Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System

May 1994

Office of the State Court Administrator
Oregon Judicial Department

The Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System

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Abbreviations used in this report:

ABA	American Bar Association
ABE	Adult Basic Education
CSD	Children's Services Division
DRI	Disproportionate Representation Index
F2d	Federal Reporter Second Edition
FED	Forcible Entry and Detainer
L J	Law Journal
L Rev	Law Review
MHRC	Multnomah Human Relations Commission
Or	Oregon Reports—Supreme Court
Or App	Oregon Reports—Court of Appeals
ORCP	Oregon Rules of Civil Procedure
ORS	Oregon Revised Statutes
OSCI	Oregon State Correctional Institution
OSP	Oregon State Penitentiary
P2d	Pacific Reporter Second Edition
S Ct	Supreme Court Reporter
US	United States Supreme Court Reports
UTCR	Uniform Trial Court Rules

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Introduction

Forenote to Nonminority Readers

One conclusion permeates this report, but it is expressly stated only on this page. The conclusion should be evident to even a casual reader of the report. Lest any reader fail to perceive the message, however, we state it here explicitly:

> Nonminorities have brought about many of the problems that minorities encounter and are discussed in this report. Addressing these problems, and ultimately solving them, is the joint responsibility of nonminorities and minorities.

When a person or an institution has a problem, a common and reliable approach to solving the problem runs along these lines:

1. Define the problem and its cause.

2. Consult with the person or persons causing the problem and with the persons affected by the problem, and try to get them to agree upon a solution.

3. Implement the solution.

Often the greatest challenge is getting those who cause a problem to recognize any responsibility for the problem and to agree on the solution. Our society is filled with persons who nod in agreement that a problem exists and say, "It's them; not *me*."

Law schools, bar associations and other entities have periodic conferences and seminars about racial discrimination. Readers who have attended such conferences know that those in attendance are, for the most part, minorities. Not nonminorities, but minorities. The persons *affected* by the problem attend. Those *contributing* to the problem do not.

This report repeatedly urges members of the majority to learn about the problems discussed herein so that, ultimately, the majority *agrees* that racial discrimination in our society is "our problem" too and that nonminorities *must* be involved in the solution. Nonminorities have contributed to the problems that minorities experience, and if the problems ever are to be solved, then nonminorities must work with minorities to rectify the situation.

If a poll were taken of all the lawyers, court staff and judges in Oregon, it is doubtful that even one person would admit that he or she discriminates against minorities in any

way. "Sure," they might say, "there's a problem. But someone else is causing it. Not me." That attitude makes the education process even more difficult.

The truth is that many nonminorities were raised in a culture in which discrimination was common, even accepted. Not surprisingly, the habits and attitudes learned as children carry over into adult life.

This report, therefore, begins with a plea to nonminority judges, court staff, lawyers, law school faculty and students, juvenile staff, corrections personnel, law enforcement officers and others in government: recognize that our minority population has serious problems in our society. Nonminorities, who have contributed to the problems that minorities encounter, must work with minorities to solve these problems. This report contains a number of suggestions to address the issues of racial discrimination or ethnic bias at all levels in the Oregon judicial system. Our hope is that the reader agrees with our recommendations and is impelled to act.

Chapter 1

Overview of Task Force Report

The Oregon Supreme Court, on February 21, 1992, established the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System. This is the report of that task force. Instead of opening with our findings and recommendations, we begin with an incident from an Oregon courtroom. A Mexican-American defendant appeared on December 28, 1993, before an Oregon judge. The defendant had been arrested for driving under the influence (DUII) and had begun a diversion program, but he had not paid the diversion fees that had been assessed. The December 28 hearing was one of several at which the question was whether the defendant's diversion should be revoked because of nonpayment of diversion fees. At an earlier hearing, the defendant had told the judge he could pay $100 each week. The December 28 record shows that the defendant had been working for a "tree farm operation." The judge said:

> "I'm not going to let him just hold out money. And I know just darn good and well where that money from the tree harvest went. *I'll bet a good part of it went down South*, and that's his business, except he's got this obligation here." (Emphasis added.)

By invoking this stereotype, the judge mocked the idea of equal justice under the law and the notion that an individual has the right to be treated as a unique human being in our judicial system. That is one reason for some of our recommendations that follow.

We offer no pie-in-the-sky recommendations. *Every recommendation in this report is attainable within a reasonable time.* Many recommendations are attainable at little or no cost. But attainment will best be achieved if the goal of equal justice for all ever is in the minds of the members of the Oregon Supreme Court and others responsible for implementation of the recommendations.

This report is a small but important step. If the efforts of this task force are to bear fruit, the Supreme Court, other judges and court staff must be convinced that its recommendations are valid and that the problems are readily addressable. This report aims to accomplish that.

Unlike most chapters in this report, which end with recommendations, this chapter begins with a recommendation, the task force's strongest. Other recommendations are set forth in each chapter.

Recommendation Number 1-1

The task force recommends that the Oregon Supreme Court:

a. Publish its response to the recommendations contained in this report;

b. Appoint a committee to assist in the implementation of the recommendations in this report;

c. Require the committee to report annually on the progress made during the previous year;

d. Publish the progress reports of the committee.

The legacy of centuries of discrimination in the United States is a society in which racial discrimination continues to exist. The Oregon court system is no more immune from its effects than are other segments of society. While overt, intended discrimination against minorities[1] by nonminority judges, prosecutors, lawyers and court staff is not common, strong evidence demonstrates that racial minorities are at a disadvantage in virtually all aspects of the Oregon court system.

Many of the problems recounted in this report stem from cultural differences between minorities and nonminorities. The dominant culture of this state and nation is reflected in its courts. Largely nonminority judges and court staff do not understand the cultures of minorities who appear in the courts.

Conversely, minorities—many of whom come from countries with different justice systems—do not understand the Oregon courts in which they appear. This lack of understanding is not limited to minorities who speak little or no English. It is just as pervasive in Native-American and African-American cultures, in which English is the dominant language.

Conclusions of the Task Force Report

This report contains conclusions that should dismay all persons dedicated to the concept of equal justice for all. Among the conclusions:

1. Many non-English-speaking minorities appearing in court do not comprehend what is going on because they do not understand the justice system, because interpreters are not present, or because interpreters are not qualified.

2. Too few lawyers speak and understand the languages of non-English-speaking minority Oregon residents.

3. Too few minority lawyers practice in Oregon. An example: Only one African American is a partner in any large Portland law firm.

4. Efforts to recruit minority lawyers are inadequate.

5. Too few minorities are called for jury duty, and even fewer minorities actually serve on Oregon juries.

6. Peremptory challenges, eliminating individuals from serving on juries, are used solely because of the race or ethnic background of prospective jurors.

7. Judges handling family law cases involving minorities often lack an understanding of the traditions and cultural practices of minority families.

8. Too few minorities are employed in Oregon courts. Of the 49 management positions in the Oregon Judicial Department, none is filled by a minority.

9. In the criminal justice area, the evidence suggests that, as compared to similarly situated nonminorities:

   - minorities are more likely to be arrested,
   - minorities are more likely to be charged,
   - minorities are less likely to be released on bail,
   - minorities are more likely to be convicted,
   - minorities are less likely to be put on probation,
   - minorities are more likely to be incarcerated.

10. In the juvenile justice system:

    - minorities are more likely to be arrested,
    - minorities are more likely to be charged with delinquent acts,
    - minorities are more likely to be removed from their family's care and custody,
    - minorities are more likely to be remanded for trial as adults,
    - minorities are more likely to be found guilty of delinquent acts,
    - minorities are more likely to be incarcerated,
    - minorities lack experts sensitive to the cultural differences of minorities.

11. All nonminorities involved in the justice system—judges, court staff, lawyers, law school professors and law students—need ongoing, cross-cultural training. Nonminorities have contributed to most of the problems facing minorities today. Nonminorities must recognize that problems exist; nonminorities must address them with resolve and sensitivity.

Overview of the Task Force

On the recommendation of the Oregon Judicial Conference, the Supreme Court of Oregon ordered, on February 21, 1992, the creation of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System. The order is set forth, in part, in Appendix 8. The members of the task force were appointed in May 1992.

Why was the task force created? The Supreme Court created the task force to identify problems faced by racial and ethnic minorities in the judicial system; to examine the concerns of racial and ethnic minorities in their treatment in and by the courts; and to propose a course of action to address the problems and concerns.

Who is on the task force? Eighteen persons were appointed to the task force. The task force included four African Americans, one Native American, one Asian American, three Mexican Americans, two persons of Middle Eastern extraction and seven Caucasians. The membership also could be described by vocation: two trial judges, two appellate judges, a prosecutor, criminal defense attorneys, civil attorneys and public members. Twelve members were male; seven female.

The chair of the task force was former Associate Justice **Edwin J. Peterson**.[2] Professor **M. Khalil Zonoozy**, Director of International Student and Faculty Services at Portland State University, was vice chair. Other task force members were:

Kathleen Bogan, a lawyer and former Executive Director of the Oregon Criminal Justice Council, Portland.

Honorable Nancy W. Campbell, District Court Judge, Hillsboro.

Kathryn H. Clarke, a lawyer in private practice, Portland.

Honorable Mercedes F. Deiz, Senior Circuit Court Judge, Portland.

Marco A. Hernandez, Deputy District Attorney, Hillsboro.

Douglas Hutchinson, a lawyer and Executive Officer, Oregon Commission on Indian Services, Salem.

Corinne J. Lai, a lawyer in private practice, Portland.

Honorable Jack L. Landau, Judge, Oregon Court of Appeals, Salem. (When appointed, Judge Landau was Deputy Attorney General.)

Angel Lopez, a criminal defense lawyer, Portland.

Yvonne Martinez, public member, Oregon Department of Corrections, Salem.

Jeffrey B. Millner, a lawyer in private practice, Portland.

Jack L. Morris, a criminal defense lawyer, Hood River.

Liliana E. Olberding, public member, Spanish interpreter, Hillsboro.

William A. Olsen, a public member and President, Center for Organizational Research and Development, Portland.

Nargess Shadbeh, a Legal Aid lawyer, Woodburn.

H. Adunni Warren, a lawyer in private practice, Portland.

How the Task Force Gathered Information

The conclusions in this report were drawn from four sources: testimony at public hearings, extensive survey research, prior research and written comments submitted to the task force.

Public Hearings

In the summer and fall of 1992, the task force held nine public hearings throughout the state to encourage Oregonians to tell the task force of their experiences in the courts and observations regarding the treatment of minorities in the Oregon court system. The hearings were held in Woodburn, Pendleton, Ontario, Klamath Falls, Portland, Warm Springs, Salem, the Oregon State Penitentiary and the Oregon Women's Correctional Center.

The public hearings were well publicized in advance, and most were well attended. Witnesses were invited to give oral or written testimony regarding issues of race/ethnicity in the Oregon court system. Interpreters were provided for non-English-speaking persons who wished to testify. Each hearing was recorded and minutes of the hearings kept. The largest number of minority witnesses were Hispanics. Significant numbers of Native- American, African-American, Asian-American and Pacific Islander witnesses testified. Other ethnic groups also testified.

Survey of Oregon Legal Community

Also, 7,525 persons who use the court system were surveyed by the task force regarding issues of race/ethnicity in the Oregon court system. The task force prepared three surveys. The "main survey" was for lawyers, judges, court staff and corrections personnel. The second survey was for persons in the juvenile justice system. The third survey was exclusively for language interpreters/translators in the Oregon court system. Copies of the surveys are contained in Appendices 3, 4 and 5. Professor Robert Shotola, chair of the Department of Sociology at Portland State University and an expert in survey research, assisted in preparing the surveys, and he statistically analyzed the survey responses. Dr. Shotola's analysis is set forth in Appendix 1.

