commission public hearings. As in the case of findings in other state commission reports, many people expressed concern in the various public hearing testimonies that minority defendants, particularly black defendants, are being tried before all-white juries. Second, in the public hearings, a frequently articulated perception is that jury pools that depend solely upon voter registration lists underrepresent poor people. Many poor people neither vote, nor own vehicles, the two primary sources for jury pools. Third, it was suggested that non-whites are less trustful of the judicial system and therefore less likely to perform jury duty when summoned. This perception is related to voter registration concerns — minorities, it is feared, will not register to vote in an effort to avoid jury duty. Finally, there is a perception that minorities are routinely eliminated during *voir dire* solely on the basis of their race, therefore they are less likely to perform jury duty even when summoned.

The survey data on juror perceptions of treatment in courthouse environments also was helpful in understanding racial bias concerns in Ohio jury matters. For instance, the best jury pool data collected, because it included the most information about racial and ethnic issues, was from a survey of jurors (295), designed by Cuyahoga County court administrators. Jurors were asked standard demographic questions: education, age, gender, marital status, employment, racial status and zip code of residence along with more substantive questions about how they were treated in courthouse environments.

## Sample Characteristics

Slightly more than 70.1 percent of the surveyed jurors were white; almost 24.7 percent were black; about 2.8 percent were Hispanic, and 2.4 percent were “Others” such as American Indians and Asians. This ethnic breakdown compares in the following way with the ethnic breakdown of Cuyahoga County: black 24.8 percent, white 72.6 percent, Hispanic 2.2 percent, American Indian .2 percent, Asians 1.3 percent, and “Others” 1.1 percent. Most of the black and white jurors were fully employed, while there was a greater distribution of white jurors in other employment categories such as self-employed, homemaker, retired, and student. For both blacks and whites, there was a noticeable under-representation of part-time and unemployed persons. While the educational level of whites was higher than blacks, the educational level of persons in the “other racial categories” was the highest. Not only did blacks have lower educational levels than whites, they also had significantly lower incomes. Blacks were clustered significantly in the less than \$5,000 to \$15,000 range, while whites are clustered significantly on the other end of the income range: \$50,000-\$65,000+. Hispanics, Native Americans and “Others” were also clustered in the higher end of the income range. The survey data also revealed a low representation of minority and white jurors under 30 with most being over 30, especially over 40 years of age.

Jurors were asked to respond to 10 questions regarding their perceptions of and participation in jury duty. Each question had nine ordinal response choices ranging from very good (value #1) to very poor (value #9). In general and overall, we found most of the jurors least satisfied with the “parking facilities” and the “process of selecting jurors” and most satisfied with “how the judge treated you” and the “judge’s treatment of “others.” When the responses were broken down by race, an interesting pattern emerges. While whites were the most satisfied with jury duty issues and their treatment by court personnel and judges, Hispanics were the least satisfied, and blacks tended to fall in the middle on many of the questions regarding treatment. In responding to the question regarding the manner in which the court processed jurors, the average ethnic distribution was: blacks 2.8, whites 2.4 and Hispanics 4.0. The mean (“average”) distribution by race for the question regarding orientation on arrival was: black 2.6, white 2.4 and Hispanic 2.5. The ethnic mean distribution for the various questions are as follows:

“Process of selecting jurors to serve on panels:” blacks 3.3, whites 3.1 and Hispanic 6.5; “Treatment by staff while on jury assignment:” blacks 2.1, whites 1.7 and Hispanics 2.8; “Treatment by courtroom bailiff:” blacks 2.1, whites 1.8 and Hispanics 3.0; “Judges treatment of you:” blacks 2.1, whites 1.6 and Hispanics 3.0; “Judges treatment of others”: blacks 2.2, whites 1.8 and Hispanics 3.0.

Although the number of Hispanics in this sample is not statistically significant, their responses are certainly sociologically significant because most of their responses regarding treatment and processing deviate noticeably from black and white responses. Further research into the unique problems of Hispanics in jury issues is highly recommended. This is especially the case given the growth of the Hispanic population in Ohio over the past two decades, which will likely continue to increase in size and influence.

The recent enactment of Ohio Sub. S.B. 69, effective April 16, 1998, is a positive step in expanding the pool for jury selection by increasing available sources, eliminating exemptions and facilitating arrangements for service. The law also increases fees paid to jurors.

## Recommendations

- 1. The sources for jury selection should be further expanded. While currently the source for jurors is the voter registration list, we recommend that driver’s license records, state identification records and other appropriate sources also be used as lists of potential jurors.**
- 2. The state law restriction of \$40 maximum compensation a day should be periodically reviewed for fairness and the amount increased where appropriate to meet jurors’ economic needs.** Some reasons for avoiding jury duty may be linked to poor economic status as observed in one report: “The cost of jury service to any person, non-white and white alike, who is poor, can be prohibitive. Persons who are underemployed face the risk of losing their jobs since there are no protections. For example, persons who are unemployed and in dire financial straits find it difficult to come up with the bus money just to get to the courthouse.”<sup>25</sup>

**3. Research should be conducted to determine accurately the pattern of minority under-representation in juries in Ohio state courts.** The under-representation of minorities, especially those of low socioeconomic status has been found to be the rule throughout the United States. More than likely, Ohio experiences similar patterns of under-representation. This is especially true when it comes to poor people of color. We received evidence of such under-representation in the Cuyahoga County juror data and in background documents.<sup>6</sup>

**4. Research should be conducted concerning the ways in which minority jurors are treated and their racial perceptions during court proceedings and while delivering with their peers during a trial.** The statistically weak, though socialogically important, Cuyahoga County data on the attitudes of Hispanic jurors regarding treatment by judges points to the need to understand what happens to bilingual and bicultural jurors in the process of their assignments. More research must be done to determine how widespread that attitude is in Hispanic and other minority populations.

**5. The Supreme Court of Ohio should require racial diversity education for jurors as part of their orientation, and for lawyers as part of continuing legal education.** As has been found in other commission studies, distinct racial perceptions exist among jurors regarding minority judges, attorneys, witnesses and defendants. For instance, the Massachusetts Commission to Study Racial and Ethnic Bias found: “A perception exists that jurors, most of whom are white, tend to favor attorneys and litigants of their own race . . . There is an overall perception among attorneys that white jurors respond more favorably to white victims than to minority victims . . . There is some evidence that jurors tend to give more credibility to white than to minority expert and lay witnesses . . . A significant percentage of minority judges believe that white jurors respond more favorable to white judges than to minority judges . . . Racial and ethnic biases among jurors often adversely affected deliberations of guilt or innocence in criminal cases and on the calculation of damages in civil cases . . .”<sup>7</sup>

The educational program should be established by a professional race-relations specialist in such a way that jurors

feel safe enough to discuss their experiences with culturally different people. This process of open and honest discussion certainly is not a panacea for the epidemic problems of racism, which becomes a form of cultural baggage and which does not stop at the doorstep when a person becomes a juror. However, such discussion could prevent or lessen some problems that occur behind closed doors or in court when jurors allow their unexpressed racial stereotyping to stand in the way of fair evaluation. This educational program should be implemented regardless of the ethnic makeup of the jury or of the defendant or plaintiff. Such programming is especially important for ethnically diverse juries and when defendants, plaintiffs, judges, attorneys and court employees are minorities.

**6. The Supreme Court of Ohio and the Ohio State Bar Association should institute a comprehensive, state-wide community education program on jury duty.**

Most state commissions have recommended that a host of methodologies be employed in all local communities to educate community residents about the purpose of jury duty and about what to expect during a jury assignment. Settings for such educational meetings include the courthouse itself, churches, community centers, cable and commercial television, radio spots and local schools. School-based programs from primary to university levels and the development of an informational pamphlet on jury duty and other aspects of the administration of justice should be established to familiarize people with jury responsibilities. Civic associations catering to children and adults such as athletic leagues, fraternal orders and civil rights organizations should also be encouraged to get involved in educating communities about jury duty and other aspects of the administration of justice.

Last but certainly not least, courts should periodically hold town hall meetings and public hearings on the administration of justice to receive feedback on issues such as jury duty and to receive feedback from residents within their jurisdiction.

# CRIMINAL JUSTICE AND SENTENCING

The Criminal Justice System is comprised of numerous participants, including police, prosecutors, defense counsel, probation officers and judges. The Commission spent considerable time conducting personal interviews, reviewing and digesting numerous reports and statistical data, and observing the criminal justice system as it relates to disparate sentencing in Ohio. Based on its work, the Commission concludes that many minorities perceive that Ohio's criminal justice system discriminates against them because of their race or minority status. This perception is not unique to Ohio, but represents the views of many minorities throughout the United States.

While the Commission recognizes that racial discrimination does not account for all differences in treatment of white people and minorities, it concludes that a factual basis for this perception clearly exists.

The Commission recognizes that many factors affect the sentence ultimately imposed by each sentencing judge.<sup>1</sup> The police decision to arrest, the prosecution decision to charge and what charges are brought; the criminal code itself; the skills, abilities and resources of defense counsel; the willingness of the parties to plea bargain; the particular jury selected; the nature of the particular criminal conduct; the background of the accused; the manner in which the pre-sentence report is prepared; the predilections of the particular sentencing judge, as well as other factors all effect the penalty that an individual defendant may be required to endure.

What is clear is that the differences that minorities perceive between their treatment at the hands of the criminal justice system and the treatment afforded whites for the same offenses have a basis in statistical fact. Yet, based upon the strength of the data developed by the Commission, we are unable to say with certainty that these statistical results, and the perceptions that they foster, are solely the result of pervasive racial discrimination in Ohio's criminal justice system.

Because the statistical disparity *does* exist, however, if Ohio's criminal justice system does not undertake extraordinary efforts to address these perceptual problems and to dispel their

racial contexts, significant numbers of our minority citizenry will continue to believe that there is no justice for people of color in this state.

The consensus of the available research acknowledges that minorities are more frequently sentenced to prison and generally receive harsher penalties than do whites. As previously noted, the debate, as in the school desegregation cases of the past, revolves around the question of whether it can be definitively stated the cause for this disparity is racial discrimination and whether the appropriate remedy is some form of mandatory sentencing and sentencing guidelines.

## **Racially Disproportionate Sentencing and Figures**

“In Ohio, blacks are arrested, convicted and sentenced to prison almost 10 times as frequently as whites. One in 523 whites in the state will spend some time in prison, while for blacks the number grows to one in 53. The state’s incarceration ratio of blacks to whites is 9.81, which is 28 percent higher than the national average.” This quote comes from a report, *“Intended and Unintended Consequences: State Racial Disparities in Imprisonment,”* written by Marc Mauer, assistant director of the Washington-based Sentencing Project. The report also finds that from 1988 to 1994, the national figures of the black rate of incarceration in state prisons increased from 6.88 times that of whites to 7.66. In Ohio, the racial disparity increased by 21 percent, from 8.13 to 9.81. Twelve states and the District of Columbia incarcerate blacks at a rate of more than 10 times that of whites. Ohio is thirteenth on the list with a rate of black incarcerations of just under 10 to 1.<sup>2</sup>

## **Ohio’s Death Row**

As of September 29, 1997 there were 174 people on Ohio’s death row, all male and no female. Of the 174, 81 are classified as Caucasian, two Native American, two other, two Latino, and 87 African-Americans.<sup>3</sup> Black males compose approximately five percent of the Ohio population, yet they compose 50 percent of death row inmates.