The main survey was distributed to 5,438 persons, including the following:

- All judges and court personnel statewide (1,562)
- Corrections personnel likely to appear in court (415)
- Municipal Court judges (182)
- Private and public attorneys in the following organizations:

  Oregon District Attorneys Association (400)

  Oregon Criminal Defense Lawyers Association (741)

  Oregon Women Lawyers (630)

  Oregon Trial Lawyers Association (700)

  Oregon Association of Defense Counsel (475)

  Oregon Minority Lawyers Association (258)

  Legal Aid lawyers (75)

The juvenile justice survey was sent to 1,778 juvenile law practitioners and court personnel. The interpreters survey was distributed to 309 persons who serve as interpreters in the Oregon court system.

A postage-paid return envelope, addressed to the Center for Sociological Research at Portland State University, was sent with each survey. Respondents were instructed not to write their names on their surveys; responses were anonymous. Returned surveys were scanned and tabulated at the Portland State Computer Center.

Of 5,438 main surveys distributed, 2,198 were returned, a response rate of 40 percent. Of the 1,778 juvenile surveys distributed, 667 were returned, a response rate of 37.5 percent. Of the 309 interpreter surveys distributed, 96 were returned, a response rate of 31 percent.

One goal of the survey was to obtain information based on actual experience in the courts. The survey asked questions in several different formats. For example, the survey included several "forced choice" questions, where the respondent was required to agree or disagree. Other questions gave the respondent an opportunity to agree, disagree or answer "no opinion." A third type of question asked respondents to rank their response on a scale that included the frequency with which they had observed certain behavior: NEVER (0% of the time), RARELY (1–5% of the time), SOMETIMES (6–25% of the time), OFTEN (26–50% of the time), and USUALLY (51–100% of the time).

For questions that asked respondents to agree or disagree, the tables used in this report are relatively easy to understand. For example, Question 3(a) asked, "Do you more agree or disagree that MINORITY LAWYERS need better grades in law school to be hired." The responses were:

Respondents who agree "that minority lawyers need better grades in law school to be hired."

Respondents	Percentage Who Agree
All respondents	22%
Minority respondents	39
Prosecutors	8
Criminal defense lawyers	32

There are nine chapters in this report. Each chapter discusses one subject area and contains findings and recommendations, as follows:

Chapter Number	**Subject**
1	Overview of Task Force Report
2	Interpreters
3	Minorities Working in Oregon Courts
4	Criminal Justice System
5	Juvenile Justice System
6	Civil Justice System
7	Juries
8	Oregon Law Schools
9	Minorities in the Legal Profession

Chapter 2

Interpreters

The first task force hearing was held in Woodburn in July 1992. It was a hot night. The meeting room was packed and people were standing in the rear and outside. A Spanish-speaking interpreter was available.

Shortly after the first Spanish-speaking witness began to testify, a murmur arose from the crowd. “The interpreter is not getting it right,” said one person. It quickly became apparent to everyone in the room that the person selected by the task force to provide Spanish interpretation was not equal to the task. Fortunately, a qualified back-up interpreter, Liliana Olberding, was available and she took over. Ms. Olberding volunteered to interpret at all subsequent task force hearings, and she was appointed to serve on the task force.

With the best of intentions, the task force failed in its first effort to get a qualified interpreter. Not surprisingly, courts have encountered similar problems.

The democratic ideal of equal justice under law requires that persons having disputes with one another or with the government have equal access to a tribunal in which they can hear and be heard and have their conflicts decided by a neutral and detached third party. The effectiveness of the court system is limited if parties or witnesses do not understand what is being said in court.

By law, “every writing in any action…in a court of justice in this state…shall be in English,” ORS 1.150. As a practical matter, almost all court business is conducted in English. Except for Native Americans, today’s Oregonians are immigrants or descendants of immigrants. In recent years, Oregon has experienced a new influx of pioneers from foreign lands. Increasingly, Oregon residents speak languages other than English, and many speak no English at all. The result: a commensurate rise of non-English-speaking court litigants.

Interpreters and the Judicial System

At the public hearings, non-English-speaking litigants, their interpreters and advocates, repeatedly voiced dissatisfaction with Oregon’s justice process. Many litigants felt misled by counsel; many argued that their legal theories and positions received little consideration from the court; many litigants believed that the court interpreter was not effective in presenting them with a clear understanding of what was taking place, or in adequately presenting their testimony. A picture emerged of confusion and frustration.

Many who came before us said that, because of cultural and language differences, they did not receive justice. The best they could hope for, they said, was to experience the process of justice even though it was unexplained and unintelligible.

> "Most Hispanic litigants do not comprehend legal terminology… Hispanics feel they are not adequately represented and their cases are not adequately addressed."
>
> *—Edward Hernandez, Hispanic Club, Oregon State Penitentiary, Salem*

Although the testimony usually focused on in-court proceedings, the task force also notes that interpreter services are sorely lacking in other related areas. It was repeatedly pointed out that non-English-speaking criminal defendants, in particular, face formidable obstacles in trying to comply with court directives because of the lack of interpreters in probation offices, Department of Motor Vehicle offices, alcohol and drug programs, and other more specialized treatment programs such as those for sex offenders. Without interpreters in such offices, an offender's ability to complete probation or a diversion program or to avoid running afoul of court prohibitions is compromised.

Interpreters responding to the survey voiced a common concern—the absence of formal training in legal terminology and in basic interpreter skills for court interpreters. Other areas of concern centered on the inability of attorneys to work effectively with interpreters and a perceived lack of empathy from the bench regarding the difficult nature of simultaneous court interpretation.

> "Many judges won't make a record that there is an interpreter, won't swear or won't make a record regarding qualifications."
>
> *—Connie Crooker, bilingual (Spanish-English) attorney, Portland*

Although laws mandate interpreter assistance during court proceedings, no laws existed before the 1993 legislative session to regulate the competence of interpreters. Although most non-English-speaking litigants seem to have been afforded court interpreters in recent years, no process was in place to assure that the job was done properly and uniformly.

Oral testimony before the task force spoke to this problem.

> "Certification and qualification of interpreters are needed. Translation is a more apt term than interpretation. Some interpreters advise rather than staying neutral and interpreting."
>
> *—Annabelle Jaramillo, Executive Director, Commission on Hispanic*

Affairs, Salem

> "Interpreters need more education and training. With training, we would get more qualified people from the community. We need more interpreters; the ones we have are overworked."
>
> *—Pat Sullivan, District Attorney, Malheur County*

Justice under the law may be denied to those who are not conversant in the language or prevailing culture. This not only handicaps the individuals involved, but also compromises the judicial system in the pursuit of justice for all. To assure equal access, while preserving the integrity of the process, cultural differences must be considered. Thinking and perception are shaped by more than vocabulary and grammar. This highlights the importance of the role and function of a court interpreter. To avoid injustice, it is imperative to measure the language skills *and* the cross-cultural capabilities of interpreters. The cultural skills of the interpreter should be compatible with the culture of the person whose testimony is being translated.

The task force worked with Kingsley Click, Deputy State Court Administrator, and Bill Linden, State Court Administrator, to secure the passage of legislation addressing these problems. Senate Bill 229 passed both houses and became law, 1993 Oregon Laws, chapter 687, now ORS 45.273 to ORS 45.297. (See Appendix 7.) The new law mandates, subject to available funds, statewide training, licensing and oversight of court interpreters as well as the implementation of an interpreter's code of ethics. The State Court Administrator must promulgate administrative rules to implement the new interpreter law.

Pay for court-appointed interpreters must be considered, especially in view of the difficult task they are called upon to perform, often on short notice. The current rate for court interpreters is $25 per hour. By comparison, the federal court system pays interpreters an average of $32.50 per hour with minimum flat fee compensation of $135 for zero to four hours of work and $250 for four to eight hours of work. With adoption and implementation of certification requirements, interpreters will be called upon to undergo rigorous training and testing and to have their ethical performance reviewable by a higher authority. So far, they have no assurance of even a modest pay raise.

The American justice system is a complex amalgam of difficult jargon, concepts and procedures. What judges and lawyers take for granted often seems unintelligible, even nonsensical, to intelligent persons who use the courts. The problem is exacerbated for the non-English-speaking litigant. Many non-English-speaking litigants have no understanding of how American justice works. Legal concepts such as arraignment, reasonable doubt, jury trial, relevance, hearsay or motion to suppress are not always understood. Portland court interpreter Terry Rogers pointed this out in oral testimony:

> "It takes longer to explain foreign concepts. It may take a long time to explain the right not to incriminate oneself, as well as the trial process."

Many survey respondents cited the need for translated legal documents:

> "I see Hispanic people more in criminal court because of their inaccessibility to the civil side. Small claims action are inaccessible to Hispanics—no interpreters, no forms in Spanish—so they resort to self-help remedies. We need interpreters on the civil side and forms printed in Spanish so people can use the forms themselves."
>
> *—Richard Rambo, attorney, Klamath Falls*

> "There is need to have court forms properly translated. Some of the forms used in Multnomah County are travesties. If the court understood what was being said in Spanish, it would void some of what people have signed."
>
> *—Terry Rogers, court interpreter, Portland*

> "Every court should have someone readily available (if not in the courtroom) to translate Spanish. Particularly the traffic departments run into problems with no one to translate basic information. A booklet with commonly used phrases would be helpful to let the defendant know what is going on."
>
> *—anonymous letter to the committee*

Equal access to the court also requires cross-cultural sensitivity on the part of judges, attorneys and court personnel. Letters and testimony reveal inconsistencies in intercultural awareness:

> "I have seen *several* well-educated judges speak more loudly to non-English-speaking defendants who are appearing with interpreters. The last time I checked, a non-English-speaking person did not understand English any better when it was shouted at them!"
>
> —*anonymous letter to the committee*

> "My favorite interpreter was one who kept interrupting an interview to explain that I was asking all the wrong questions because I didn't understand what the words meant to the defendant due to cultural differences. He did a great deal to educate me."
>
> —*anonymous letter to the committee*

Cross-cultural training of nonminorities can improve conditions for non-English-speaking minorities. However, the simple presence of bilingual and bicultural judges and court personnel would make the courthouse a more welcome environment for the non-English speaker.

> "I think the major part of the solution is ethnic diversity in court personnel. When I took office there was no one in the building who even spoke Spanish."
>
> —*Pat Sullivan, District Attorney,*
> *Malheur County*

> "I work in District Court, Clackamas County. There is a dire need for Spanish-speaking court personnel. We have an abundance of Spanish clients that come to our counters or call on the phone and *no one* can assist them with their questions."
>
> —*anonymous letter to the committee*

> "I have seen arraignment and release hearings continued until the following day because the defendant was Spanish-speaking and no one in the courtroom could speak Spanish. I can understand this type of situation with a less common foreign language or in a more rural country. However, this should never be the case for a Spanish-speaking person in the Portland Metro area."
>
> —*anonymous letter to the committee*

The words of one letter writer expressed the frustrations of many.

> "In a time when our communities are becoming more ethnically diverse, I believe there is a need for court personnel to be able to communicate with minority litigants. It is difficult to assist anyone

> through the maze of the court system when you cannot effectively communicate.
>
> During my employment I have not witnessed intentional prejudice, but I am concerned that the language barrier itself creates room for error."

People's lives are affected by their experience with the legal system. It is fundamental to a democratic society that *all* litigants understand the process. Every lawyer should be sensitive to his or her responsibility of informing non-English-speaking clients about our legal system.

Interpreters, Minorities and the Courts

Findings

1. The number of non-English-speaking litigants is rising at a rapid rate.

2. Significant numbers of non-English-speaking litigants are disadvantaged because they cannot understand the court system and its decisions.

3. Interpreters are often not available in offices that are associated with the court system. For instance, few probation offices, drug and alcohol programs, and other treatment programs have bilingual resources. At times, interpreters are not readily available in the courtroom itself.