The issue here is not whether one is a proponent or opponent of capital punishment or whether those on death row deserve to be there. The issue is the integrity of the criminal justice system, whether black males are looked upon as

expendable and treated differently than white males resulting in disparate sentencing.

One hundred seventy-five (175) people were the victims of those currently residing on Ohio's death row. Of those 175 victims, 124 were Caucasian and 42 were African-American.<sup>4</sup> The numbers speak for themselves. A perpetrator is geometrically more likely to end up on death row if the homicide victim is white rather than black. The implication of race in this gross disparity is not simply explained away and demands thorough examination, analysis and study until a satisfactory explanation emerges which eliminates race as the cause for these widely divergent numbers.

## Variables of Sentencing

Disparate sentencing adversely affects minorities. The question is whether disparate sentences are justified by variables that are associated with legitimate purposes. For example, did prior convictions play a role in the sentence, or did violence during the commission of the offense play a role in the sentence?

Prior to evaluating racial fairness in sentencing, it is necessary briefly to review a few sentencing variables that occur before a court is involved in the matter. The variables are:

- Politics and the political function
- Arrest (decisions and policy)
- Charging decisions and applicable charge
- Prosecutorial roles in decision-making
- Effectiveness of defense counsel
- Sentencing judge

Politics (in the broad sense) is a variable in sentencing. What constitutes a crime in Ohio is a legislative function.<sup>5</sup> Whether particular charges disproportionately affect a particular race may be the result of legislation.<sup>6</sup>

Arrest is another variable in sentencing. Departmental decisions play a role in who is most likely to be arrested and ultimately sentenced.

The decision to charge and what charges are brought are variables in sentencing. With legislative enactments that cur-

tail judges' discretion in sentencing, such as mandatory sentences and sentencing guidelines, a prosecutor's role becomes more powerful. Therefore, the racial attitudes of some prosecutors may play an extremely important role, for instance in such matters as the manner in which they go about jury selection.<sup>7</sup>

Prosecutors must also prioritize time and resources. The question is, "Does the race of the defendant or victim play a role in the decision to charge or what charge will be brought?" Does race play a role in the decision to negotiate a plea, thus affecting the sentence?

Stephen B. Bright, Director of the Southern Center for Human Rights in Atlanta, Georgia, has written that one reason "for the disparities in seeking the death penalty was racial bias by the prosecutors in their dealings with the families of the victims." Mr. Bright wrote that in cases "involving white victims, the prosecutors met with the victim's family and deferred to their family's decision about whether to seek the death penalty. But prosecutors did not even consult with family members in cases involving black victims, and the families of African-Americans were often not even notified of the dates of proceedings or the resolution of the case with a plea bargain." (The Champion, January/February 1997, p. 22).

Finally, another important variable in sentencing is the effectiveness of defense counsel. Because the non-white groups studied for this report are disproportionately represented in the ranks of the indigent defendant, determining the quality of the services that they receive from their court-appointed counsel has both racial and economic implications for the criminal justice system. Indigent defendants are generally presented with one or more of the following options for legal representation in the defense of criminal charges brought against them. Those options are: 1) self-representation, 2) representation by the office of a public defender established by the government, or 3) representation by court-appointed private counsel who have contracted with the government to provide the service. Obviously, those who represent themselves are at a great disadvantage when confronted with the resources that the criminal justice system can marshal. However, the disadvantage is only slightly diminished if the lawyers who are charged with the responsibility of protecting the rights of this populations harbor inappropriate racial attitudes regarding clients that they receive by the luck of the

draw. It is therefore important that sound methods for evaluating the performance of this important part of the system, both prior to and at the time of sentencing, on the critical issue of race be in place.

In some Ohio counties, court-appointed counsel receives as little as \$150 per misdemeanor case and \$300 per felony case.<sup>8</sup> Public Defender caseloads are usually grossly overloaded. With such meager fees paid, questions are raised. Can counsel afford to provide adequate representation? Are minority defendants treated differently than white defendants by court appointed white counsel? Do white counsel stereotype young black defendants? These are legitimate questions especially in light of how minority lawyers perceive their own treatment by the bar and bench in general (as addressed in other areas of the Commission's report). These questions will not be answered in this report, but are raised here because anecdotal evidence at least suggests that these factors have an effect on sentencing. (The concepts of "stereotyping the African-American Defendant" will be reviewed later in this report.)

Lawyers who receive adequate resources can afford to do more in the representation of the client. So the question here may be more one of economics than of race. Where attorneys are hired, typically more resources are available for investigation, fees, DNA testing and the like. Most courts are reluctant to pay or authorize payment for investigator fees and/or special testing in order to adequately represent the indigent defendant (minority or non-minority). Thus, in Ohio, failure to approve fees because of indigence may implicate both the issues of race and the allocation of scarce public resources.

## **Ohio Judges**

Most Ohio judges are white.<sup>9</sup> Because American demographics have shifted but have not changed, the majority of Ohio judges grew-up in predominately white neighborhoods. They had limited, if any, real interaction with minority students while attending undergraduate and law school.<sup>10</sup>

It is with the above stated background that the young law school graduate and future judge is often thrust into the role of Assistant Prosecutor, Assistant City Attorney or Assistant Attorney General to have initial interaction and encounters with minorities—i.e., he or she as prosecutor and the minority as criminal defendant, handcuffed and shackled. Thus, stereotypes are reinforced.

The Commission believes that empathy depends on what people are familiar with and apathy rests in the unfamiliar. Human beings empathize with emotions, feelings, and environments with which they are familiar and do not relate to emotions, feelings, and environments with which they are least familiar.

Judges are human, and prejudices, perceptions, and stereotypes are not lost with the elevation to the bench. The question remains: Does a judge's past and present environment influence sentencing decisions? All sentencing judges must make every effort to assure that the answer in each case is a resounding "NO!"

## **Putting The Question Of Race on the Table**

The Commission randomly selected a representative number of Ohio judges at the municipal, common pleas and appellate court levels and solicited their input on the question of racial fairness in criminal sentencing before the state's trial courts. Each judge was invited to offer comments either by means of a personal interview in chambers, an interview by telephone, or a narrative response by letter.

Also contacted were a representative sample of Ohio's court administrators and clerks of court. Each administrator and each clerk was asked to provide information and data that the Commission could study to determine whether race might be implicated as a crucial factor in the sentencing patterns of Ohio's trial courts.

The response to our request was disappointing. Of those approached, the Commission heard from only one municipal court judge, two common pleas court judges, and one appellate court judge.

All of the court administrators and clerks of court contacted by our staff indicated an inability to be of assistance. Their inability was occasioned by the fact that none compiled or maintained their records in such a way as to allow for the determination of the race of the individuals sentenced by their respective courts.<sup>11</sup>

The commission was aware that the sentencing reforms contained in Senate Bill 2 included a request from the leg-

islature to the Ohio Supreme Court that it “adopt a rule to have each court keep on file a form that has the case number, the judge’s name, the race, ethnic background and the religion of the offender.”<sup>12</sup> We, therefore, approached the staff of the Ohio Sentencing Commission for assistance in completing this aspect of our study. They provided us with several forms they had submitted to the Ohio Supreme Court for approval and adoption pursuant to the new sentencing statute provisions. We are informed, however, that, as of this date, no form has met with the Supreme Court’s approval, primarily because of the significant clerical and logistical challenges that capturing, storing and retaining the information would impose upon the state’s criminal trial courts.

Our inability to empirically validate the information obtained from testimony on this topic at the Commission’s public hearings leaves us unable to conclude that the greater percentage of minority citizens than white citizens sentenced to prison is because a majority, or even a significant minority, of Ohio’s trial court judges make sentencing decisions that are not race-neutral.

What we can say without fear of contradiction is that the number of minority citizens sentenced to prison is grossly disproportionate to any reasonable correlation with their numbers in the general, lower social-economic, or even, criminal populations. The national controversy involving the disparate sentencing imposed for crimes involving the possession or use of crack cocaine provide a good case in point. In the mid-to-late 1980’s, crack was viewed as the scourge of the universe and harsh sentencing policies were enacted across the country to deal with the problem. We have since learned that crack is no more dangerous than cocaine ingested in its powdered form. Still, many jurisdictions persist in the application of draconian penalties for the possession of crack that are greatly disproportionate to those imposed for the possession of cocaine in its powdered form. Because crack is the drug of choice of many African-American drug users, these laws have had a racially disproportionate impact on the African-American community. For example, in February of 1995, the U. S. Sentencing Commission released a thorough and meticulously documented report, Special Report to the Congress: Cocaine and Federal Sentencing Policy, confirming that harsher federal sentences for crack were being imposed almost exclusively on

blacks and other minorities. It found that African-Americans accounted for 88% of those convicted for Federal crack offenses, while just 4% of those convicted were white. Congress and the President responded by ordering that yet another study be conducted.

Georgia's implementation of a "two strikes and you're out" law involving second convictions for certain drug offenses results in life imprisonment for those convicted on a second offense. One study of their records revealed that life imprisonment had been sought in 1% of eligible cases involving white defendants and 16% of those cases involving African-Americans similarly situated. Ninety-eight percent of those serving life sentences under this law are African-American.<sup>13</sup>

These statistics seem to reveal some disturbing questions about the possibility of selective prosecution in drug cases. Though a National Household Survey on Drug Abuse found that 75% of those reporting cocaine use were white, 15% black, and 10% Latino, crack use figures showed that 52% of users were white, 38% were black, and 10% Latino. The data also showed that defendants in the crack cases tended to be at the lowest level in the distribution chain.

It should also be noted that numerous studies have revealed race as a predominate factor in determining the application of the death penalty in this country, according to a report issued by the National Association of Criminal Defense Lawyers. No less an authority than Congress' General Accounting Office found in 1990, research then available revealed "a pattern of evidence indicating racial disparities in the charging, sentencing, and the imposition of the death penalty" at the state level.<sup>14</sup> A March 1994 report by the House Judiciary Committee Subcommittee on Civil and Constitutional Rights concluded, "Racial minorities are being prosecuted under federal death penalty law far beyond their proportion in the general population or in the population of criminal offenders." The report went on to say that while 75% of those convicted under the provisions of the 21 U.S.C. Section 848 (the "drug kingpin" provision of the Anti-Drug Abuse Act of 1988) law have been white, and only 24% of those convicted have been black, almost 90% of those against whom the statute's death penalty sanction have been imposed have been minorities.

None of these statistics supports a broad statement that individual judges, courts, or, for that matter, other parts of the criminal justice system are purposely going out of their ways to “get” minority citizens. However, given the strength of some public hearing testimony presented before this Commission, it is impossible to escape the conclusion that such individuals exist.

Intended or not, disparate end results suggest that, when laws are drafted in such a way that they target certain minority communities for enforcement, and combine with arrest policies focusing on those same communities, and are then joined with sentencing guidelines, practices and policies that have devastating impacts on those exact same minority groups, a legitimate grievance is identified which demands redress, if fundamental fairness is to be obtained.

For these results alone, the means to develop, analyze and act upon the types of information this Commission found unavailable are essential to a definitive determination of the validity of the strong-held perception, in some quarters, that there is one sentencing standard for whites and another for others.