4. A strong perception exists in the non-English-speaking community that many interpreters are not trained or are undertrained. Sometimes court staff, friends or relatives with inadequate language translation skills are used in an attempt to "get by" when a qualified interpreter is not present.

5. No statewide system is in place to train, license or regulate court interpreters.

6. Qualified court-appointed interpreters, who currently earn $25 per hour, are underpaid, considering the skill required for their work and its importance to the impartial administration of justice.

7. Simultaneous interpretation of oral testimony requires a high level of training and skill. Mere proficiency in a foreign language, in and of itself, does not qualify one to interpret in-court testimony from that language or to that language.

8. The bar, courts and attorneys must give greater consideration to the communication problems of non-English-speaking litigants and must understand that even excellent interpretation does not obviate many of the problems that arise because of cultural or class differences.

9. In a courtroom, not only is it essential that the interpreter understand his or her role; it is also essential that all persons in the courtroom understand the interpreter's role.

Recommendations

Recommendation Number 2-1

We recommend that the Judicial Department prepare an explanation of the court system and court process, drafted in simple format and language, to be made available to the public. This document should address essential issues including, but not limited to: the function and organization of the court system, the role and responsibilities of court litigants, interpreters and other participants, and appeal procedures. This document should be translated into the foreign languages most frequently spoken in Oregon. There should be a civil law version of this document as well as a criminal law version. The document is not expected to provide legal advice, but to highlight what a litigant can expect during the court process.

The Judicial Department should also prepare foreign language videotapes providing similar information.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Unknown.

Persons responsible: State Court Administrator with assistance of bench and bar.

Recommendation Number 2-2

Commonly used court forms should be translated into other languages. Small claims petitions, restraining order applications, forcible entry and detainer (FED) notices, plea petitions, diversion agreements, mediation documents and other forms to be determined by the State Court Administrator should be available not only in English, but also should be available in the foreign languages most commonly spoken in Oregon. All commonly used forms should include a question as to whether an interpreter is needed.

In counties with a significant minority population, trial court administrators should post signs in appropriate foreign languages.

Note: The task force believes that this recommendation can be accomplished without amending ORS 1.150. If there is doubt on this point, ORS 1.150 should be amended to permit the use of non-English forms.

Estimated date for implementation to be completed: January 1, 1996.

Estimated cost of implementation: Unknown.

Persons responsible: State Court Administrator, assisted by local court staff, court interpreters and bilingual attorneys.

Recommendation Number 2-3

Trial courts should:

a. **Increase the number of bilingual and bicultural court personnel who have contact with the public;**

b. **Through a personnel plan, provide financial incentives to employees who speak a second language and are called upon to use that language in dealing with the public;**

c. **For employees and judges who are willing to take foreign language courses, pay the tuition for the courses, if the language skills that are learned can be used at work;**

d. **Actively recruit bilingual court personnel;**

e. **Annually monitor and report on the status of the effort.**

Estimated date for implementation to be completed: Put plans in place by July 1, 1995, with pay enhancement. Recruitment and cross-cultural diversity training should be ongoing.

Estimated cost of implementation: Unknown.

Persons responsible: Local trial court administrators, State Court Administrator.

Recommendation Number 2-4

The Chief Justice and State Court Administrator should forthwith implement 1993 Oregon Laws, chapter 687. The Chief Justice or State Court Administrator should forthwith appoint a committee to draft the court interpreters code of ethics. This same committee should also recommend testing, certification and oversight procedures regarding court interpreter qualifications. We recommend that the code of ethics be modeled after that used by the Registry for the Deaf or the Washington State Code of Conduct for interpreters.

Estimated date for implementation to be completed: Committee appointed by September 1, 1994; ethics code completed by March 1, 1995; implementation of Chapter 687 by December 31, 1995.

Estimated cost of implementation: Unknown.

Recommendation Number 2-5

Certified interpreter fees should be raised from $25 to $32.50 per hour.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: $342,415 per year.

Person responsible: State Court Administrator.

Recommendation Number 2-6

A uniform trial court jury instruction should be drafted regarding interpreted testimony. The language of this jury instruction might be as follows:

> **"All parties and witnesses testifying in open court have the right to have their testimony articulated and heard. You are about to hear a trial in which one or more of the parties or witnesses do not speak English. Those parties or witnesses will be assisted by a court interpreter. The**

> **interpreter is neutral. The interpreter has the responsibility to translate from English to another language, or from another language to English, truly and accurately to the best of the court interpreter's ability and training.**
>
> **"You must evaluate interpreted testimony in the same manner as you would any other testimony. That is, you must not give interpreted testimony any greater or lesser weight than if such testimony was not interpreted. Neither shall you give greater or lesser weight to interpreted testimony based on your conclusions, if any, regarding the degree of English proficiency that the interpreted party or witness has."**

In appropriate cases, this jury instruction should be given after the jury has been impaneled and before testimony is taken.

Estimated date for implementation to be completed: March 1, 1995.

Estimated cost of implementation: Minimal.

Persons responsible: Oregon State Bar Committee on Jury Instructions.

Recommendation Number 2-7

Governmental agencies should provide interpreters in administrative proceedings.

Estimated date for implementation to be completed: January 1, 1996.

Estimated cost of implementation: Unknown.

Persons responsible: Executive Department, local governments, Legislative Assembly.

Recommendation Number 2-8

Interpreters should be provided in all court proceedings, including court-supervised arbitration and mediation.

Estimated date for implementation to be completed: January 1, 1996.

Estimated cost of implementation: Unknown.

Chapter 3

Minorities Working in Oregon Courts

The Supreme Court charged the task force to "collect demographic information on lawyers, judges, court officials, [and] other court personnel." The task force undertook the task of ascertaining the racial and ethnic makeup of the judiciary and Judicial Department staff and analyzing job classifications in each Judicial District and the state Judicial Department. If the task force found the racial and ethnic makeup of the judiciary and court staff not representative of the communities they serve, it was asked to determine: (a) what effect this may have on employees working within the Judicial Department and (b) whether this affects how minorities are treated by Judicial Department employees.

Importance of Having a Diverse Work Force

Minorities who appear in Oregon courts often feel like foreigners in their own court system. This perception was stated again and again at task force hearings across the state. Even if it could be assumed that most nonminority judges, lawyers, and court staff make every effort to see that justice is administered fairly, rulings will not be accepted as fair if minorities believe the system is skewed against them.

In most courthouses in this state, almost all, if not all, of the personnel are monolingual, monocultural, and nonminority. (*See* Appendix 3, Oregon Judicial Department Affirmative Action Plan, Utilization Analysis, Summary of Findings, EEO Category: all positions.) This is true even in courthouses in communities that have significant minority populations. It is difficult for minorities as well as other citizens to perceive the system as fair and not racially biased when its work force is not representative of the community. The "us versus them" mind-set is reinforced.

A judiciary and court staff that is racially and culturally diverse and whose members have a knowledge of non-English languages common in the community would increase the likelihood of effective access to the courts for all members of society. A diverse courthouse would be less intimidating to a minority litigant than one that is monoracial, monocultural and monolingual. This is especially true for someone who is both a racial minority and non-English-speaking person.

Consider the barriers a monoracial and monolingual courthouse presents to a non-English-speaking minority who, for example, seeks a restraining order. He or she may have been advised by the police after a domestic dispute to obtain the restraining order. The abuse victim goes to the courthouse where all employees he or she sees are

nonminority, no one speaks his or her language, all of the forms are in English, no interpreters are available to help, and the judge asked to sign the order speaks only English. This problem was emphasized at a task force hearing by the police chief of a city with a large minority and non-English-speaking population. It was also confirmed in interviews with employees of cultural centers and domestic violence shelters. The barriers are so extreme that non-English-speaking minority abuse victims rarely seek restraining orders.

A racially diverse courthouse work force would increase the likelihood that people will be treated fairly and without bias. Having daily contact with people of diverse cultural backgrounds increases the understanding of these cultures by all of the work force. Increased understanding fosters fairness.

Lack of diversity among Oregon's judges and court administrators may have a negative "trickle-down" effect that discourages a diverse and bias-free judicial system. Judges and administrators exercise authority and determine or recommend policy. Changes in workplace attitude are more likely to occur when people experience diversity on a day-to-day basis. The absence of diversity "at the top" suggests that the judicial system will continue to be nondiverse and racially biased unless steps are taken to change the judiciary and judicial administration. The task force believes that many persons in the judicial system lack an understanding of the benefits of a diverse work force.

The Judicial Department Affirmative Action Plan

We are respectfully, but strongly, critical of the Judicial Department's Affirmative Action Plan. The plan states:

> "The goal of the Judicial Department is to have an employee work force which is at least equal to the Oregon Labor Force in terms of the representation of women and minorities."

The task force applauds this goal. But that goal is only the first of many steps necessary to achieve a work force that truly is culturally diverse and serves a culturally diverse population. Granted, numerical parity seems to be the goal of federal affirmative action laws. But merely achieving numerical parity does little to address biases that already exist among nonminorities in a work force.

For example, changing a work force that is 100 percent nonminority to a work force that is 90 percent nonminority and 10 percent minority would still leave 90 percent of the work force with the biases and prejudices that pre-existed numerical parity. One writer succinctly put it, "Affirmative action gets the new fuel into the tank, the new people through the front door. Something else will have to get them into the driver's seat."[3]

By itself, racial parity achieves only arithmetic racial parity. The true and ultimate goal of an affirmative action program must be to increase the understanding of all races and ethnic groups in the workplace, to increase the appreciation of one for the other, to

achieve a society in which no race, no culture, is dominant other than in a numerical sense. The goal is to achieve a heterogeneous culture, one in which racial prejudice and bias, overt or covert, intended or unintended, no longer exists.

How can this be achieved? By *education, education and more education*. By education of judges and staff to make them aware of, and sensitive to, the manifold ways in which bias or lack of cross-cultural understanding creeps into conduct. This is the direction that the Judicial Department should be taking. *(And by education, education and more education of others—juvenile counselors, corrections personnel, indeed, all persons whose work brings them in contact with the justice system.)*

This problem is not unique. The private sector of American society recognizes and is addressing this very problem. The cover article of the January 31, 1994, issue of *Business Week*, pages 50–55, discusses what companies should do and what companies should avoid in "taking adversity out of the workplace." These quotations are alike relevant to the Judicial Department, indeed, to all government.

> "For some companies, diversity simply means affirmative action. But at others such as IBM, Corning, and Honeywell, it's part of a broader effort to change the corporate culture…[C]ompanies are linking diversity more closely to business objectives—and holding managers accountable for meeting them. The goal: to create a culture that enables all employees to contribute their full potential to the company's success."

The article also contains a list of "what companies should avoid," including this one:

> "[Avoid] **agitating** employees with one-shot sensitivity workshops and seminars that stir up emotions by pitting different groups against each other. Favor ongoing training programs that seek not only to educate workers about ethnic, racial, and cultural differences but also seek to change the company's culture."

Employment of Minorities in the Courts

Findings

1. The racial/ethnic composition of the judiciary is not representative of the populations served by the courts.

   Of 172 judges in the judicial system, only four are minorities, none of whom are minority women. Members of the bar should encourage minority lawyers to become judges.

2. The proportion of racial/ethnic minorities serving as nonjudicial court employees is not representative of the populations served.[4]

3. Racial/ethnic minorities are under-represented in all nonjudicial court positions.

4. To the extent that minorities are represented in nonjudicial court positions, they are concentrated in office/clerical positions.

5. Few minorities are on judges' staffs.

6. *No* minority court administrators are employed in the state.

7. No comprehensive programs implemented by the Judicial Department or by individual judicial districts specifically aim to increase minority representation in nonjudicial court positions through *specific* policies and procedures.

8. Of the 49 statewide positions in the executive, administrative and managerial court staff categories, *none* is filled by a minority. Moreover, several large Oregon counties have either no minorities or a limited minority representation in court administrative support categories.