As members of the Commission discovered, the information is not easily obtained and is subject to multiple interpretations. The announcement of a call for yet more study will undoubtedly be met with derision from a minority community that expected *this* study to be definitive. However, an institutional commitment to a process of regular and ongoing data collection, analysis, and reporting, as well as both agency and individual accountability will eliminate the excuse of “lack of information” as a convenient shield for those who would hide their inability or unwillingness to assure equal treatment to all those involved in our state’s criminal justice system and serve as a weapon for equal justice for all, rather than just another dilatory review.

Americans continue to be singularly uncomfortable when it comes to discussing issues of racial fairness candidly and constructively. Judges and lawyers are not immune to this aversion. We recommend and strongly urge the Supreme Court of Ohio and the Ohio State Bar Association to take whatever steps are necessary to require that the members of the legal profession put the issue of racial fairness on their professional agendas. These two organizations are uniquely qualified to force this discussion out into the open and to

keep it there until the juxtapositioned attitudes of the criminal justice system and the disaffected minority community are addressed and reconciled.

## **Critical Analysis of Previous Ohio Sentencing Commission Report on Disparity in Sentencing**

The Commission's staff reviewed previous reports and efforts by the Ohio Criminal Sentencing Commission's staff. The goal was to identify potential disparity in sentencing based on race in Ohio. The review of the findings fostered a number of concerns which will be addressed in the sections below.

As part of its review of the existing research, the Commission reviewed the Ohio Sentencing Commission staff report entitled Disparity and Uniformity in Criminal Sentencing (1993). That report uniformly recognized racially disparate results in Ohio's criminal sentencing patterns. Nonetheless, the staff report also uniformly found non-racial causes to explain those results. Our analysis of the same data causes us to question the Sentencing Commission's conclusions and to suggest that further research in this area is not only desirable but mandatory.

The report begins with a disclaimer, "Generally, numerical disparity in sentencing can be explained by who is arrested, or by other factors that are generally perceived to be legitimate."<sup>15</sup> The report goes on to state in relevant part:

"Once arrested in Ohio, roughly the same percentages of whites and non-whites are sentenced to prison for serious crimes (such as homicide, sexual assault, robbery, burglary, and drug trafficking). Thus, imprisonment decisions for serious crimes can be mostly explained by arrest."

Even if this conclusion was true in 1993 (i.e., roughly the same percentage of whites and non-whites are sentenced to prison), the statement does not tell the reader anything about the disparity in the sentences of those sent to prison or about modified sentences and shock probation. For instance, if 33 percent of Ohio's black population were sent to prison for drug-related crimes, and one percent of Ohio's white population were sent, then "roughly the same percentage"

would be sent, but the number of whites should far exceed the number of blacks in prison because there are more whites in Ohio.

The Sentencing Commission's report attempted to explain the disparate sentences it found. It said, in part:

... the explanation lies in the type of drug abused and in the enforcement of drug laws against street level transactions. A greater percentage of cocaine offenders than marijuana and pharmaceutical offenders are African-American. Since cocaine is more serious under Ohio law than marijuana, there are disproportionately more African-Americans drug offenders in Ohio's prisons.

The staff did not footnote or cite any authority to support the above conclusion. The Commission found no data to support the Sentencing Commission's findings that a greater percentage of cocaine offenders are black. Moreover, the Commission was unable to determine what "cocaine offender" means as presented in the Sentencing Commission Staff report. Does it mean all drug abuse offenders who use cocaine or just those who were arrested for possession of crack or free-base cocaine? Does it mean offenders who traffic or were arrested for trafficking in cocaine related offenses?

We question how the Ohio Sentencing Commission staff determine the race of those "involved" in serious felonies that result in arrest. Again, the staff failed to footnote or cite authority for its conclusions.<sup>16</sup>

An analysis of other pertinent findings of the Ohio Sentencing Commission report includes the following:

- Large counties typically have less available jail space (small counties have 42 percent more jail space per 100 crimes than large counties). This makes a sentence of incarceration in local jails a less viable option for urban counties. Thus, blacks are likely to be incarcerated in prison (rather than jail) at higher rates because blacks live in large counties with less available jail space.
- Conversely, because medium and small counties indict a higher proportion of whites and have more space available in local jails, a higher per-

centage of whites receive a split sentence (with a jail term as a condition of probation) rather than a prison term.

- The most important empirical reason that a greater proportion of those sent to prison are black is that a greater proportion of those arrested are black.

Again, the Sentencing Commission staff failed to footnote or cite any authority to support this finding. To blame the higher rates of black incarceration in prisons as opposed to local jails on the availability of jail space is not supportable. Actually, in 1993, jail space in most Ohio counties was lacking. Contrary to the Sentencing Commission staff conclusion, the Commission's random survey found it was the smaller counties which suffered more from overcrowded jail conditions as a result of not building new and larger jails than the larger counties. In other words, smaller county jails were grossly overcrowded in 1993, and many are currently experiencing overcrowded conditions.

The Sentencing Commission staff also failed to cite authority for the conclusion that a greater proportion of those arrested are black. Moreover, contrary to this conclusion, the vast majority of those arrested who could be sent to prison in Ohio during the time the Sentencing Commission report was issued were not blacks as the report states, but white citizens of Ohio. See 1990 Uniform Crime Reports for Ohio, provided to the Commission staff by the Governor's Office of Criminal Justice Services.

The statistics found in the Uniform Crime Reports for Ohio need to be explained because the Sentencing Commission staff cited them in their report as support for the percentages of blacks in certain crime categories without explaining its limitations. Its main limitation is that it does not cover the majority of police jurisdictions in Ohio, thus, any information derived from it is not complete.

The Uniform Crime Reports are compiled by the FBI from data voluntarily reported from Ohio police departments. Only 300 of the 900 or more police departments in Ohio volunteered the information to the FBI for compilation in the report. Therefore, the Uniform Crime Reports for Ohio are comprised of information from about one-third of the police departments in our state.

- The Bureau of Justice Assistance of the U.S. Department of Justice concluded that, “the overrepresentation of blacks among offenders admitted to state prisons occurs because blacks commit a disproportionate number of imprisonable crimes.”

This claim (that blacks “commit” a disproportionate number of these crimes) has no legitimate factual basis that the Commission could discern and none was provided by the Sentencing Commission.

Additional conclusions of the Ohio Criminal Sentencing Commission’s report regarding racial disparity in sentencing include:

- Racial imbalance exists in Ohio’s justice system. Yet, for more serious offenses, it is not because of systematic discrimination by judges.
- For less serious offenses, the imbalance cannot be as easily explained by arrest, but can for the most part be explained by other factors generally viewed as legitimate to the justice system, such as criminal history and offense seriousness.
- Much of the imbalance in incarceration for drug offenses can be explained by greater involvement by blacks with drugs that are penalized more seriously (such as crack cocaine, as opposed to marijuana). Overall, drug offenders nationally do not ethnically mirror drug offenses in Ohio.

That racial imbalance exists in Ohio’s justice system is beyond contradiction. However, after reviewing The Sentencing Commission’s research, we do not think that it successfully made the case to exclude any causative factor for that imbalance.

During our study, some highly suspect sentencing outcomes were brought to our attention. A cursory review of such cases does not allow them to be easily dismissed by resort to factors other than race. By the same token, our own research, while uncovering these aberrant examples of the system gone awry, was unable to verify allegations put before us that the imbalance was the sole product of systemic discrimination in the handling of criminal sentencing in this state. The conclu-

sion that we reach, therefore, is that constant attention must be paid to this aspect of the criminal justice process. If Ohio's non-white populations are ever to feel confidence in the state's criminal justice system, that system must assure that the number of aberrations experienced is held to an absolute minimum. Those who are exposed to the system's aberrations need to have a rapid, credible and public methodology for the redress of legitimate complaints, beyond the current appellate process. The creation of an effective, permanent mechanism for closely monitoring and objectively reporting on the status of Ohio's efforts in this regard will fill this need.

In 1979, in spite of the existence of well-established law, the Ohio Department of Rehabilitation and Correction was sued and forced to racially desegregate Ohio's prison cells, Stewart v. Rhodes.<sup>17</sup>

Subsequently, in 1982 the Ohio Department of Rehabilitation and Correction was successfully sued again because they maintained "racially segregated dining facilities" at the Lebanon Correctional Institution which resulted in a black inmate being brutally beaten by prison guards for entering the all-white prisoner dining room. Hendrix v. Dallman.<sup>18</sup> As late as 1992, prisoners were forced to sue to desegregate cells in the Ohio prison system. White v. Morris.<sup>19</sup> The Ohio Attorney's General office represented the state in these prison segregation cases. Each time they put forth arguments claiming that racial segregation was for "security reasons" or for other reasons. (See Stewart v. Rhodes)

In the prison segregation cases, the advocates for the prison officials attempted to give legitimate or justifiable reasons for the racial segregation at issue, in the same manner that other governmental entities argue the existence of justifiable reasons for racially disparate criminal sentences.

## Juvenile Justice

There is a direct correlation between the way adults of color and juveniles of color are sentenced for the commission of criminal violations in Ohio. The variables mentioned earlier in this report affect both sentencing patterns.

The Department of Youth Services ("DYS") provided the Commission with statistical data for fiscal years 1996 and 1997 regarding race distribution of felony commitments, along with other data regarding commitments to DHS.

In fiscal year 1996, 49.9 percent of the DYS population was represented by blacks. Hispanics represented 2.6 percent, and other (minority groups) represented 2.2 percent of the DYS population. The white population was at 45.2 percent for 1996. The total minority population confined in DYS was 54.7 percent. The numbers for fiscal year 1997 essentially remain the same. Blacks represented 48.7 percent, Hispanics 2.6 percent, and others (minority groups) were at 1.9 percent. The total white population confined at DYS for fiscal year 1997 was 46.9 percent, while 53.2 percent of the population at DYS was represented by minorities. This is a curious proposition considering that Ohio's total minority youth population is 14.3 percent. Clearly, Ohio's minority youths are being incarcerated at a much higher rate than non-minorities.

Black males are the group of youths who are incarcerated at the highest rate. DYS provided the Commission with statistical data of their population. The statistics provided a breakdown of the numbers of males and females confined and a breakdown based on race. Black females represented 48.89 percent; white females represented 50.37 percent. Other minority groups represent 0.74 percent of DYS's population as of November 13, 1997. Black males represented 50.21 percent, white males 45.15 percent, Hispanic males 2.68 percent, Asian males, 0.15 percent and other minority groups represented 1.81 percent of the population. The number of minority males exceeded the number of minority females.

There were 67 minority females incarcerated at DYS during this period versus 1,063 minority males housed in DYS facilities. The number of white males housed in DYS facilities during the same period was 875. The trend of incarcerating young black and minority males at higher rates than non-minority males mirrors the Commission's findings for the state's adult population.

In 1993, Bowling Green State University (BGSU), prepared and published a report titled: Race and Juvenile Justice in Ohio: the Overrepresentation and Disproportionate Confinement of African-American and Hispanic Youth. The report details and focuses on Ohio data and statistics regarding minority youths in the criminal justice system. The report concludes with policy issues and recommendations in an effort to identify and eliminate the disparate effects of sentencing as it relates to Ohio's minority youth population.

The report gives a statistical analysis of nationwide trends. Between 1926 and 1986, the numbers of persons incarcerated increased dramatically, and black males comprised an increasingly disproportionate share of those persons incarcerated. The annual number of admissions to state prisons had risen 333 percent, from 38,318 in 1926 to 167,474 in 1986.<sup>20</sup>

The BGSU study and report supports the perceptions of the general public that minority youths are being incarcerated at an alarming rate. It concludes that, based on relevant Ohio and national data, differences in delinquent behavior are insufficient to account for disparities between minority and white youth in detention and confinement.<sup>21</sup> The data and statistical information available from the BGSU study and other studies suggest that it is not possible to claim that minority youth commit more crime or are referred to juvenile court for more serious offenses than white youth.<sup>22</sup>

The BGSU study concludes that minority youth are referred to juvenile court nearly twice the proportion as their prevalence in the population suggests they should be. Minority youth are detained more frequently than white youth, their cases dismissed more frequently, and they are confined in DYS institutions more frequently. At none of these points of decision are their offenses more serious on average than those of white youth nor, is their prior record of referrals to court lengthier. In fact, the average number of prior court referrals for minority males sent to DYS is about three; for white males, about five.<sup>23</sup>

DYS statistics for 1989 for male detained cases serving to DYS confinement, by race of offenders shows: Out of 100 percent of cases referred, 27 percent of those detained were white males, 39 percent were minority males; 24 percent adjudicated were white males and 32 percent adjudicated were minority males. As a result of being adjudicated, only eight percent white males were confined, and 11 percent minority males were confined. The percentage of those confined in DYS facilities for minority males was eight percent, while DYS confinement for white males was only five percent.<sup>24</sup>

The same statistical data from DYS regarding males not detained reveals that out of the 100 percent referrals, 73 percent of white males were not detained and 61 percent of minority males were not detained. Of those adjudicated, 58

percent white males were adjudicated, while only 45 percent minority males were adjudicated; six percent of the white males were confined and five percent of the minority males were confined. The same percentage of white and minority males, three percent, were confined to DYS.<sup>25</sup>

The 1989 data is consistent with the DYS statistical data regarding its commitments for fiscal year 1996 and 1997. The trend continues to date. Minorities are being incarcerated at a much higher rate than their white counterparts. Disparate sentencing is not only affecting the adult minority population but also the juvenile minority population as supported by existing statistics and data in Ohio and the nation.

These findings illustrate that the disparity in sentencing experienced by whites and non-whites is a fact and not a mere “feeling” or a perception that the public holds without justification or merit.

## Conclusion

The Commission concludes that many people of color in this state, and in this nation, view the entire criminal justice system as discriminatory toward them, solely because of their color. This perception of discrimination encompasses every phase of the criminal justice process and many of the personnel responsible for its operation. The final reports of commissions similar to ours in other states throughout the nation confirm what we found in Ohio - that is, that these perceptions are firmly entrenched and for some take on the character of irrefutable, universal truths.<sup>26</sup>

It must be said again that, like it or not, evidence does exist that, more frequently than we want to admit, race plays a role in too many of the decisions made in Ohio’s criminal justice system. The only way that the situation can be corrected is to acknowledge that a problem exists. While the Commission recognizes that race does not account for all of the differences in treatment that whites and people of color report experiencing in their treatment at the hands of the criminal justice system, we are comfortable in concluding that the system does not always operate in a race-neutral fashion. Based on our review, we find that a factual basis does appear to exist for a significant percentage of the negative perceptions of the system reported to us.

Let us reiterate: Regardless of accuracy, a person’s perceptions are that person’s reality. Therefore, if Ohio’s criminal

justice system is ever to appear fair in the eyes of all of its residents, all of those responsible for its construction, operation, implementation and maintenance must be viewed as making every reasonable effort to eradicate every factual basis for perceptions of unfairness brought to their attention.

To that end, several of the Commission's major recommendations in this area are geared toward the mandated gathering of statistical data concerning the effect of race on the various stages of the criminal justice process. Gathering this information, in and of itself, of course, will not determine the existence of, or the extent of, race-based mistreatment. The collection, maintenance and availability of such information, however, will provide those concerned with such issues the ability to conduct objective research and objective evaluations of the validity and extent of any future claims of race-based disparate treatment. Where problems are found, this information will assist in the construction of effective corrective remedies to eliminate them. The additional benefit of assembling this information is that those who might contemplate routinely engaging in inappropriate behavior will know that their behavior is subject to scrutiny.

The Commission makes no recommendations as to the treatment of individuals under the jurisdiction of the Ohio Department of Corrections. After much thought and study we conclude that any such recommendations are beyond the mandate of this Commission.

## **Recommendations**

The Commission recommends the following:

- 1. All groups and organizations involved in the criminal justice system - e.g., police, prosecutors, defense counsel, pre-trial release personnel, probation personnel, judges - engage in a continuing process of study and discussion with the objective of identifying and eradicating race based attitudes and practices.**
- 2. Statistical data as to race be collected as to pre-trial bond decisions.** This information will address the perception of some people of color that bond decisions are not always race neutral, although CrimR. 46 is itself race neutral. The Supreme Court would create the vehicle for

collection of this information by the clerk of courts, who would, in turn, transmit the information to the Supreme Court to be maintained by the Supreme Court.

**3. Statistical data as to race be maintained in connection with sentences, including community based sentences, in all criminal cases, including misdemeanor, juvenile and traffic cases.** Senate Bill 2 requires this information as to felony sentences. The Supreme Court would create the vehicle for collection of this information by the clerk of courts, who would, in turn, transmit the information to the Supreme Court to be maintained by the Supreme Court.

**4. Law enforcement agencies maintain statistical data as to race in connection with all arrests.** The public hearings conducted by the Commission reveal a widespread perception by people of color that the law enforcement officer's discretion as to whether to arrest an individual is not always exercised in race neutral fashion. These statistics should be regarded as public records in the jurisdiction where they are collected, and should be transmitted on a regular basis to the head of the law enforcement agency, certain elected officials of the jurisdiction and the chief executive officer of the jurisdiction.

**5. Implementation of the recommendations of the Ohio Commission on African American Males, as stated at pp. 12-13 of its Executive Summary. (See Appendix I for recommendations)**

**6. All attorneys who wish to do criminal defense work receive formal training in the basics of criminal defense, and only be permitted to do so upon obtaining certification as to proficiency.** The General Division of the Montgomery County Common Pleas Court and the Dayton Bar Association conduct an annual one day Criminal Law Certification Seminar. Training and certification would better assure all indigent defendants, regardless of color, of a minimum level of proficiency in their counsel.

**7. The Bowling Green State University study be reviewed and that its recommendations be implemented. (See Appendix II for the recommendations)**

**8. The Supreme Court should require that Common Pleas Courts adopt a form for purposes of com-**

**plying with the requirements of S.B. 2 section 2953.21(A)(5) of the Revised Code.**

**9. The Supreme Court should enforce the mandate of S.B. 2 that the Ohio Criminal Sentencing Commission monitor the effects of S.B. 2 with regard to R.C. §2953.21(A)(5) as outlined in R.C. §181.25, Sentencing Commission Duties as amended by S.B. 2.**

**10. The Supreme Court should engage a person or entity with the necessary skill and experience to design meaningful methodologies for the collection and compilation of relevant data as to race at all relevant stages of the criminal justice system, and to monitor the collection and compilation of the data.**

**11. The Supreme Court should establish the responsibility for implementing the recommendations contained in this section in the Office of the Court Administrator for the Supreme Court and require an annual report to the public on the progress obtained.**

# LAW SCHOOLS

Law schools are the thresholds to the legal profession and, as such, play the major part in assimilation of minorities into the legal profession and the formulation of attitudes among future lawyers and judges.

Racial minorities continue to lag behind in the administrative ranks of law schools. Minorities comprise 12 percent of Ohio's population. The law schools' minority student populations reflect that diversity with an average of 12 percent minority students in the state's nine law schools. However, only nine percent of law school faculty in Ohio are minorities. While 10 percent of the law school administrators are minorities, that percentage is based on only two schools. Fifty percent of Cleveland State University law school administrators and 38 percent of Ohio State University law school administrators are minority.<sup>1</sup> Not one of the remaining seven law schools has a single minority administrator. Administrators are defined as deans, librarians and other administrative personnel teaching less than half-time.

Little is known beyond anecdotal evidence about the racial climates experienced by law school students, administrators and faculty. Presently, there exists a paucity of collective national research of racial bias in law schools. To this end, the Commission on Racial Fairness chose to include a review of racial bias issues in the nine Ohio law schools. It is our desire and intent that the Commission's survey of law schools, information gathered from focus groups and public hearings, along with the Commission's recommendations, will ultimately contribute to the national effort to resolve questions of racial bias in the classroom, the legal profession and, ultimately, the court system.

The remarks, findings and recommendations made regarding the Ohio law schools are based on a survey completed by eight of the nine law school deans in 1994 and updated in 1998; interviews with students, faculty and administrators during several focus group meetings; public hearing testimony; the examination of law school catalogs and brochures; and a review of studies completed by other state commissions. In addition, pertinent qualitative and quantitative data from the gender bias study in Ohio law schools were consulted.

## Research and Findings

Focus groups were conducted with administrators, faculty and students of various American ethnic and international backgrounds encompassing seven of the nine Ohio law schools in four different parts of the state. Group discussions with students were held separately from those held with deans, faculty and administrators in order to create a more confidential, candid and relaxed atmosphere for the students.

The focus group discussions allowed the Commission the opportunity to explore the informal law school culture by descriptions of the daily activities, interactions, and perceptions expressed by those participating. Further, the focus group discussions provided the Commission a multidimensional sense of law school issues.

Additionally, the Commission mailed questionnaires to the deans of the nine law schools. Eight deans responded. The questionnaire surveyed the demographics (students, administrators, faculty) of schools; their efforts to incorporate relevant issues in curriculum and in professional service; and academic, professional, and financial programs targeting minority students. The surveys provide an account of racial fairness issues and the formal structure and culture of surveyed law schools as expressed through the perception and interpretations of the deans.

### Recruitment Practices: Students, Faculty and Administrators

It appears that all of the responding law schools are making a concerted effort to recruit minority students. While some higher educational institutions across the country appear to be limiting their recruiting efforts of minority students and staff because of challenges to affirmative action and diversity programs, we are pleased that Ohio law schools have recognized that the legal basis for diversity programs remains strongly supported by the United States Supreme Court case *Bakke v. California* and other decisions. We urge Ohio's law schools to continue their diversity efforts consistent with existing legal authority. All send mailings to promising minority candidates, invite them to campus, and have outreach programs to attract minority students. All participate in law school fairs and most have summer enrichment programs for minority students. Most have scholarships and two have fellowships for minority students.

Recruitment efforts of minority students varied somewhat among the law schools.

The recruitment of minority students could be evaluated by a number of different standards: 1) adult minority population of Ohio; 2) minority college students; and 3) a percentage of Law School Admission Test (LSAT) minority test takers. Regardless of the standards applied, increased recruitment of minority students is desirable.

In attempts to recruit more minority students, some law schools have broken away from typical methods. For example, at Cleveland-Marshall School of Law, the law school co-sponsors a “magnet high school” in recognition that it is important to reach out to students before they even enter college. The University of Toledo has implemented a “Minority Summer High School Law Program” for ninth and tenth graders to encourage minorities to consider legal careers and ultimately to increase minority representation in the legal profession.

Other recruiting initiatives are aided in part by the Law School Admission Council (LSAC) which offers up to \$1,000 to law schools to support minority student recruiting initiatives in the month of February, which the LSAC Board of Trustees has designated as National Minority Recruitment Month.