Number of Minorities Available and On-Staff in Oregon Courts by County

County	Number of Positions	Percentage Minority Labor Force Availability	Number of Minority Hires
Benton	18	7.2%	0
Clackamas	62	3.9	1
Coos	31	5.4	0
Douglas	36	4.2	0
Jackson	56	4.6	0
Jefferson	7	23.7	0
Lane	91	4.8	1
Linn	33	2.9	0
Yamhill	22	4.5	0

9. Findings regarding the lack of minority representation of nonjudicial employees are even more disturbing when one considers that the Judicial Department goal apparently intends to comply with federal Equal Employment Opportunity (EEO) Guidelines based on 1990 census figures. These figures are outdated, and do not accurately reflect the population makeup of most counties. Comparing 1990 census figures with current school enrollment figures shows a significant increase in the minority population of the state since 1990. For example, the 1990 Census reported Oregon's Hispanic population to be four percent of the population. The

Oregon Department of Education reported that 4.37 percent of children attending school are Hispanic. In only two years the school enrollment figure rose to 5.32 percent for the percentage of Hispanic children in school in October 1992, an increase of more than 20 percent. (The number of Hispanic children attending school went from 21,200 in October 1990 to 27,115 in October 1992.) This increase is even more dramatic in some counties. In Marion County, the number of Hispanic children enrolled in school jumped from 3,859 in 1990 to 4,918 in 1992, a 27 percent increase; in Washington County, the Hispanic school enrollment figure jumped from 2,849 in 1990 to 3,912 in 1992, a 37 percent increase.

10. Substantial problems exist in communication between minorities and nonminorities in the court system, irrespective of the language spoken.

    A large percentage (64.1 percent) of all respondents to the main survey concluded that court personnel have some difficulty communicating with minority witnesses or litigants because of cultural differences that are *not language-related*. A slightly lower percentage (53.6 percent) of the same respondents believe that court personnel sometimes stereotype minority witnesses or litigants because of their race or ethnicity. (*See* Appendix 1.)

    The response of minority respondents is even more dramatic. For example, 73.6 percent of minority respondents to the main survey believe that court personnel have some difficulty communicating with minority witnesses or litigants because of cultural differences not language-related. Over 67.6 percent of minority respondents also believe that court personnel sometimes stereotype minority witnesses or litigants due to their race or ethnicity.

    Such problems exist within most work forces that include minorities and nonminorities. *Education* of staff is the best way to address this problem.

11. Minority employees believe they are discriminated against in terms of advancement opportunities and their treatment by judges, staff, attorneys and the public.

    This finding is based on personal interviews with a sampling of minority staff members, survey results returned by Judicial Department employees, and statements made by minority court employees at public hearings.

12. Support exists for cross-cultural diversity training in minority issues for all legal personnel.

    In response to the statement, "[S]ensitivity training in minority issues for all legal personnel would help attain fair treatment for all within the court system," 50 percent of all respondents to the survey agreed. A recurring theme among those testifying at task force hearings was the belief that cross-cultural diversity training for judges and court employees would help to increase understanding and achieve

fair treatment for those who work in the court system, and for those who come in contact with the court system. *Ongoing* cross-cultural training is the key.

Recommendations

Recommendation Number 3-1

Judicial selection committees should include the goal of achieving racial/ethnic diversity in the judiciary as one of the factors considered in making judicial appointment recommendations to the Governor, and the Governor should be encouraged to consider this factor in making judicial appointments. Members of the bar should develop a pool of qualified minority judicial candidates.

Estimated date for implementation to be completed: January 1, 1995.

Estimated cost: None.

Recommendation Number 3-2

Presiding judges and administrators responsible for hiring and promoting should give high priority to the goal of achieving racial/ethnic diversity at all levels of Judicial Department employment when making hiring and promotion decisions.

Administrators and judges must be held accountable for failing to recruit, hire or promote minorities.

The Judicial Department personnel office should have, as a performance goal, a marketing plan to reach minority applicants. All job openings should be advertised in ways to reach minority applicants.

Estimated date for implementation to be completed: January 1, 1995.

Estimated cost: None.

Recommendation Number 3-3

Judges and administrators responsible for filling vacancies should be trained in methods of attracting qualified minority employees, including

methods of identifying a wider, more ethnically diverse applicant pool to increase the number of minority applicants. They should be more aggressive in advertising and recruiting for qualified minority applicants for managerial and supervisory positions. Notice of job opportunities should be made known as early as practicable. The task force has been given numerous suggestions: advertising in minority publications, posting job announcements with various minority organizations (many have "job banks"), and emphasizing a preference for otherwise qualified job applicants who are bilingual.

Estimated date for implementation to be completed: January 1, 1995.

Estimated cost: Modest (training could be conducted at meetings regularly scheduled for judges and administrators).

Recommendation Number 3-4

Judges, administrators and all court personnel must be convinced, through education, of the need for and value of increasing the diversity of the work force at *all* levels. Diversity includes a message of inclusion rather than exclusion and, once achieved, will bring a variety of perspectives of human experiences, greater awareness and a more productive work force.

Estimated date for implementation to be completed: Ongoing; commencing no later than January 1, 1995.

Cost of implementation: Modest, but ongoing (should be included in ongoing training of judges and court personnel).

Recommendation Number 3-5

Ongoing cross-cultural awareness training should be established for judges and court staff, with the objectives of (1) creating an environment where individual differences are valued, not merely tolerated, and (2) creating a heterogeneous environment, rather than simply assimilating minorities into a dominant majority work environment.

Estimated date for implementation to be completed: Ongoing; commencing no later than January 1, 1995.

Cost of implementation: Unknown.

Recommendation Number 3-6

The Judicial Department should increase its efforts to train and attract bilingual employees. Suggestions include:

1. ***See* Recommendation 3-2.**

2. **Hiring preference should be given to otherwise qualified bilingual employees and applicants fluent in a language common to the environs of the courthouse.**

3. **The Judicial Department should reimburse the cost of judges and court personnel learning a second language that could be used at work.**

Estimated date for implementation to be completed: July 1, 1995.

Cost of implementation: Unknown.

Recommendation Number 3-7

Each court should appoint an ombudsperson who would investigate complaints against staff relative to allegations of racial bias. The State Court Administrator should appoint a person to act as a liaison between management and staff concerning staff racial issues or problems. Periodic reports should be made to the State Court Administrator and Chief Justice.

Estimated date for implementation to be completed: January 1, 1995.

Cost of implementation: Minimal.

Note: The task force does *not* recommend creating a new position. After receiving training in cross-cultural diversity, one or more staff members—preferably bilingual—could be appointed to hear and investigate complaints against court staff. By merely providing such access to dissatisfied persons, most complaints could be resolved expeditiously, with a corresponding increase in confidence in the courts, both by those using the courts and by those working *in* the courts. Each courthouse should post, in appropriate languages, notices advising persons of the availability of this service.

Recommendation Number 3-8

The Chief Justice should appoint an ombudsperson to investigate complaints against judges and administrators relative to allegations of racial bias.

Estimated date for implementation to be completed: January 1, 1995.

Cost of implementation: Minimal.

Recommendation Number 3-9

The success, or lack of success, of improving diversity in court staffing must be monitored. Specific goals and standards (in addition to numerical goals) should be developed to measure whether diversity is being achieved. The Chief Justice and State Court Administrator should monitor this improvement (or lack thereof) at least annually to ensure that needed diversity is achieved. The monitoring should focus on equal opportunity plans, recruiting minorities for the more responsible and more visible positions, cross-cultural diversity training, and the development of standards to assess progress other than on a purely numerical basis.

We recognize that development of non-numerical standards to evaluate success is a difficult challenge. But Oregon can be a leader in developing standards to evaluate the success of what we might call "Phase 2" of the affirmative action program—developing a *unitary* work force that is culturally diverse in thought and action as well as diverse in race and ethnicity.

Estimated date for implementation to be completed: January 1, 1996.

Cost of implementation: Unknown.

Recommendation Number 3-10

The Supreme Court, Chief Justice and State Court Administrator should adopt a canon for judges and administrative rules for staff that would prohibit discriminatory conduct. The judicial canon could be patterned after the ABA Code of Judicial Conduct 3B(6) (which has not been adopted in Oregon). It provides:

> **"Judges, in proceedings before the court, shall refrain from manifesting, by words or conduct, bias or prejudice based upon race or ethnic origin, against parties, witnesses, counsel or others."**

Estimated date for implementation to be completed: July 1, 1995.

Cost of implementation: Minimal.

Recommendation Number 3-11

Canon 2 of the Code of Judicial Conduct should be amended to provide:

> **"A judge should not engage in conduct, on or off the bench, that reflects or implements bias on the basis of race, sex, religion, ethnic or national origin, or sexual orientation (including sexual harassment)."**

***See* the Draft Report of the National Commission on Judicial Discipline and Removal, 102–03 (June 19, 1993).**

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

Chapter 4

Minorities in Criminal Courts

The task force heard wide-ranging reports of racial and ethnic bias within the Oregon criminal justice system. Oral and written testimony identified instances of racism at practically every stage in the process: from arrest and detention to charging decisions, bail and pretrial release hearings, jury selection, plea negotiations, trial, judge and jury deliberations, sentencing, imprisonment, and parole and probation decisions. The extent to which these reports reflect aberrant individual biases or deep-seated structural or organizational prejudices is difficult to establish. Statistical evidence suggests the existence of "niches" within the system where bias exists. Task force survey results are not conclusive. Still, the evidence that the task force received is too strong to ignore. There is, at the least, a significant perception, by both minorities and nonminorities, of racism *within* the criminal justice system and that perception is, in many ways, every bit as disturbing as statistical reality.[5]

Arrest and Detention

Findings

Strictly speaking, arrest and detention are matters that lie beyond the charge of the task force. Nevertheless, the sheer volume of comments to the task force regarding this pre-judicial stage of the criminal justice process warrants recognition. At virtually every public hearing a substantial portion of the testimony—in some cases a majority of the testimony—concerned racially discriminatory treatment by law enforcement officers. The complaints tended to fall into several categories.

First, a large number of witnesses complained of police stops, citations or arrests based solely on the color of a person's skin. Hispanic witnesses, in particular, complained of police action taken for the unwritten crime of "driving while Hispanic." One middle-aged woman, for example, reported being stopped while driving her 1980 Cadillac through a city. When she asked why she had been stopped, she said the officer replied, "We don't see very many Hispanics driving Cadillacs."

Second, witnesses complained of a lack of civility, or outright hostility, from law enforcement officers for no apparent reason other than their color. One witness complained that his arresting officer refused to provide an interpreter to assist him in responding to questioning. According to that witness, the officer explained: "You're in America, not in Mexico."

Third, witnesses complained of the extent to which law enforcement officers appear more inclined to use unreasonable force or deadly force against minorities than against white suspects.

Arrest data compiled by the State of Oregon Law Enforcement Data System reveals a disproportionately large number of minority arrests. In 1992, for example, 9,739 African Americans were arrested, representing 6.4 percent of all arrests. Yet African Americans account for only 1.6 percent of the state's 1990 population. Similarly, in 1992, 12,599 Hispanics were arrested, representing 8.3 percent of all arrests. Hispanics represented only 4 percent of the state's 1990 population. This disproportionality in arrests is especially evident in particular counties. In Multnomah County, 1992 arrests of African Americans accounted for nearly 23 percent of the total, while African Americans constitute only 5.9 percent of the county's total population. *See* Tables 4-7 and 4-8 at the end of this chapter.

This data, however, does not necessarily demonstrate the existence of racial bias at the arrest and detention phase. It is possible that the figures merely reflect the fact that a disproportionate number of persons of color are engaging in criminal activity, or that more arrests are of persons from lower socio-economic classes, which are comprised of a disproportionate number of persons of color, or that more police officers are being deployed in areas with larger minority populations. *See generally* A. Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* 179–98 (1992). Those possibilities still may reflect racial bias, but of an entirely different sort.[6]

Insufficient data is available from which to draw hard conclusions concerning the extent to which racial and ethnic bias affect arrest and detention decisions in Oregon. Nevertheless, the combination of the available data and hearing testimony concerning instances of actual discriminatory treatment cannot be ignored. Certainly, minorities strongly perceive bias, and that perception undercuts the credibility and effectiveness of law enforcement throughout the state.