Our survey of the initiatives of other jurisdictions revealed a new program to expand the number of minority and other disadvantaged students attending law school, initiated in 1997 by Indiana Supreme Court Chief Justice Randall T. Shepard and the Indiana General Assembly. Called the Indiana Council on Legal Education Opportunity (CLEO), this program invites minority and disadvantaged college students to a summer institute designed to prepare them for the special nature of law school. Those who are successful are entitled to three years of state financial assistance to help them complete their legal education. Programs such as Indiana’s indicate the court’s and state’s commitment to addressing the problem of too few minority lawyers.

University catalogs and brochures are representative of an institution’s formal culture and identity. Such official publications, through pictures and words, emphasize what is most important and relevant in an institution’s culture and identity. Those law schools that publish pictures and quotations of faculty and minority students and that distribute literature target-

ing minority students, demonstrate a desire and commitment toward the pluralization of their student bodies. In a market in which competitive minority students are scarce, law schools interested in pluralizing their student bodies may wish to engage in assertive diversity public relations, starting with the publication of minority-friendly catalogs.

In spite of the fact that there has been an overall increase in the minority law student population in many Ohio law schools, there is a need for Ohio law schools to recruit, retain and graduate more law students of color in order to admit more licensed attorneys of color into the profession. Students state that law schools need to continue to do everything possible to recruit and admit more minority students so those who enroll do not constantly feel that they are coming to a place “where nobody looks like (them).”

Responses to the law school questionnaires by the eight law schools indicated most of the 1994-95 and 1998-99 student admission committees of these schools were predominately white in terms of administrators, faculty and law students. Only two law school committees had two minority faculty members; one law school committee had one minority faculty member, and the rest had none. In part, the lack of minority faculty on admission committees is a function of the low percentage of minority professors in Ohio law schools and in law schools in general.

The same can be said regarding minority administrators; only two schools in 1994-95 and three schools in 1998-99 reported having minority administrators on their admission committees—one each. The biggest puzzle is the scarcity of minority students on such committees because, numerically, they tend to be larger in number than administrators or faculty of color. In 1994-95, only three admission committees had minority student members—one each. In 1998-99, four schools had minority student members. One of those schools seated two minority students; the others had one minority student each. The University of Akron School of Law does not seat any students on its admissions committee.

Regarding faculty recruitment, most of the deans reported their schools are using more than one strategy to identify and interview potential faculty of color. Most law schools send mailings to promising faculty candidates, invite candidates to campus and offer guided tours. Nevertheless, it is evident that in keeping with national trends, most Ohio law school faculty of color are relatively new and untenured.

“In 1982, I received tenure at Cleveland-Marshall College of Law. To my knowledge, the first or second black person to receive tenure in the university... It is now 1994. I am still the only black tenured law professor at Cleveland State University Cleveland-Marshall College of Law. Right now, Cleveland-Marshall on the good side has four Afro-American members of the faculty; myself and three Afro-American females. None of them are tenured. Two of them are on tenure track. On the other hand, we have a law school faculty of 40-plus people. Four is not enough.”<sup>2</sup>

*Frederic White, Professor of Law  
and Associate Dean of Cleveland-  
Marshall College of Law*

As the Commission members met with more and more students, it became clear that a prevalent student concern at all Ohio law schools is the need to increase the recruitment and retention of minority deans, faculty and administrators. In fact, as one Hispanic law student succinctly put it, “if there were more minority faculty, deans, and administrators, there would be more minority law students.” This sentiment was not only expressed by students, but by minority faculty as well.

During focus group meetings with individual law school deans, they identified the following problems in recruiting minority faculty and administrators:

- The “pool” of qualified minority faculty applicants is small.
- The competition from law schools across the country, particularly those of higher prestige and national reputation, is fierce when it comes to attracting minority deans, faculty and administrators.
- Midwestern states such as Ohio face stiff competition from schools located in states which offer more attractive climates and local/social resources (e.g., California, Florida, Arizona).
- Financial resources often are limited with regard to offering competitive salaries in comparison with larger schools.

While the Commission can certainly appreciate the noted obstacles to the recruitment and retention of minority deans, faculty and administrator prospects, it is incumbent upon the law schools to search for ways to combat these obstacles and increase the number of minority deans, faculty and administrators.

## **Retention of Students**

The law schools' responses to the retention and curriculum questions were among the most interesting. Most of the deans reported their schools had general formal orientation programs for all students rather than orientation programs that targeted minority students. What is unknown is to what extent are culturally pluralistic norms, values, traditions, and resources discussed during the general orientation programs?

Some Ohio schools have established mentorship programs such as receptions, workshops and retreats. Such activities introduce minority students to administrators, faculty and school cultures and structures.

Mentorship programs may be modeled after the "buddy system" program established at Georgetown University Law School. The buddy system includes all students, not just "at-risk" students. Thus, participating minority students are not stigmatized in any way. At New York University School of Law, there exists a similar buddy system between students and faculty. The University of Washington School of Law and Arizona State University College of Law are two other examples of mentoring programs.

These mentorship activities should begin just before or soon after the general orientation day and should be available for the duration of the students' enrollment in the school. The Commission strongly encourages continuation and expansion of these and other initiatives taken by Ohio law schools.

## **Diversity Sensitivity Issues**

Throughout the late 20th century, diversity sensitivity in American higher education curriculum development has proved to be a complex and controversial issue. The question "Does the law school incorporate diversity sensitivity issues in relevant classes?" and the deans' responses to the question certainly reflect the ambiguity and confusion characterizing the

issue of cultural pluralism in law school curriculum. Five deans indicated their schools had diversity requirements that amounted to students being required to take courses on gender and/or racial law. The remaining three law schools left course diversification up to the discretion of the faculty. As much as it is commendable to find courses on gender bias in law school curricula, it simply is not the same as courses on racial bias.

Most Ohio law schools reported they do not have formalized cultural diversity training programs.

The military and a number of universities and corporations have found that when cultural diversity sensitivity issues are linked to managerial promotion and merit evaluation, it makes such demographic changes part of the normative structure of an institution.

Such diversity sensitivity training is certainly not a panacea for the elements of racism that exist in law schools and society as a whole. Nevertheless, such training would assist with day-to-day interactions among majority and minority students, faculty and administrators. Perhaps as a result of such training, white faculty might be encouraged to seek out, assist, and advise students of color, so that this does not become the “unofficial duty and responsibility” of faculty of color.

## **Extracurricular Activities**

All of the deans reported their law schools have extracurricular activities which address racial issues, such as the Black Law Student Association (BLSA) and the Hispanic Law Student Association (HLSA).

Not one law school review or journal has more than a few minority student members. Of the law schools responding to the questionnaire, one school had 16 percent minority representation on the law review; the number drops to nine percent at the next school before bottoming out at five percent.

## **Placement**

With regard to placement issues, in 1994-95 three law schools had “special programs that specifically assist minority students seeking summer employment or employment following graduation.” In 1998-99, six schools offered such assistance. All eight law schools offer “discussions or presentations” by legal

professionals in various fields, while five offer such services targeting minority students. All eight responding law schools provide “written information about specific professional options,” while five target minority students for information distribution.

While all eight responding law schools provide individual appointments with placement officers, one school provides such services targeting minority students. Eight law schools currently offer practice interviews for all students, and one school offers such practice sessions targeting minority students.

The patterns of placement of law school graduates by the employment sector (public, private, and government) within one year of graduation and broken down by racial ethnicity was quantified by the deans. On a very important level, such quantified patterns of employment are useful because they give us an anecdotal sense of the sectors in which minority students tend to be employed.

The Commission strongly supports the current placement strategies used by several Ohio law schools that improve the degree to which minority law students are networked into professional career tracks, such as minority clerkship programs that work in coordination with local bar associations and law firms. Another example is the roundtable breakfast held each year with the participation of area attorneys and local law students. These are examples of programs established throughout the state of Ohio in cooperation with local bar associations. The Commission encourages the development, continuation, and expansion of similar initiatives.

## **Monitoring Racial Bias In Law Schools**

Only three schools reported having administrators with primary responsibility for specific groups such as racial minorities, women and the physically handicapped. The status and effectiveness of these administrators were not revealed. If given empowered, proactive charges, such diversity policy-making positions may prove to be very effective.

Law schools should establish a mechanism to ensure a systemic approach toward minority issues in law schools. In other words, all policies, activities, staffing and initiatives should be viewed with an eye toward minority input and concern for the impact they might have on minorities.

The final hurdle in law school education is passing the bar exam. Data on bar results is important not only for the law schools from which students graduate, but for the legal profession as a whole. Race-based discrepancies should be noted in totality and by law school, and examined by the Supreme Court of Ohio.

## Recommendations

To assist Ohio law schools in focusing on the issues of racial fairness and to promote changes that foster a commitment to address racial/ethnicity issues, the Commission makes the following recommendations for law schools:

**1. Law schools should give priority to efforts to recruit and retain minority students. The Commission strongly supports and encourages affirmative action and diversity programs that attract and retain minority students and staff.** Some suggested strategies to accomplish this include the following:

- a. Law schools should use candidate referral service lists to contact minority students who take the LSAT and provide them information specific to the minority experiences at the law school.
- b. Law schools should attend large law school recruitment forums and pre-law fairs and make certain the team representing the law school includes students of color.
- c. Law schools should visit historically black colleges and other colleges with a high-minority representation.
- d. Law schools should encourage minority students to enroll in law school by showing interest in their matriculation through telephone calls and mailings from the law school dean, faculty and administration. Sending letters and calling after a student's application has been accepted shows additional support and encouragement. Law schools should consider applying for Law School Admission Council (LSAC) funding for a February minority recruitment program.

e. The Supreme Court's support of the report and funding of programs similar to the Indiana CLEO program should be adopted by the Ohio General Assembly.

f. Law schools should maintain contacts with college advisory offices and send updated information regarding the school requirements and admissions process to, at minimum, local junior high and high schools. Special presentations could be made to encourage minority student interest through programs such as Big Brothers/Big Sisters, summer programs for high school students and "magnet high school" relationships in the local area.

g. Law schools should design and publish public relations materials about their law schools and law school life that demonstrate the cultural pluralism commitments of the school.

**2. The Admissions Committee should include minority student representation.**

**3. Law schools should recruit and maintain minorities to serve as law school faculty and staff and adopt policies aimed at advancement toward tenure and retention of minority faculty members.** The Commission suggests the following strategies to address this task:

a. Law schools should involve professors and students of color in the recruitment process for dean, faculty and administrator positions.

b. Law schools should actively seek out and identify minority individuals that may be "faculty material," whether it be at conferences, minority organizations, minority alumni, other minority professionals or through the practicing bar. The Commission highly encourages schools to go outside of the "traditional structure" in order to increase the pool of candidates.

**4. Law schools should evaluate the graduation rates among students of color and include an objective evaluation of the scope and effectiveness of each school's academic support programs.** This evaluation might include conducting exit interviews with all minority students including

contact with those who drop out in order to learn what they deemed beneficial and what they deemed detrimental to their law school experience.

**5. Law schools should review their academic program to assess ways in which diversity values are manifest throughout the institution.** This may be partially achieved by providing diversity sensitivity training for the dean, faculty, administration and students. Students should be sensitive to the impact of bias in many substantive and procedural contexts. Such training might assist professors with their delivery and style during class communications. Additionally, law schools are encouraged to find ways professors can integrate the effects of race and ethnicity upon legal decision-making and the effects of legal decisions upon racial and ethnic minorities including the treatment of fellow professionals and treatment of court users. The law schools should set up their own method of accomplishing this.