Law enforcement agencies appear to be aware of the potential for racial and ethnic bias in arrest and detention decisions. The Oregon State Police has distributed information to all officers concerning the need to be aware of cultural differences in law enforcement work. However, the task force knows of no consistent, mandatory, formalized law enforcement officer training programs concerning cross-cultural awareness.

Recommendations

Recommendation Number 4-1

The Chief Justice should recommend to the Governor:

1. **That all Oregon State Police officers be required to receive cross-cultural awareness training, including training on the extent to which cultural differences may be relevant in investigations and other law enforcement activities;**

2. **That the Board on Public Safety Standards and Training be required to offer similar training as a prerequisite to certification.**

Estimated date for implementation to be completed: July 1, 1994.

Estimated cost of implementation: Minimal.

Recommendation Number 4-2

All law enforcement agencies—state, county and city—should implement a hiring program designed to attract minority and bilingual police officers.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

Charging Decisions

Findings

In Oregon, the county prosecutor has the authority to determine whether to file charges against an arrested person, what charges to file and what penalties to seek. In exercising that authority, the prosecutor is constrained by no statutes, rules or regulations. The prosecutor is constrained by the constitution and case law to make those decisions in a nondiscriminatory manner. However, the judiciary traditionally is deferential to the discretion of the prosecutor in reviewing charging decisions for possible unconstitutional bias. *See, e.g., U.S. v. Redondo Lemos*, 955 F2d 1296, 1299 (9th Cir 1992). This leaves the prosecutor in a singularly powerful position in the criminal justice system. His or her discretion is nearly total, leaving significant room for potential abuse.

Research in other jurisdictions suggests that, in fact, racial and ethnic minorities—particularly African Americans and Hispanics—are much more likely than whites to be charged with felonies, especially if the victim is white. *See generally* Comment, *Why Have You Singled Me Out? The Use of Prosecutorial Discretion for Selective Prosecution*, 67 Tulane L Rev 2293 (1993); Developments, *Race and the Criminal Process*, 101 Harv L Rev 1472, 1525–32 (1988). Decisions to seek the death penalty have been shown to be especially suspect. *See McClesky v. Kemp*, 481 US 279 (1987).

The task force knows of no such research concerning prosecutorial decision-making in Oregon. Many, if not most, counties do not maintain data on the variable of race in the filing and disposition of cases. Charging practices no doubt vary considerably from county to county; no uniform charging guidelines exist at this time. The Oregon District Attorneys Association has been studying the possibility of producing uniform charging guidelines, but none has been proposed or adopted to date. Other jurisdictions have operated under some form of uniform charging guidelines for as long as two decades. The California District Attorneys Association, for example, published the "Uniform Crime Charging Standards" in 1974. The most recent edition, published in 1989, lists as "improper bases for charging" the race, religion, nationality, occupation, economic class or political association of the charged person or position of the victim.

The task force heard testimony from a number of witnesses who believed that race was a factor in prosecutorial charging decisions. Witnesses testified that persons of color are more likely to be charged with crimes than whites engaged in the same activities and that persons of color are more likely to be charged with more serious crimes than whites engaged in the same activities. Witnesses also testified that the color of the victim appears to be a factor taken into account by prosecutors: if the victim is white, the prosecutor is more likely to charge than if the victim is not. One prosecutor acknowledged that she charged a disproportionately high number of Hispanics, although she suggested that—as in the case of arrest data—that may be explained by the fact that criminal behavior in her county is largely a function of low income, unemployment and similar factors. The task force is well aware of the limitations of anecdotal testimony. It is also aware of the importance of the prosecutor's discretion in making charging decisions. Only the prosecutor is in a position to weigh the complex set of variables—such as the severity of the crime, the strength of the evidence, the likelihood of conviction—that go into determining the extent to which it is appropriate to devote the state's limited resources to enforcement of the law in a given case. Nevertheless, the task force considers unacceptable the nearly complete absence of any limitations on the prosecutor's charging authority. The need for discretion, while compelling, must be balanced against the potential for abuse. The need to ensure that the charging decision is free from racial and ethnic bias must be taken into account.

Recommendations

Recommendation Number 4-3

District attorneys should be required to collect and report to the Criminal Justice Council data on the variable of race in all charging decisions.

Estimated date for implementation to be completed: January 1, 1996.

Estimated cost of implementation: Unknown.

Recommendation Number 4-4

The legislature should direct the Criminal Justice Council to develop uniform charging standards to be used by all prosecutors in Oregon. The uniform standards should be sufficiently detailed to provide meaningful limits on prosecutorial discretion and to enable judicial review. At a bare minimum, they should specify that race, religion, nationality, gender, occupation or economic class are improper bases for charging. The Criminal Justice Council should be directed to report biannually to the legislature on the implementation of the standards.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Unknown.

Pretrial Release

Findings

Several witnesses testified that pretrial release decisions appear to be based on the race of the defendant. These witnesses complained that white defendants are more likely to be released without bail, while minority defendants are more likely to held in custody or subjected to bail requirements that are impossible for them to meet. Others complained that minority defendants are subjected to more careful scrutiny by the courts than are nonminorities. One lawyer, for example, mentioned a judge who often requires Hispanic defendants' employers to be notified of the defendants' legal problems while imposing no such requirement on white defendants. Others complained of implicitly discriminatory pretrial release criteria that unfairly discriminate against migrant workers in particular.

Task force survey results based on the actual experience of the respondents are consistent with those perceptions. About half of the respondents (47.8 percent) said that minority defendants are less likely than nonminority defendants to be released without bail pending trial. Similarly, a third of survey respondents felt that minority defendants are more likely to have higher bail set for them. Among minority respondents to the survey, the percentage of those who believe that minorities are less

likely to be released on their own recognizance is substantially higher (65.2 percent). Similarly, more minority survey respondents (55.5 percent) said that minority defendants are likely to have higher bail set for them than nonminority defendants.

Little empirical data exists on the extent to which the race of a defendant influences pretrial release decisions. Oregon law prescribes a uniform procedure for making pretrial release decisions. The law directs that persons in custody who have a right to be released[7] are to be released on their own recognizance, subject to the "least onerous" conditions likely to ensure later appearance, unless the application of enumerated release criteria shows that release is unwarranted. ORS 135.245(3). Those criteria include the defendant's employment status and history, the defendant's financial condition, the nature and extent of family relationships with defendant, the past and present residences of the defendant and any facts tending to indicate that the defendant has "strong ties to the community." ORS 135.230(6).

The release criteria are, at least facially, race-neutral. Some of the criteria, particularly those relating to employment and income, have the potential for unfair application to minority defendants, who tend to make up a disproportionately large percentage of the unemployed or lower economic classes. For example, even when bail for a Hispanic migrant farm worker is set at the same level as bail for a nonminority defendant, the migrant worker may rarely be able to post that amount. However, nothing in the release law gives these factors any particular prominence, and they are subject to the general statutory commission to impose the "least onerous" conditions that are likely to ensure appearance.

Recommendations

Recommendation Number 4-5

The Chief Justice should require trial judges, in rendering pretrial release decisions, to use uniform forms that include the race of defendants.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

Recommendation Number 4-6

The legislature should direct the Criminal Justice Council to study and report the extent to which the race of a defendant affects the outcome of a pretrial release decision, either in the decision whether to release on personal recognizance or in the conditions of release.

Estimated date for implementation to be completed: January 1, 1995.

Estimated cost of implementation: Unknown.

Recommendation Number 4-7

The Chief Justice should propose that ORS 135.230(6) be amended to include the following as a "release criterion": "the defendant's ability to provide cash, stocks, bonds or real property to secure a promise to appear in court."

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

Plea Negotiations

Findings

The task force heard frequently from minority witnesses that they had been "pushed" into accepting plea negotiations rather than exercising their right to trials. A number of witnesses suggested that it is more common for minority defendants than nonminority defendants to be encouraged to take a plea. The suggested reasons for this practice include defense counsel's assessment that minority defendants are more likely to be convicted and that minorities are more difficult than nonminorities to defend, particularly when language barriers exist.

Slightly more than a third of all respondents to the task force survey concurred in the perception that minority defendants are more frequently advised to plead guilty. Of the minority respondents, however, 57.4 percent believed that minority defendants are more often advised to take a plea bargain, and 61.8 percent believed that minority defendants are given less than adequate explanations of court proceedings than similarly situated nonminority defendants. To the contrary, felony plea rates data do not appear to substantiate the reported perception. The Criminal Justice Council reports a breakdown of 1991 felony plea rates by race as follows (from 9,602 cases statewide):

Table 4-1

Felony guilty plea rates by race/ethnic group

Race/ethnic group	Percentage of guilty pleas

White	90%
African American	87
Native American	83
Hispanic	88
Asian	82

This data suggests that minorities do not enter felony guilty pleas more often than do nonminorities. The data does not, however, address the question whether minority defendants are less likely than nonminority defendants to be given adequate explanations of the consequences of the negotiated plea arrangement. Post-hearing complaints that a minority did not understand the consequences of his or her guilty plea are, in fact, not uncommon. *See, e.g., Keeney v. Tamayo-Reyes*, 118 L Ed 2d 318 (1992) (Hispanic *habeas* petitioner complained that he did not understand that by pleading guilty he would lose his right to jury trial).

Conduct of Trial

Findings

The behavior of judges, juries and lawyers in the courtroom also was the subject of testimony before the task force. Witnesses complained that judges and juries begin the trial process with built-in biases against the credibility of minority witnesses and parties. Others expressed concern that judges and juries simply do not understand differences in demeanor that may be attributable to cultural differences and not to truthfulness. A number of witnesses, for example, asserted that judges and juries are likely to draw adverse inferences from an Asian or Hispanic witness who fails to make eye contact with anyone in the courtroom, when that behavior may more accurately be seen as a cultural sign of respect.[8] The task force heard testimony about judges who refused to let witnesses speak in court because of the witnesses' inability to speak English. The task force also heard numerous anecdotes concerning comments of both court and counsel that reflect, at best, insensitivity and, at worst, outright hostility to minorities in the courtroom.

Even seemingly inoffensive references to race are problematic. For example, the Oregon Court of Appeals recently, in reciting the facts of a case, stated that "[o]ne witness testified that Osiris and a taller, younger, *black* man had approached Gonzales and demanded drugs, then money." *State v. Taylor*, 125 Or App 636, 638, 866 P2d 504 (1994) (emphasis added). This reference was not necessary to the decision in the case. The court simply could have described the defendant as "a taller, younger man" without affecting the analysis and resolution of the case. References to race, when not directly relevant to the resolution of a case, are dangerous because they perpetuate, and can exploit, the stereotype that minorities are likely to commit crimes.

Task force survey results indicate that a vast majority of respondents have either "never" or "rarely" observed any disrespect or discourtesy toward minority witnesses or litigants. Nevertheless, a significant number of respondents said they have observed such behavior. Of the minority survey respondents, for example, 10.1 percent said that court personnel "usually" stereotyped minority witnesses or litigants. More than a third (37.7 percent) of the minority respondents also complained of having seen racial or ethnic "stereotyping" in the courtroom "sometimes" or "often." Of related concern is a perception that court personnel do not communicate well with minorities. Approximately a third of all survey respondents indicated that they had "sometimes" or "often" observed court personnel, judges or lawyers having difficulty communicating with minority witnesses or litigants due to cultural differences. The figure is substantially higher (52.8 percent) among minority respondents.

Hard data on the extent to which racial or ethnic bias invades the courtroom is difficult to come by. Many instances of appeals to racial or ethnic prejudices in courts around the nation have been catalogued in Johnson, *Racial Imagery in Criminal Cases*, 67 Tulane L Rev 1739 (1993). Empirical studies suggest that white jurors have more trouble distinguishing African-American faces than white faces and that white jurors tend to assume less favorable characteristics of African-American witnesses and defendants. *Id*. at 1639–40 (citing studies). The task force knows of no such studies of Oregon juries or Oregon courtroom conduct.

The task force recommends amendments in the canons of judicial conduct and ongoing cross-cultural training to address these problems. *See* recommendations in Chapter 3.

Recommendation Number 4-8

Judges should be aware of racial stereotypes lurking beneath references to race. Accordingly, judges should refer to race only when necessary to the disposition of the case.

Sentencing

Findings

The task force heard testimony that minorities are likely to receive greater sentences than nonminorities upon conviction of the same offenses. One lawyer complained that Hispanics may be denied optional probation because they fail to satisfy regulations that require that "a treatment program is available" when no such treatment programs for non-English speakers exists, particularly in sexual abuse cases. Another submitted the transcript of a case in which a judge meted out a tough sentence to provide a Hispanic defendant "enough incentive to stay where he belongs and, in essence, stay out of this country." The perception appears to be particularly widespread among minorities. As one minority witness stated: "If you're a black man, you're going to prison."

A substantial number of task force survey respondents reported the same perception. A third of all respondents answered that minorities are more likely than similarly situated nonminorities to receive a sentence of prison than probation. Among minority respondents that figure nearly doubled, with 60.1 percent believing that minority defendants are more likely than nonminority defendants to receive prison sentences. Nearly half of the minority respondents (49.6 percent) felt that minority defendants are more likely to receive a longer prison sentence.

Oregon is one of more than a dozen states that have adopted uniform sentencing guidelines for all felony crimes. Developed by the Oregon Criminal Justice Council, the sentencing guidelines were approved by the 1989 Legislative Assembly and apply to all crimes committed on or after November 1, 1989. One of the purposes of the guidelines is to achieve sentence uniformity and promote sentencing decisions that are racially neutral.

The sentencing guidelines set presumptive sentences for convicted felons based on the seriousness of the crime and the offender's criminal history. The presumptive sentences are stated graphically in a two-dimensional grid, with one axis ranking crime seriousness and the other ranking criminal history. Judges are permitted to depart from the presumptive sentence and impose a sentence more (an "upward departure") or less (a "downward departure") severe than the presumptive sentence upon a finding that there are substantial and compelling reasons for the departure.

The extent to which the administration of the sentencing guidelines has resulted in more uniform sentencing practices has been monitored by the Sentencing Guidelines Board. The most recent report of the board, *Third Year Report on Implementation of Sentencing Guidelines 1992*, analyzes the sentencing of 12,354 felons during calendar year 1992. It reveals that, after three years of guidelines implementation, racial disparity, although considerably reduced, continues to exist in sentencing decisions, particularly where judges retain discretion to depart from presumptive sentences set by the guidelines.

The Third Year Report finds that the 1992 imprisonment rate varied significantly by race:

Table 4-2

Offenders sentenced to prison by race/ethnic group

Race/ethnic group	Percentage sentenced to prison
White	16.7%
Hispanic	22.1
African American	27.2
Native American	20.1
Asian	25.0

The Third Year Report notes that the disparity in imprisonment rate is most likely a result of higher presumptive imprisonment sentences required by the guidelines, which are occasioned by minority convictions of more serious crimes and more serious criminal history records. The Third Year Report adds that some of the disparity is a function of judges' decisions to depart from the guidelines. Those departure decisions fall into two general categories: "dispositional" departures and "durational" departures.

Dispositional departures occur when the presumptive sentence is prison and the offender is sentenced to probation (a "downward" dispositional departure) or vice-versa (an "upward" dispositional departure). The Third Year Report shows that, statewide, minorities had an *upward* dispositional departure rate almost double that of whites. According to the Third Year Report, minority offenders tend to have more serious criminal histories than white offenders and those with more serious criminal histories tend to have higher upward dispositional departure rates. Controlling for criminal history, the Sentencing Guidelines Board found no racial disparity in 1992 upward dispositional departure rates, with the exception of drug offenders with no or one prior adult felony drug conviction. Within that group, the board found Hispanic offenders had an upward dispositional departure rate of 4.6 percent, while the rate for African-American offenders was 1.9 percent, and the rate for white offenders was 0.4 percent.

The Third Year Report also reveals some disparities in downward dispositional departures. In Multnomah County, where 58 percent of the state's minority felons are sentenced, racial disparity in downward dispositional departure rates was deemed statistically significant. The rate for white offenders totaled 22 percent, while the rates for Hispanic and African-American offenders were only 10.3 percent and 15.8 percent respectively.[9]

Departures may also be "durational." Such departures occur when the judge imposes a prison sentence that is longer (an upward durational departure) or shorter (a downward

durational departure) than the range that is specified by the guidelines grid as the presumptive sentence. The Sentencing Guidelines Board found that, with the exception of one category of offenders, there is no statistically significant racial disparity in the imposition of durational departures. The single exception is the category of drug offenders sentenced in counties other than Multnomah, where Hispanics were found to be more likely to be sentenced to an upward durational departure. In that category of offenders, 11 percent of Hispanics received upward durational departure sentences, while none of the whites received such sentences.

A final category of sentences analyzed for possible racial disparities involves sentences of imprisonment where optional probation is included in the presumptive sentence. The bulk of offenders eligible for optional probation are classified in a single grid block (8-I). The Third Year Report indicates that in these cases, whites received probation 77 percent of the time, Hispanics 41 percent of the time, and African Americans 54 percent of the time. Particularly in the category of drug offenders, Hispanics appear to be offered probation significantly less than any other racial group. According to the Third Year Report, in such cases, white offenders were sentenced to probation 77 percent of the time, African Americans 71 percent of the time, and Hispanics only 29 percent of the time.

In sum, the Sentencing Guidelines Board's annual report establishes that, although racial disparity has been reduced significantly, it still exists under the state's sentencing guidelines. That disparity appears to be more pronounced when judges retain discretion to depart from the presumptive sentences contained in the grid. In such cases, Hispanic offenders appear to be treated more severely than African-American offenders, and African-American offenders more severely than white offenders.

Although, as the Sentencing Guidelines Board points out, a substantial amount of the racial disparity may be explained by the fact that minority offenders tend to have more serious criminal histories than white offenders, that explanation fails to take into account the possibility that racism may, in some measure, account for those more serious criminal histories. To the extent that is so, implementation of the guidelines simply has perpetuated the effects of that racism in subsequent cases. A number of witnesses recommended limiting the use of criminal histories that pre-date the implementation of the sentencing guidelines to ameliorate the possibility that racism affected prior convictions and sentences.

The task force also notes that obtaining explanations for departures is complicated by the unavailability of the judges' stated reasons. Although judges are required to state their reasons on the record, that information is not readily available without ordering a transcript in each case. The guidelines reporting form submitted by the court in each case records only a few categories of bases for departure decisions, and those categories are too broad to provide any meaningful explanations. For example, the explanation of "persistent involvement" and "other" account for most departures. It is not possible, after the fact, to determine what either of these means.

The task force also heard complaints that not all counties are reporting sentencing decisions as required while others are reporting only partially. This, too, hampers the ability of the Sentencing Guidelines Board and others to evaluate the effectiveness of implementation of the guidelines, and possibly unfairly skews the results that are reported.

A recent audit of Multnomah County sentencing shows significant differences in decisions to impose jail sentences in drug cases involving Hispanic and white offenders with little or no criminal record. Of the Hispanics in that category, 74 percent were sentenced to jail; of the whites, only 35 percent.

The disparity in the use of jail sentences decreases as criminal history increases. In the case of Hispanics and whites with prior nonperson felony records, 73 percent of the Hispanics were sentenced to jail, while 53 percent of the whites were sent to jail. In the case of Hispanics and whites with prior person felonies, 75 percent of the Hispanic offenders were sentenced to jail, compared to 68 percent of white offenders with similar histories.

Interpretation of the data is complicated somewhat by the fact that Hispanic offenders who are illegal immigrants are generally sentenced to jail because probation is considered an illegal sentence for such persons.

Recommendations

Recommendation Number 4-9

The Chief Justice should require trial judges to use a uniform judgment form, or other uniform form, that includes the defendant's race and that states specifically the reasons for a departure (in those instances in which a departure sentence is imposed) from a presumptive sentence applicable under the guidelines.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

Recommendation Number 4-10

Because some counties have not been reporting as required, all counties should be required to submit sentencing guidelines reports timely and in a complete manner.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

Recommendation Number 4-11

The Sentencing Guidelines Board should again consider amendments to the sentencing guidelines that establish a five-year sunset period for consideration of prior criminal history.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

Recommendation Number 4-12

Because of the immense help that its statistics have been to this task force, and because it is imperative that such statistics be available in the future, the Criminal Justice Council should continue to study and report on racial disparities in sentencing.

Estimated date for implementation to be completed: Not applicable.

Estimated cost of implementation: Unknown.

Imprisonment, Parole and Probation

Findings

Although imprisonment, parole and probation are beyond the charge of the task force, sufficient testimony was received to warrant comment. The task force heard testimony from a number of witnesses, including inmates at the Oregon State Penitentiary (OSP) and the Oregon Women's Correctional Center, that "racism is alive and well" within Oregon's corrections system. Some witnesses stated that the existence of a disproportionately large number of minority inmates in corrections institutions evidences racism in the criminal justice system. Others complained that "your skin color, your

accent, and the money in your pocket will determine how you are treated." African-American inmates complained that they are unfairly assumed to be members of gangs solely because of their color, which adversely affects their chances for early release. A number of inmates objected to discrimination against minorities in the availability of vocational training. Others complained about the small number of minorities on staff. Still others complained that persons who perform psychological evaluations are nonminorities, and lack sensitivity to the minority defendant's cultural background.

Offender population statistics reveal a disproportionately high percentage of minorities subject to Department of Corrections supervision in one form or another. For example, although African Americans make up only 1.6 percent of the state's total population, they make up 7.6 percent of those persons in custody or supervised by the Department of Corrections. The breakdown of the population of offenders in the 12 correctional institutions located around the state is as follows:

Table 4-3

Population of offenders in correctional institutions by race/ethnic group

Race/ethnic group	Institution population percentage	Statewide population percentage (1990 census)
White	72.8%	92.8%
African American	13.5	1.61
Hispanic	10.5	4.0
Native American	1.9	1.33
Asian	1.2	2.42

The breakdown of the population of those offenders in community services is similar:

Table 4-4

Population of offenders in community services by race/ethnic group

Race/ethnic group	Community services population percentage	Statewide population percentage (1990 census)
White	81.1%	92.8%
African American	9.4	1.61
Hispanic	6.5	4.0
Native American	1.5	1.33
Asian	0.7	2.42

In both cases, all minorities except Asians are over-represented, and nonminorities are underrepresented.

Overrepresentation of minorities in the state's corrections programs is to be expected, given the disproportionately higher numbers of minorities who are arrested, charged, prosecuted, convicted and sentenced to prison. The number of minority offenders subject to Department of Corrections supervision does not, in and of itself, demonstrate racism in the corrections system. However, some upward "creeping" appears in the proportion of minorities within the criminal justice system. Thus, while African Americans represent 6.4 percent of all arrests, they make up 7.8 percent of the criminal convictions and 13.2 percent of the prison population. It is difficult to avoid the conclusion that racial bias accounts for at least some of the cumulative increase in the proportion of minorities.