**6. Law schools should continue to review their courses, extracurricular programming, introduction to law programs, student orientation and student life to consider the extent to which diversity values are embedded in their academic and nonacademic programming.** In addition, textbooks, course materials and classroom presentations should be reviewed and altered where necessary, to eliminate overt and subtle race and ethnic bias whenever discrimination is not the subject of the course or case.

**7. Law schools should continue to review co-curricular programs to ensure minority students are actively sought out for inclusion. Faculty and law review members should make certain the writing competitions and application processes are fair and equal to all students.** Some suggested strategies to accomplish this include faculty members acting as sponsors for law reviews, journals and moot court should communicate early in the minority students' law school careers regarding the process by which students are admitted onto these scholarly publications, become editors or participate on the moot court team(s). Law review or journal members and editors and moot court team members should make presentations at minority organizational meetings (e.g., HLSA, BLSA). Minority students should be advised as to how to increase their chances of getting on these publications or teams.

**8. Placement directors should be encouraged to work with professional associations, bar organizations, minority alumni and the courts to facilitate the entry of minority students into summer clerkships and other opportunities which lead to professional development.** Minority lawyers are valuable role models to demonstrate to minority students they can succeed. Minority students should be introduced early to the requirements and benefits associated with obtaining judicial clerkships.

**9. The Commission recommends all Ohio law schools should continue to annually review their policies and internal procedures for addressing violations of human rights or discrimination and make modification as necessary to foster confidence and a commitment to racial fairness among faculty, staff and students. If such a policy and procedure does not exist, one should be adopted within one year and reviewed annually.**

**10. The Commission recommends the Supreme Court of Ohio collect racial and ethnic information on bar examination candidates and monitor the results for race-based discrepancies.** Such a system would allow for continuous monitoring of performance levels of majority and minority candidates.

**11. The Commission recommends that each law school should continue to monitor and evaluate student and faculty recruitment and retention. Law schools should report relevant data as may be prescribed by the Supreme Court of Ohio.**

The Commission recommends ongoing and routine data collection and analysis regarding minority application, acceptances, admissions, placement and bar passage. Only through such systematic data collection and analyses can a law school conduct ongoing self-assessments regarding how well it is meeting its goal of improving minority education.

# INTERPRETER SERVICES

## Nature of the Issue

The population of the United States is changing. While the population of the country as a whole increased by just over 10 percent since 1980, the Asian-Pacific Islander segment of America's population increased by 108 percent. The nation's Hispanic community increased by 53 percent. Other linguistic minority populations increased by 45 percent during the same period.

When the Commission began its study, approximately 546,000 Ohio residents did not use English as their primary language. As is the case throughout the country, that number grew dramatically during the last five years. The growth of Ohio's non-English speaking population is projected to continue to grow substantially during the next five years and for many years to come.

The National Center for State Courts reviewed the findings of court jurisdictions that had conducted systemic observations of interpreter services provided in their courtrooms. These trained observers found that in every single jurisdiction observed, without exception, glaring problems existed with the provision and quality of these services.

These problems resulted in uneven application of the guarantees contained in the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution to those whose first language is not English.

The problems encountered invariably include:

1. Inaccurate interpretations.
2. Failure to interpret the entire message.
3. Interpreters adding, deleting or putting their own "spin" on testimony or statements made by the parties, witness, court or counsel.
4. A lack of understanding by interpreters of their professional responsibilities.

Research studies and news media investigations in other jurisdictions have uncovered alarming miscarriages of justice.

These problems generally fall into one of four categories:

1. An underestimation and misunderstanding by the legal community of the skills required to serve adequately as a court interpreter.
2. An absence of standards and criteria to qualify one to perform court and legal interpreter services.
3. An inability of the system to effectively and efficiently locate qualified legal interpreters.
4. A shortage of qualified interpreters.

During the public hearings the Commission conducted here in Ohio, these same concerns echoed from some of those who appeared. In most communities the Commission visited, inquiries were made as to the existence of resources for those who did not speak English as a first language. Sadly, the Commission was unable to uncover even one location in Ohio where any plan, let alone a coherent plan, to handle these matters was institutionally developed and implemented.

The testimony of a witness in Lorain provides a good example of the manner in which interpreter services apparently are handled across the state. The witness was a bilingual Hispanic female. She has worked for the court system in Lorain for many years. During those years, she often has been asked to volunteer her services as an interpreter for other Hispanic residents. She testified that she had not received any formal training to perform these services. Any additional training that she received, she sought for herself. She indicated that she received no additional training for performing these services and that she was expected to perform them in addition to her other duties. She expressed her deep-seated anxieties and fears that she was not qualified to perform these functions properly and that people might have suffered because of her inability to interpret information correctly.

In addition, the Commission heard horror stories relating to guilty pleas unintelligently entered in criminal cases and testimony inaccurately translated. The Commission itself did not conduct any independent or original research to confirm the anecdotal information that these reports provided. We are convinced, however, that the uniform experience of Ohio's sister states, the current number of non-English speaking residents currently living in Ohio, the projected increase in Ohio's

non-English speaking population in the near-term, as well as the sheer importance of the Constitutional protections that are implicated, require that the state take immediate action to address the problem.

## **Proposed Solutions**

California, Massachusetts, New Jersey and Washington state have initiated efforts that received national attention and recognition with regard to this interpreter issue. In these jurisdictions, standards for the provision of interpreter services include testing and certification programs, as well as training for potential interpreters, judges and other justice system personnel. A number of other states, including Kansas, Minnesota, Nevada, New York, Oregon, Utah and Virginia have similar programs under consideration or development.

The federal government was the first to see interpreter services as a significant Constitutional problem and was the first to attempt to remedy it. In 1988, Congress passed the Court Interpreter Amendments Act that requires the use of criteria-referenced examinations to certify potential interpreters.

The Federal Court Administrative Office developed the certification process after an extensive study of court needs and consultations with judges, lawyers, litigants and experts in linguistics and test development. The process requires that the successful applicant must pass both a written proficiency and an oral performance examination. The objective is to determine if those tested have the range of vocabulary, reacting comprehension and grammatical structure needed to handle a variety of verbal tasks, both oral and written, covering style language level and intent of speakers in court proceedings.

By all reports, the federal examinations are the most thorough currently being employed in the nation. Since the development of the tests, fewer than 20 percent of those taking them passed. This very low passage rate points out some of the problems faced in developing an adequate pool of qualified interpreters to serve the entire state court system in Ohio. It also emphasizes the high risks in not having a certification requirement.

Even in those states in the forefront of this issue results are mixed. New Jersey developed an oral screening examination for interpreter candidates that it modeled after the federal test and reports similar passing rates to those encountered in the

federal experience. California was the first state to adopt a certification examination. However, its process was challenged because of inadequate test administration.

Unfortunately, there is currently no alternative to an exhaustive, comprehensive, systematic skills testing and certification program to address and overcome the ills identified in this area. It is, however, impractical for the state to put together a testing and certification program that would include more than five to 10 of the world's languages.

The good news is that a program that focuses on those five to 10 languages would cover nearly all court proceedings requiring interpreter services. The languages that such a program should include are those European languages that gained world-wide currency during the colonial period as well as those that reflect the recent influx of major Asian population groups into our country and state.

## **The Cost Of Implementation**

Curing these problems will not come without a cost. A study prepared by the State Institute of Justice concluded that, "Creative policy management strategies, the will to undertake a long term initiative and a pragmatic attitude about striking a balance between optimum and wholly unsatisfactory services are required to make progress. Court Interpreter Services lend themselves especially well to resource and service sharing, regionally, statewide, interstate and where appropriate, across state and federal jurisdictions."

In Ohio, we are fortunate that other jurisdictions have gone before us and that their experiences resulted in a move to engage in the creation of a multi-state collaborative effort to reduce the costs of qualified interpreter service delivery and to increase the pool of those qualified to deliver those services. The National Center for State Courts estimates that Ohio's costs to develop a stand-alone examination and certification process is upwards of \$100,000. According to the center, the state can cut those costs by 75 percent by joining the collaborative court interpreter service initiative that currently includes a number of other state court jurisdictions. (See the appendix.)

Eventually, Ohio must consider the creation of an administrative position to oversee the implementation of any protocol developed. The Commission understands that currently many

of Ohio's courts have a limited need for interpreter services and for many of our courts that situation is likely to prevail for the foreseeable future. Reliance on resources such as the AT&T Language Line and other non-government resources for administration of an interpreter services program, in the short run, is probably most prudent and politically defensible. Ultimately, however, non-English speaking population growth and the need to have all individuals who provide interpreter services well-versed in the translations of legal terminology will demand a more comprehensive solution to the problem.

## Recommendations

On January 20, 1995, the Commission voted unanimously to recommend to the Ohio Supreme Court the adoption of a set of policy guidelines to address the problem of interpreter services in this state's courts even in advance of the publication of this final report. On April 25, 1995, the Supreme Court adopted the Commission's recommendations. Those recommendations were as follows:

- 1. The Supreme Court of Ohio should immediately develop, and require the implementation of, concrete guidelines for the certification and qualification of individuals and programs that provide language interpreter services in the courts of Ohio.**
- 2. The Supreme Court of Ohio should develop, and require adherence to, a code of conduct for all individuals who are certified to provide interpreter services in the courts of Ohio.**
- 3. The Supreme Court of Ohio should require education for judges, referees and court administrators on the importance, availability and proper use of language interpreter services in the courts.** This education should include components on the mandatory qualifications for service as a language interpreter and how a court should establish and maintain access to an effective language interpreter pool.

# CONCLUSION

There are no radical surprises in the facts found by and the recommendations made in this Report of the Ohio Commission on Racial Fairness. There is a great disparity in the perceptions of the entire justice system between Ohio's white citizens and her citizens of color. Whites see a fair system that basically works well; others see an unfair system that sometimes works but very often does not, at least not for them. The disparity of experience is widest in criminal justice.

The Commission, after careful study of similar efforts in many other states, is not surprised that empirical evidence supports the perspectives of both groups. Yet, perceptions also proved to be wrong in some situations. The experiences and feelings of citizens of color against the justice system are so strong that they are often not aware when the system is working. This lack of trust in the system is itself a serious problem.

The Commission also was not surprised by the discomfort that those who chose to talk about these problems displayed as they related them. Nor was the Commission surprised by the fact that many who should have spoken, both as to positive and negative experiences with Ohio's legal system, declined to do so.

The strength of the emotions of Ohio's citizens that this inquiry brought to the surface also was not a surprise. Any discussion about any aspect of the question of race in the last decade of the twentieth century anywhere in the United States of America should be expected to evoke strong emotions.

The Commission expects that its recommendations will evoke the same kind of strong emotions from those who believe that it has overstated the case for reform and from those who will maintain it has not made the case strongly enough.

The Commission believes that its work is a valuable, though imperfect, effort to begin a movement toward improving Ohio's legal system. We hope that the result of these improvements will be that all those who seek to use the system, or who are required to resort to it, will come away believing that they were afforded the guarantees that our constitutions and our fundamental law promise. That is, at a minimum, equal protection and due process of law.

If our system is to survive, if it is to be respected and obeyed, all of the barriers to universal perceptions by significant majorities of all groups within our citizenry that the system is just must be destroyed . If that means spending more money, adding additional procedures, or eliminating objectionable practices, it is a small price to pay to reach that goal.

The mandate of this Commission was so broad that it was impossible to conduct a detailed inquiry into all of the allegations of bias that were brought to the Commission's attention. The areas that were studied and the actions the Commission recommends as a result of those studies will bring about immediate improvements in the way race is viewed by all participants in Ohio's legal system.

The Commission also believes the way it looked at the areas that were examined will cause those who are engaged in other areas of the legal system that were not examined to take a hard look at the way they also conduct business. Hopefully, a closer eye will result in the correction of those practices that currently cause distrust of the legal system by its minority participants.

Racism is real, and it is insidious. As shown by Andrew Hacker in his book, Two Nations, Black and White, Separate, Hostile, Unequal, the evil of racism goes far beyond prejudice and discrimination because it is often unconscious and destroys our institutions. Racism, moreover, can take over institutions, establishing enforced and legally structured barriers to fairness and sanctioning bias. Platitudes about freedom and equality are not enough; indeed, they can become excuses for hidden unfairness. Instead of a leap of faith, what is required is a leap of action to make bold changes to the status quo as recommended in this Report.

The Ohio Commission on Racial Fairness has established a process and a roadmap for Ohio to assure its legal system delivers on the promise contained in the Commission's and our country's pledge, that is, "justice for all." It is the Commission's fervent hope that those who have the power to use the tools this Report provides will recognize their utility and see fit to use them.

## ENDNOTES

### Judges' and Attorneys' Perceptions

- 1 In its 1995 session, the Oregon Commission's Implementation Committee assured that its recommendations would be pursued by soliciting bids for carrying out nine recommendations in their own task force report. Ohio's Recommendation # 1 recommends just such an implementation committee.
- 2 In 1996, there were 31,655 attorneys employed in the State of Ohio. A comprehensive directory of all attorneys in the state should be developed, including their addresses, ethnic status, educational and employment histories, and areas of practice. This task will be difficult in the case of minority attorneys, because many do not belong to bar associations, and they tend to work in areas where they are less likely to be identified. Nevertheless, the development of a comprehensive directory of attorneys in Ohio is a significant recommendation. See Recommendation # 4 in this section.
- 3 The question of qualifications of white and minority attorneys is noted as a problem in race relations perception research. The term "qualifications" is usually left ill-defined, and there is a presumption that entry and promotion depend on merit rather than personal connections and social status.

### Jury Issues

- 1 See generally, *American Bar Association Judicial Administration Division Committee on Jury Standards. Standards Relating to Jury Use and Management* (1993). Wash.D.C.: State Justice Institute at vii.
- 2 American Bar Association, *Standards Relating to Juror Use and Management*, State Justice Institute, (1993).  
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- 3 *Supreme Judicial Court of Massachusetts Commission to Study Racial and Ethnic Bias in the Courts. Equal Justice*. Boston: Supreme Judicial Court of Massachusetts at 55 (1994).

4 The jurisdictions were selected on the basis of the following criteria:

1. The percentage of minorities in the jurisdiction. Since a complete statewide study of jury selection would not be feasible given the time and staff constraints of the Commission, we purposely selected jurisdictions with high percentages of nonwhites. This was fueled by our interest in determining the representation along racial lines of juries in various jurisdictions, and those jurisdictions with large minority populations had the greatest impact on the largest number of minorities.

2. The Commission conducted public hearings in the selected jurisdictions. Thus, it would be possible to compare the testimonial evidence collected at the public hearings with empirical evidence of jury selection in the respective jurisdictions.

3. Because of time constraints and statistical concerns, rural counties (with populations under 200,000) were not selected. In Ohio's rural counties, jury trials are infrequent, thus making the collection of a significant number of observations a very lengthy process. Moreover, the demography of the state is such that the urban counties have the highest concentrations of minorities while the rural counties are overwhelmingly white. While it may be of considerable interest to study jury selection in rural Ohio, the impact jury selection in rural Ohio has on minorities is much less than in the urban counties.

5 Robert Joe Lee, *Non-White Issues in Jury Management*, at 21. Background paper for New Jersey State Supreme Court's Committee on nonwhite access to Justice (1991).

6 Franklin County Municipal Court file, Ohio State Commission on Racial Fairness and William L. Danko, *Evaluation of Juror Management: Cuyahoga County, Ohio* (April 1993). A serious methodological problem with these reports is that they claim to find "racial" representation in jury selection procedures without taking into account the interactions of socioeconomic status and racial status. This prevented the report writers from considering the underrepresentation of people with low socioeconomic status in relation to their racial status.

7 *Equal Justice*, *supra note 3*, at 66-67.

### **Criminal Justice and Juvenile Justice**

1 *See, e.g., McCleskey v. Kemp*, (1987) 481 U.S. 279, 107 S.Ct. 1756.

2 *National Racial Disparity in Incarceration Growing, Study Says*, *The Plain Dealer*, Jan. 30, 1997, at 12A, *citing* "Intended and Unintended Consequences: State Racial Disparities in Imprisonment" a report issued by the Washington-based Sentencing Project.

3 *Death Penalty Proportionality Statistics*, Ohio Public Defender's Office, Death Penalty Division, Sept. 29, 1997.

4 *Id.*

5 *See* OHIO REVISED CODE ANN. §2901.03 (July 1, 1996).

6 *See Akron v. Rowland* (1993), 67 Ohio St.3d 375 (The Supreme Court of Ohio struck down an Akron ordinance that made it a crime to "loiter" in what police believed to be high drug areas); Anti-Drug Abuse Act of 1986 which established a 100-1 ratio between powder cocaine and crack cocaine. (A person convicted of selling 5000 grams (5 kilograms) of powder cocaine is subject to the same mandatory minimum sentence as the person convicted of selling 50 grams of crack cocaine.)

7 For example, one prosecutor made a training tape in which he advised young prosecutors to try to keep blacks from low-income areas off juries. He said the blacks from the low-income areas are less likely to convict. He further said, "I understand it. It's an understandable proposition. There's a resentment for law enforcement. There's a resentment for authority. And as a result, you don't want those people on your jury." L. Stuart Ditzen, Linda Loyd and Mark Fazlollah, Philadelphia Inquirer, Apr. 1, 1997, p. A1 (internal quotation marks omitted).

8 For example, in Franklin County, court-appointed lawyers are paid \$30 per hour for out-of-court services and \$45 per hour for in-court services. In most retained cases, a typical fee per hour (Franklin County) ranges between \$95 and \$250 per hour, depending on the attorney. Source: Interview, Youngstown Municipal Court Administrator, Michael Crogan, Dec. 5, 1997, and Franklin County Municipal Court Administrator, Bud Capretta, Dec. 5, 1997. These figures were re-checked in 1999 and the same rates apply.

9 For example, in 1999, of the eight Summit County Common Pleas Judges of the General Division, Judge James R. Williams is the only minority judge on the court. Of the five 9th District Court of Appeals judges, all are white.

The judges and staff of the General Division of the Franklin County Court of Common Pleas remain predominately white. All of the judges of the 10th District Court of Appeals are white.

The Commission staff also found that white judges usually have white law clerks and other court personnel, while minority judges usually have some minority personnel.

10 For example, only three blacks graduated from the University of Akron School of Law in 1996 and five in 1997.

11 Police departments keep information sheets of arrest with a category for the race of the suspect/defendant. Every probation department the Commission staff contacted, except Franklin County, provided the numbers of probationers broken down by race, and the Ohio Department of Rehabilitation and Correction provided the numbers of incarcerated persons broken down by race and sex in addition to providing the same from some probation departments under their jurisdiction.

12 Memorandum to Sentencing Sub-Committee and Advisory Committee from Fritz Rauschenberg, (Aug. 12, 1996).

13 *The Real War on Crime*, Report of the National Criminal Justice Commission, 1996.

14 February 1990 U.S. General Accounting Office report, "*Death Penalty Sentencing: Research Indicates Patterns of Racial Disparities.*"

15 Fritz Rauschenberg and David Diroll, *Disparity and Uniformity in Criminal Sentencing: An Ohio Criminal Sentencing Commission Sub-Committee Staff Report* (1993), at 2.

16 By contrast, a recent report by the United States Sentencing Commission entitled Special Report to the Congress: Cocaine and Federal Sentencing Policy, (April 1997), p. 8 stated: "While there is no evidence of racial bias behind the promulgation of this federal sentencing law, nearly 90 percent of the offenders convicted in federal court for crack cocaine distribution are African-American while the majority of crack cocaine users are white."

This same report states: “In the same way, biases in favor or against African-Americans can largely be explained by a greater involvement of African-Americans in serious felonies that result in arrests.”

17 (1979) 473 F. Supp. 1009 (S.D. Ohio ).

18 (1982) C-1-82-123 (S.D. Ohio).

19 (1992) 811 F. Supp. 341 (S.D. Ohio).

20 *Bowling Green State University Report: Race and Juvenile Justice in Ohio* (June 1993) at 1 (hereinafter “*BGSU Report*”).

21 *BGSU Report*, at 126.

22 *Id.*

23 *Id.*

24 *BGSU Report*, at 30, fig. 2.5.

25 *BGSU Report*, at 31, fig. 2.6.

26 Other states which have studied this issue have also concluded that racial bias does exist in the criminal justice system. Minnesota, which established race neutral sentencing guidelines in 1980, found that white offenders were nevertheless treated more leniently and concluded that “(t)here is racial bias in sentencing in Minnesota.” See Final Report of Minnesota Supreme Court Task Force on Racial Bias in the Judicial System (1993) pp. 49-57. See also Final Report of the (Iowa) Equality in the Courts Task Force (1993).

### **Law Schools**

1 American Bar Association Official Guide to Approved Law Schools 1999 Edition.

2 Since 1994, according to Professor White, one black female and one Pakistani have been tenured while one faculty member from India and one black female faculty member are on the tenure track.

## Appendix I

Ohio's African-American Males: A Call to Action  
Report of The Governor's Commission on Socially Disadvantaged Black Males  
Columbus, Ohio: The Ohio Office of Black Affairs  
June 1990

### **Criminal Justice**

As of June 1, 1989, African-American male youth represented 43.3% of the male youth institutionalized by the Department of Youth Services (DYS). As of January 1, 1990, African-American males made up 51.1% of the Department of Rehabilitation and Corrections (DRC) prison population. The African-American male population in Ohio is estimated at just over 10%. Clearly, this population is being incarcerated at rates far exceeding its population percentage.

The Criminal Justice Subcommittee addressed three main areas of concern:

1. Juvenile Justice
2. Criminal Justice System Analysis
3. Police/Community Relations and Victimization

#### **1. Juvenile Justice**

The increase in the percentage of African-American males in DYS institutions has risen from 34% in 1985 to 43% in 1989. At the same time, the overall male population of DYS institutions grew 13% (from 1,749 to 1,980). The cost of housing youth at a DYS institution increased from \$21,593 in 1985 to \$28,451 per year in 1989, a 32% increase. In 1989, Ohio spent \$92,019,995 operating juvenile justice correctional agencies – fourth in the nation behind California, Florida, and New York.

Recidivism rates, categorized as re-commitments (a DYS felon released and on aftercare who commits a new offense) and prior discharges (a DYS felon released, who completed aftercare and is discharged, who commits a new offense) are increasing for all DYS youth, but at a faster rate for African-American male youth. Revocations (a DYS felon released to aftercare who violates one or more conditions of aftercare) are decreasing, but at a slower rate for African –American male youth than for the overall DYS population.