Statistics concerning the availability of vocational training appear to bear out some of the concerns expressed by inmates. The breakdown of participants in vocational training programs at OSP and Oregon State Correctional Institution (OSCI) is as follows:

Table 4-5

Population of offenders in vocational training programs at correctional institutions by race/ethnic group

Race/ethnic group	OSP		OSCI	
	Percentage in vocational training	Total institutional population percentage	Percentage in vocational training	Total institutional population percentage
White	87.67%	75.15%	75.0%	68.4%
African American	8.22	11.85	15.0	17.91
Hispanic	4.11	9.51	8.33	9.77
Native American	0.0	2.69	1.67	1.4
Asian	0.0	0.8	0.0	2.33

Thus, in both institutions, a disproportionately large percentage of participants in vocational assistance are nonminorities, while the percentage of minority participants is generally lower than the minority share of the prison population for all groups except Asians.

Data on participation in educational programs reveals a very different distribution. Participation in Adult Basic Education (ABE) at OSP and OSCI, for example show the following:

Table 4-6

Population of offenders in adult basic education (ABE) at correctional institutions by race/ethnic group

Race/ethnic group	OSP		OSCI	
	Percentage in ABE	Total institutional population percentage	Percentage in ABE	Total institutional population percentage
White	59.09%	75.15%	44.64%	68.4%
African American	9.09	11.85	23.21	17.91
Hispanic	27.27	9.51	27.68	9.77
Native American	2.27	2.69	0.89	1.4
Asian	2.27	0.80	3.57	2.33

There, African-American and Hispanic inmates participate in adult basic education at a rate that exceeds the percentage of their prison population. This is most likely a

product of the educational background of offenders, *i.e.*, the fact that white offenders tend to come to prison with more education on the average than do minority offenders.

Inmate complaints that the Department of Corrections employs few minorities do not appear to be borne out by the department's own work force statistics. According to its work force analysis of August 11, 1993, the percentage of minorities working for the department is slightly more than 11 percent. However, the number of minorities at management levels in the Department is quite low, particularly at institutions that house large percentages of minority offenders. That fact no doubt contributes to the impression that the department employs too few minorities.

One final observation deserves mention. At least since 1989, sentencing decisions have been subject to uniform guidelines, but the same has never been true of parole revocation decisions, or decisions to grant or deny institutional "earned time credits" (which can reduce an offender's prison term), and other prison and post-prison supervision decisions. These decisions should be monitored for consistency and possible racial or ethnic bias.

Recommendations

Recommendation Number 4-13

The Department of Corrections and the Criminal Justice Council should be required to monitor and report whether race, ethnicity or cultural differences of inmates play a role in revocations of parole or post-prison supervision or probation status or in administrative processes, such as granting or denying earned time credits.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Unknown.

Recommendation Number 4-14

The Department of Corrections should examine the requirements of inmate participation in educational, vocational and treatment programs to determine whether the entry requirements operate in a manner that systematically disfavors any racial or ethnic group.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Unknown.

Recommendation Number 4-15

The Department of Corrections should develop a program designed for employees to enhance retention and promotional opportunities of minorities.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Unknown.

Table 4-8

State of Oregon 1990 census figures by race and county

Total Population	County	Population composition by race/ethnicity White	Black	Indian	Hispanic	Asian	Other Race
15,317	Baker	14,829	29	137	276	45	1
70,811	Benton	64,103	580	501	1,735	3,845	47
278,850	Clackamas	263,965	1,107	1,824	7,129	4,723	102
33,301	Clatsop	31,756	99	361	648	419	18
37,557	Columbia	36,067	37	485	684	273	11
60,273	Coos	56,879	133	1,338	1,353	556	14
14,111	Crook	13,455	11	207	388	47	3
19,327	Curry	18,367	31	444	354	121	10
74,958	Deschutes	72,303	78	609	1,526	426	16
94,649	Douglas	90,196	140	1,428	2,225	629	31
1,717	Gilliam	1,668	-	10	30	9	-
7,853	Grant	7,595	6	86	152	14	-
7,060	Harney	6,544	2	252	221	39	2
16,903	Hood River	13,628	36	186	2,752	284	17
146,389	Jackson	136,957	319	1,722	5,949	1,386	56
13,676	Jefferson	9,590	20	2,551	1,448	62	5
62,649	Josephine	59,521	123	802	1,749	434	20
57,702	Klamath	51,704	352	2,202	2,984	442	18
7,186	Lake	6,689	5	178	270	41	3
282,912	Lane	265,391	2,040	3,017	6,852	5,419	193
38,889	Lincoln	36,962	63	926	598	329	11
91,227	Linn	87,081	171	1,001	2,177	765	32

26,038	Malheur	19,839	63	177	5,155	783	21
228,483	Marion	201,218	2,039	2,970	18,225	3,874	157
7,625	Morrow	6,688	8	65	825	30	9
583,887	Multnomah	497,700	34,415	6,122	18,390	26,626	634
49,541	Polk	45,145	192	704	2,802	653	45
1,918	Sherman	1,853	-	24	28	13	-
21,570	Tillamook	20,765	38	231	374	154	8
59,249	Umatilla	51,303	350	1,746	5,307	503	40
23,598	Union	22,612	99	226	381	268	12
6,911	Wallowa	6,738	6	31	113	23	-
21,683	Wasco	19,474	59	844	1,065	235	6
311,554	Washington	280,239	1,986	1,575	14,401	13,190	163
1,396	Wheeler	1,370	1	11	12	2	-
65,551	Yamhill	59,538	344	756	4,129	760	24
2,842,321	**State Total**	**2,579,732**	**44,982**	**35,749**	**112,707**	**67,422**	**1,729**

Table 4-8

State of Oregon 1990 census percentages by race and county

Total Population	County	Population composition by race/ethnicity				
		White	Black	Indian	Hispanic	Asian
15,317	Baker	96.8	0.2	0.9	1.8	0.3
70,811	Benton	91.0	0.8	0.7	2.4	5.4
278,850	Clackamas	94.7	0.4	0.7	2.6	1.7
33,301	Clatsop	95.3	0.3	1.1	2.0	1.3
37,557	Columbia	96.0	0.1	1.3	1.8	0.7
60,273	Coos	94.4	0.2	2.2	2.2	0.9
14,111	Crook	95.4	0.08	1.5	2.7	0.3
19,327	Curry	95.0	0.2	2.3	1.8	0.6
74,958	Deschutes	96.5	0.1	0.8	2.0	0.6
94,649	Douglas	95.3	0.2	1.5	2.4	0.7
1,717	Gilliam	97.2	-	0.6	1.6	0.5
7,853	Grant	96.7	0.08	1.1	1.9	0.2
7,060	Harney	92.7	0.03	3.6	3.1	0.6

16,903	Hood River	80.6	0.2	1.1	16.2	1.7
146,389	Jackson	93.6	0.2	1.2	4.1	0.9
13,676	Jefferson	70.1	0.2	18.7	10.6	0.5
62,649	Josephine	95.0	0.2	1.3	2.8	0.7
57,702	Klamath	89.6	0.6	3.8	5.2	0.8
7,186	Lake	93.0	0.07	2.5	3.8	0.6
282,912	Lane	93.8	0.7	1.1	2.4	1.9
38,889	Lincoln	95.0	0.2	2.4	1.5	0.9
91,227	Linn	95.5	0.2	1.1	2.4	0.8
26,038	Malheur	76.2	0.2	0.7	19.8	3.0
228,483	Marion	88.0	0.9	1.3	8.0	1.7
7,625	Morrow	87.7	0.1	0.9	10.8	0.4
583,887	Multnomah	85.2	5.9	1.1	3.2	4.6
49,541	Polk	91.1	0.4	1.4	5.7	1.3
1,918	Sherman	96.6	-	1.3	1.5	0.7
21,570	Tillamook	96.3	0.2	1.1	1.7	0.7
59,249	Umatilla	86.6	0.6	3.0	9.0	0.9
23,598	Union	95.8	0.4	1.0	1.6	1.1
6,911	Wallowa	97.5	0.09	0.5	1.6	0.3
21,683	Wasco	89.8	0.3	3.9	4.9	1.1
311,554	Washington	90.0	0.6	0.5	4.6	4.2
1,396	Wheeler	98.1	0.07	0.8	0.9	0.1
65,551	Yamhill	90.8	0.5	1.2	6.3	1.2
2,842,321	**State Total**	**90.8**	**1.6**	**1.3**	**4.0**	**2.4**

Table 4-9

State of Oregon arrest percentages by race and county 1992

Arrest Total	County	Population composition by race/ethnicity				
		White	Black	Indian	Hispanic	Asian
943	Baker	97.4	0.2	0.9	1.6	-
2,851	Benton	90.2	4.2	0.2	3.2	2.3
8,511	Clackamas	90.0	2.3	0.8	6.1	1.1
2,761	Clatsop	94.7	1.2	0.3	3.5	0.4

2,177	Columbia	98.3	0.5	0.3	0.5	0.4
4,337	Coos	97.0	0.4	0.3	2.1	0.2
877	Crook	100.0	-	-	-	-
1,006	Curry	99.1	0.2	0.3	0.2	0.2
4,704	Deschutes	98.0	0.3	0.7	0.8	-
6,200	Douglas	97.5	0.4	0.3	1.7	0.2
32	Gilliam	96.7	3.1	-	-	-
249	Grant	98.8	0.8	0.4	-	-
178	Harney	92.1	-	7.3	0.6	-
1,149	Hood River	73.5	0.7	1.0	24.5	0.4
10,651	Jackson	90.2	1.5	0.8	7.1	0.5
1,219	Jefferson	58.4	0.3	24.5	16.8	0.08
2,873	Josephine	95.4	0.8	0.4	3.2	0.2
2,016	Klamath	80.1	1.7	8.6	8.6	0.4
316	Lake	91.8	1.3	1.6	4.8	0.6
16,776	Lane	95.2	3.0	0.9	0.06	0.8
2,896	Lincoln	96.8	0.5	1.7	0.4	0.7
6,354	Linn	96.0	1.1	0.4	2.3	0.3
1,731	Malheur	56.2	0.7	0.5	42.2	0.4
12,121	Marion	73.7	3.2	1.9	20.1	1.1
285	Morrow	92.0	-	0.7	7.4	-
33,354	Multnomah	61.6	22.8	2.3	11.2	2.1
2,494	Polk	78.9	1.4	1.8	17.4	0.6
66	Sherman	87.9	-	-	12.1	-
1,279	Tillamook	99.1	-	0.08	0.8	0.08
3,127	Umatilla	76.4	0.4	3.1	19.9	0.2
1,399	Union	94.3	1.4	0.9	2.6	0.8
313	Wallowa	98.7	-	0.6	0.6	-
1,372	Wasco	78.6	0.7	4.5	14.6	1.5
11,220	Washington	82.3	3.6	0.3	11.4	2.4
29	Wheeler	100.0	-	-	-	-
3,371	Yamhill	86.4	0.4	0.4	12.6	0.3
2,842,321	**State Total**	**82.7**	**6.4**	**1.5**	**8.3**	**1.1**

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Chapter 4: Minorities In Criminal Courts

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Chapter 5

The Juvenile Justice System

The juvenile justice system is a distinct subsystem within the judicial system, marked by a unique statutory and procedural framework and a discrete subject matter. In the past 15 years the juvenile justice system, both nationally and locally, has received extensive attention and has been the focus of research projects that have addressed, to various extents, the perception of bias toward minority youth. This state's juvenile justice system has recently been (and still is) the subject of a thorough analysis by the State Commission on Children and Families, which is producing an extraordinarily helpful body of information about the overrepresentation of minority youth in the system and the treatment minorities receive. The commission is now developing comprehensive strategies to address its research results.

We begin by describing the unique features of the juvenile justice system. This will be followed by a brief summary of prior reviews of Multnomah County's juvenile justice system and a recent national report from the United States Department of Justice. The chapter then summarizes the results of the study by the State Commission on Children and Families and the information gained from this task force's hearing process and survey. Finally, we present the task force's findings and recommendations.