Two important features of the Ohio juvenile justice system are:

- High rates of procession youth into the system
- Overwhelming conditions of overcrowding

Overcrowding is believed to be linked to the frequency of death and injury accidents in juvenile justice correctional facilities. Ohio is among the top five states in the nation in the frequency of death and injury incidents, along with California, Tennessee, New York and Oregon. Further, overcrowding often results in inadequate treatment, poor supervision and lack of physical safety.

Research has shown that institutionalization may not be the most effective treatment in the early stages of delinquent behavior (i.e., for first and second time offenders). Despite this, Ohio is

seriously behind other states in developing effective sentencing alternatives for juveniles.

There is a need for a reassessment of the juvenile justice system, from court processing through institutionalization to re-entry and reintegration processes.

### **Recommendation Summary – Juvenile Justice**

- CJ-1 Fund further research into the disproportionate representation of African-American youth in the juvenile justice system.
- CJ-2 Develop diversion programs to prevent African-American males from entering the juvenile justice system.
- CJ-3 Mandate juvenile offenders' statutory right to treatment provided in the least restrictive, family-centered, community-based environment available.
- CJ-4 Provide effective and productive "alternative" programs to the traditional sentence of "lock-up" for juvenile felons, and require equal minority access to such programs.
- CJ-5 Develop community-based "alternative" programs specifically designed for African-American males that are conceptualized, planned and proportionately staffed by African-American males.
- CJ-6 Establish societal re-entry/reintegration programs for juvenile offenders and communities.
- CJ-7 Increase African-American male professional employees representation throughout the juvenile justice system.

## **2. Criminal Justice System Analysis**

An analysis of the adult criminal justice system revealed two primary issues of concern:

- The number and proportion of African-American males in the Ohio prison inmate system
- African-American male attitudes toward the criminal justice system.

As with the juvenile justice system, African-American males are disproportionately represented in Ohio penal institutions. In addition, while incarcerated, African-American males are more likely to commit serious offenses within prisons than their white counterparts, and such offenses are more likely to be more severe.

At the same time, a review of the work force composition at 15 state prisons showed that, with the exception of the Dayton Correctional Institution, none had significant numbers of African-American males on their professional staffs. This lack of African-American cultural input into determining the severity of institutional offenses may be a significant factor in the large numbers of such offenses reported.

Also important is the lack of incentives for inmates to participate in educational and substance abuse

programs. The reported average educational level of Ohio's inmates is 7<sup>th</sup> grade. Improving this educational level could result in lower recidivism rates and higher success rates for inmates who are released.

The final issue is that substance abuse programs in prisons need to be expanded. DRC estimates that 7 out of 10 inmates have a problem with alcohol or drugs. There are not enough treatment programs available to meet the needs of the prison population.

### **Recommendation Summary – Criminal Justice System Analysis**

- CJ-8 Expand and upgrade public defenders' offices to ensure equity between the prosecutorial function and defense function.
- CJ-9 Provide a uniform, workable system for pretrial release for persons with bailable offenses.
- CJ-10 Require selection of juries to be based on both voter registration and drivers license lists.
- CJ-11 Mandate presentence investigations for all convicted felons.
- CJ-12 Establish a Sentencing Commission, as recommended by the Governor's Committee on Prison and Jail Crowding, to research and review sentencing patterns in Ohio courts.
- CJ-13 Provide incentives to inmates for productively participating in educational programs.
- CJ-14 Increase and expand substance abuse programs in prisons.
- CJ-15 Require community-based corrections programs to develop programs specifically addressing the needs of African-American males.
- CJ-16 Establish parole guidelines in the Ohio Administrative Code.
- CJ-17 Increase funding for development of programs for both communities and inmates for re-entry/reintegration of inmates into the community.

## APPENDIX II

Bowling Green State University  
*Race and Juvenile Justice in Ohio*  
June 1993

### **Policy Issues and Recommendations**

#### **Issue #1      Police Referral Patterns**

Since minority youth are overrepresented upon referral to juvenile court, it is clear that police enforcement practices and referral patterns have a lot to do with overrepresentation. Referral by police is ultimately related to more frequent detention of minority youth and more frequent confinements in DYS. However, it is not known what aspects of law enforcement policy or practice may contribute to overrepresentation. City crime patterns, patrol manpower allocation assignments, and police decisions to arrest or release need to be examined to see why arrests produce more minority youth than white youth.

**Recommendation #1:** Studies should be encouraged by local criminal justice planning teams in consultation with persons knowledgeable about crime distribution and manpower allocation patterns. Police data on arrest or release of youth need to be made available to qualified research teams on a redacted basis and innovative patrol observation studies should be developed.

#### **Issue #2      Records of informal referrals**

Ohio needs to decide upon a uniform policy with respect to records of informal sanction processes ranging from school discipline to unofficial handling of referrals to juvenile court. These records would be especially useful for addressing early warning signs of youth involvement in antisocial behavior and for its opposite: identifying the factors related to desistance from continued involvement in trouble.

**Recommendation #2:** State statutes and agency policies need to be reviewed in order to provide for a consistent policy with respect to youth records. There is no doubt that the protection of privacy, the assurance of accuracy, and the scope of availability are difficult issues that cut on both sides of the question. However, if effective monitoring of race differences in informal sanction processes is to be achieved, it will require availability of better information about what happens to youth when they first begin to get into trouble with authority. The common sense approach embodied in the old statement, "An ounce of prevention is worth a pound of cure," is surely applicable here.

#### **Issue #3      Developing guidelines for and monitoring detention decisions**

Since detention is so highly associated with confinement decisions and since minority youth have so much greater risk of being detained, effective guidelines need to be developed to bring greater awareness of the disparity and meaningful reforms to reduce the disparity to detention decision makers. Ultimately, this may require changing state law regarding the criteria necessary to detain a youth or developing effective community monitoring programs to take the place of a parent who can't both support her family and monitor adolescent children at the peak of their strides for independence.

**Recommendation #3:** Develop and evaluate some model community-based alternative preadjudicatory release and monitoring programs or adaptations of existing programs like electronically monitored house arrest.

**Recommendation #4:** Study the merits of changing the state statutory or local operating policies, specifically related to guardian issues, that indirectly place minority youth more at risk for detention.

#### **Issue # 4 DYS dispositions**

Findings from this study suggested that more severe dispositions may be accorded in counties that lack resources to provide community-based alternatives. Furthermore, despite the absence of an overall race effect on confinement controlling for relevant factors such as prior confinements, seriousness of the offense, and others, the type of confinement is strongly related to race. For every two out of four white youth who receive a DYS confinement, three out of four minority youth will receive a DYS confinement. The average number of prior court referrals preceding a DYS confinement is three for minority youth, five for white youth. Minority youth get to DYS in greater numbers and earlier in their careers than white youth. Some further recommendations consistent with recent recommendations for revisions of DYS funding focus on new community-based alternatives and nonprescriptive disposition guidelines.

**Recommendation #5:** The range of community-based disposition alternatives should be increased to reduce the number of nonviolent, nonchronic offenders sent to DYS. Relatedly, institutional programs need to be redesigned to take into account shifts in the nature of the delinquent population that will accompany the increased use of community-based programs.

**Recommendation #6:** Nonprescriptive guidelines concerning the kinds of offenders and stages in their “careers” at which a DYS confinement could be replaced by an alternative disposition should be developed using the data collected in this study and similar data about DYS admissions cohorts.

#### **Issue # 5 Dealing with angry youth and unresponsive systems .**

Findings from this study suggest that minority youth moreso than white youth react with anger when confronted by a sanction process that is perceived to be arbitrary, manipulative, and without an evident purpose to help youth. This may be an early expression of the crisis of confidence in our institutions or it may be a temporary teenage posture. Whatever its progression, if anger is inappropriately expressed or allowed to fester, it ultimately proves to be dysfunctional. Juvenile justice agencies have a responsibility not to make matters worse than they are.

**Recommendation #7:** Juvenile justice agencies should take the lead in developing training programs for staff who work with youth clients to deal with anger effectively and constructively. One prosecutor already communicated with project staff that he thought the decision simulation booklet was a good training exercise for new attorneys on his staff to become familiar with decisions in which demeanor may play a role.

**Recommendation #8:** Juvenile justice agencies should also take the lead in cooperation with schools to develop effective legal education programs that focus on conflict resolution and dispute resolution, on how the principles of law can operate to everyone’s benefit, and on the positive power of legal institutions. In an era of sensitivity to abuses of power and privilege, legal institutions like the juvenile court must assume a positive role in helping to restore even young people’s lost confidence in basic principles like equity, justice and the rule of law.

# DEDICATION

Any effort to examine an area as controversial as racial fairness in an institution as all-encompassing as our legal system does not just happen. Someone has to have the vision to see the need. An independent judicial system is fundamental to our democratic system of government. Fairness is fundamental to our system of justice. The Ohio Commission on Racial Fairness owes its existence to three individuals.

Judge Carl J. Character determined that there was a need to review the complaints of those who sincerely believed that they were unable to receive justice from our state's legal system. Judge Character, past president of the National Bar Association, heard the complaints of many lawyers of color who sometimes felt that, institutionally, the cards were stacked against them. As a practicing attorney, and later as a judge of the Cuyahoga County Court of Common Pleas, he frequently found himself in situations that caused him to wonder if these laments were based in fact.

Judge Character became aware that in other states, including New York, New Jersey, Florida and Minnesota, commissions of inquiry were examining the issues of racial fairness.

Judge Character became convinced that Ohio should undertake the same type of review. To that end he initiated a number of conversations with the Chief Justice of the Supreme Court of Ohio, Thomas J. Moyer.

Efforts to reform and improve Ohio's legal system mark Chief Justice Moyer's tenure as Ohio's top judge. He continually spearheads efforts by the Ohio Supreme Court to present an accurate image of the legal profession in the eyes of the public. He has insisted that the public's concerns about the legal system be addressed. These concerns include integrity, quality and fairness in the delivery of legal services and legal education in Ohio.

It is not surprising, then, that Judge Character found in Chief Justice Moyer a willing ear for his concerns about the public's perception of the fairness of Ohio's legal system. After talking to community leaders across the state, Chief Justice Moyer concluded that the level of public concern on this issue was sufficient to warrant a full-scale investigation.

With great care, the chief justice recruited the partnership of the Ohio State Bar Association and assembled the membership of this Commission to examine the pertinent issues. Among those recruited was Attorney James M. Kura, a renowned criminal defense attorney and the state's public defender. Jim brought a unique perspective and an uncommon energy to this Commission's work. No task was too large or too small for Jim to tackle. He favored the Commission with his incisive observations and his keen sense of what was right and what was wrong, a sense honed by years of working for those whose concerns and issues were most likely to receive little or no attention.

Jim Kura was one of this Commission's hardest working members. He chaired the subcommittee that explored the important issues facing people of color in the state's criminal justice system. We continued to benefit from his hard work long after he was diagnosed with terminal cancer. Jim continued to believe in the need for this Commission and to work for its successful completion until the day he died.

The vision and the efforts of these three men informed and shaped the efforts of the Ohio Commission on Racial Fairness. They supported the Commission's approach to the issues it confronted in an even-handed, deliberate way. They demanded that the Commission accept nothing at face value. They required that the Commission examine every allegation—those suggesting the propriety of the status quo and those outlining the need for change—with the same dispassionate eye.

We dedicate this final report to the commitment to fairness of these three men and to the memory of our friend and colleague, James M. Kura.

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