A Brief Description of the System

The juvenile justice system consists of three primary, often interlinked, components: the juvenile department of each county, Children's Services Division (CSD), and the juvenile court of each county. When a child comes to the attention of the juvenile system, generally by way of referral from some outside agency (*e.g.*, a police agency, school, hospital, etc.), a decision is initially made as to whether the juvenile department or CSD is going to take primary responsibility. If the issues involving the child are strictly those of abuse or neglect (a "dependency" case), CSD will almost always be the agency that initially involves itself with the child. If there are no "dependency" issues, the child is 12 years of age or older, and the child has engaged in "criminal" type activity, then the case is considered a "delinquency" case and will most likely be handled by the juvenile department. When a very young child is involved in "criminal" type behavior (*e.g.*, firesetting), generally CSD will be the agency initially involved with the child. Many cases involve both dependency and delinquency issues (*e.g.*, a teenager comes to the attention of the police because of criminal activity, but it is also learned that this child is living in an abusive household). Responsibility for these hybrid type cases can initially be given to either CSD or the juvenile department.

When CSD or the juvenile department becomes involved with a child, a decision must be made by the CSD caseworker or juvenile department counselor whether to handle the case informally or to file a petition with the juvenile court. That decision is based primarily on the seriousness of the situation, and on whether there have been prior referrals to CSD or the juvenile department. It is also sometimes the case that after working with a family and child for a period of time informally, a decision is made to file a petition with the juvenile court because the family and/or child are not cooperative and are not following through with recommendations.

The importance of family involvement in juvenile cases cannot be understated. When a child is brought to the attention of the juvenile justice system it is because of negative (*i.e.*, neglect or abuse) behavior of the family or negative (*i.e.*, delinquent) behavior of the child. In either case it is important to work with both the child and the family to correct the behavior. As an example, when a child who has allegedly committed a delinquent act is conditionally released to parents on "house arrest," it is essential that the parents understand the rules of "house arrest" so that they can adequately supervise the child.

If a child or, more commonly, the child's parents or caretakers, do not speak English, the barriers to effective communication are increased when the caseworkers or counselors do not speak the language of the family members. Communication barriers are further heightened when there is a lack of understanding of the family's cultural background by the caseworkers or counselors, the attorneys involved in the case and the juvenile judge. There is a need for foreign language interpreters at all levels of juvenile justice system "encounters," not just court proceedings. Additionally, those working in the juvenile system must be educated in cultural differences to adequately address and understand the needs of the child and the child's family. In order to be successful with children, the juvenile system must be able to work successfully with their families.

Studies of Minorities in the Juvenile Justice System

1. The 1982 Multnomah County Juvenile Court Monitoring Study

As part of a project funded by the Office of Juvenile Justice and Delinquency Prevention, the Portland section of the National Council of Jewish Women conducted a citizens' monitoring study of the Multnomah County Juvenile Court and in 1982 published its study, *Defining Justice for Children*. Respecting *delinquency* proceedings, the study concluded:

> "The percentage of minorities involved in the delinquency-status offense preliminary hearings was disproportionately high. Roughly *twice* as many minority youth were in court as would have been expected [based on the number of minority youth] in Multnomah County." *Id*. at 48 (emphasis added).

> "Minority children [at the conclusion of the preliminary hearings] were more likely than white children to receive the most restrictive dispositions (continued in detention and detained for the first time)." *Id*. at 57.
>
> "The percentage of minorities involved in the delinquency-status offense fact-finding and dispositional hearings was disproportionately high. Almost *three times* as many minorities were in court as would have been expected from the proportion of minorities in the general under-18 population in Multnomah County." *Id*. at 67 (emphasis added).
>
> "[In the final dispositional phase,] a disproportionately high percentage of minority children received the most restrictive [commitment to a secure facility] and second most restrictive [suspended commitment to a secure facility] dispositions." *Id*. at 77.

In dependency proceedings, the study found no disproportionate minority representation at the preliminary hearing stage. But it did discover a disproportionately high percentage of minority children at the fact-finding and dispositional stage—roughly twice as many as would have been expected from the proportion of minorities in the general under-18 population in Multnomah County. The study recommended that all Juvenile Court personnel and all referral sources "examine their attitudes about racial and ethnic minorities and develop procedures to guard against discrimination" and "eliminate disproportionate entrance into the juvenile court." *Id*. at 24.

2. The 1989 Metropolitan Human Relations Commission Study

The Metropolitan Human Relations Commission (MHRC) contracted with Iris M.D. Bell and B * Era Consultants to evaluate the services of the Multnomah County Juvenile Justice Division to minority youth. That study resulted in a report, *Evaluation of Multnomah County's Juvenile Justice Division Services to Minority Youth*, Metropolitan Human Relations Commission, July 1989. It began with this statement:

> "Minority youth are entering the [Multnomah] County Juvenile Justice System in disproportionate numbers, and they are also being committed to the State Training Schools and Camps in disproportionate numbers…." *Id*. at 1.

The report cited statistics that show that 42 percent of the youth committed to the State Training Schools from Multnomah County in 1988 were minorities, even though minorities comprise only 10 percent of Multnomah County's population.

In order to increase the likelihood that minority youth are provided with services and counseling that address their cultural needs, MHRC recommended that the division continue to provide "mandatory cross-cultural training" to all staff; "seek program models that identify culture-specific methods of case management;" and take steps to

attract professionals from minority group populations (*Id*. at 43–44). More generally, the report also identified the need for (1) a comprehensive network of services for minority youth involved with the juvenile justice system, including specific services to youth who are gang-affiliated, (2) approved diversion programs and (3) alternatives to secure confinement (*Id*. at 43).

3. A National Survey: Minorities in the Juvenile Justice System

In November 1992, the Office of Juvenile Justice and Delinquency Prevention of the United States Department of Justice published a report by Carl E. Pope of the University of Wisconsin, Milwaukee, and William Feyerherm of Portland State University entitled, *Minorities in the Juvenile Justice System*. The culmination of a 15-month project, the report provided an extraordinarily valuable summary, analysis and compilation of existing research. The authors asserted that this basic debate had emerged from the literature:

> "A perennial challenge facing the field of criminal justice is the extent to which 'selection bias' permeates decision-making within the system. The basic issue is whether certain decisions within both the adult and juvenile justice systems differentiate among certain groups or categories of persons such that some are more 'at-risk' than others. Selection bias may occur as a result of police deployment patterns, informal policies regarding arrest, charging, conviction and sentencing, the volume of cases being processed or on the basis of personal attributes of those coming before the system. Some argue that so-called 'extra legal' or 'ascribed' characteristics such as gender, race, education or income are as important, if not more so, in reaching such outcome decisions as offense severity, prior criminal history or other legal factors."

Indeed, the authors noted that portrayals of "an entire generation" of African-American youth as "lost because of lack of economic participation in the society" may in fact permit the juvenile and criminal justice systems to downplay processing differences within the systems (*Id*. at 5).

The project identified, located and compiled post-1970 literature that related minority status to actions of the juvenile justice system. More than 350 articles potentially relevant to the project were initially identified and coded; however, the majority was found to be only tangentially related to the project. A subsample of 46 articles was determined to be most directly relevant to the project's focus. Analysis of these articles led to the following findings:

- The preponderance of findings from the research literature suggests both direct and indirect race effects.
- The studies finding evidence of selection bias were generally no less sophisticated methodologically than studies finding no such evidence, nor was the data of lesser quality.

- When selection bias does exist, it can occur at any stage of the system.

- Small racial differences may accumulate and become more pronounced as minority youth are processed further into the system.

- Many studies which concluded that there was no evidence of discrimination achieved that result by utilizing control variables which may not have been race-neutral. For example, such a "legally relevant" variable as prior arrests may not be racially neutral if African-American youth are more likely to be picked up and formally processed within the system.

In its second phase, the project attempted to identify program initiatives that have attempted to deal with the question of equity or fairness in the processing of minority youth. Thirty-three responses were received from 27 states (including Oregon). *No* state reported any programs focusing on racial equity in juvenile processing.[10]

4. The State Commission's Report

The Oregon Community Children and Youth Services Commission (which later became the State Commission on Children and Families) conducted research to determine whether and to what extent minority youth had been overrepresented in the juvenile justice system and whether and to what extent there had been a disproportionate confinement of minority youth to secure facilities. This federally funded project resulted from Oregon's participation in the Juvenile Justice and Delinquency Protection Act of 1974, as amended in 1988. It required all states to address minority youth overrepresentation and disproportionate confinement. As a result of the 1988 amendment, the Office of Juvenile Justice and Delinquency Prevention developed a special grant program to pilot special research projects and social programs to address the problem. Oregon was selected to be one of five pilot states, along with Arizona, Florida, Iowa and North Carolina.

Phase I: Research Data

Phase I of the research project, designed to determine whether and to what extent a problem existed, was completed and *Final Research Report on Phase I* issued in May 1993. The commission gathered data in three counties—Lane, Marion and Multnomah—and also summarized available data from the rest of the state. The data confirmed the conclusions in the previous projects summarized above: across the state, as well as in Multnomah County, minority youth are disproportionately represented at all stages, an effect that increases the further one progresses through the system.

Quantitative Data

The commission collected "summary" data from such sources as law enforcement agencies, juvenile courts/departments and Children's Services Division. In the three pilot counties, the commission also gathered data by following groups of juvenile department referrals as they moved through the system, generating what is termed "system" or client tracking system data.

A "disproportionate representation index" (DRI) was developed from analysis of the 1990 census, juvenile arrest summaries, juvenile department referral information, and CSD training school commitment and close custody ward statistics. In percentage terms, the DRI compares the proportion of specific racial or ethnic youth groups processed at particular points in the juvenile justice system to the proportion of this group in the youth population at risk. For example, if 10 percent of the 12–17-year-old population are African Americans and if African Americans account for 25 percent of the arrests for serious (FBI Index) offenses, the index would have a value of 2.5 (or 25 percent divided by 10 percent) indicating that this group is 2.5 times more likely to be represented among those arrested for serious crime. Values greater than 1.0 mean that a group is overrepresented, and a value of exactly 1.0 indicates proportionate representation.

Statewide summary data shows that African-American youth are particularly likely to be overrepresented at every decision point from arrest to juvenile department referral to final case disposition (*i.e.*, training school commitment or close custody wardship). The DRI values for African-American youth range from 2.6 to 5.9, and are greater at the back end of the system (*i.e.*, for training school commitment and close custody wards) than at the front end of the system (*i.e.*, at point of arrest or referral).

More refined analysis of the system data from Multnomah County establishes that African-American, Hispanic and Native-American youth are more likely than nonminority youth to have referrals resulting in pre-adjudication detention, hearings and post-adjudication detention as a disposition. The overrepresentation of African-American youth is most pronounced for training school commitment and for remand to adult court. For Hispanic youth, the overrepresentation is most pronounced for pre-adjudication and post-adjudication detention. These patterns also existed when controlled for seriousness of offense (*i.e.*, when looking only at felony offense arrests).

In Lane and Marion Counties, analysis showed that minority youth were overrepresented throughout the system, but in those two counties the issue is basically a front-end problem: overrepresentation begins at referral or intake and continues at about the same level as cases move through the system. In Multnomah County, the analysis showed:

- Of the 7,010 referrals examined for 1991, nonminority youth constituted 81.2 percent of the population at risk (12–17-year-old youth), but only 60.6 percent of the referrals. African-American youth were overrepresented, constituting 9.7 percent of the risk population, but 27.3 percent of those referred (DRI = 2.8); on a lesser scale, Hispanic and Native-American youth were slightly underrepresented and Asian youth slightly overrepresented among referrals.

- For nonminority youth, 13.3 percent of the cases resulted in placement in pre-adjudication detention. In contrast, for Hispanic youth the percentage was 36.1 percent (or nearly three times greater). For African Americans, 25.1 percent received pre-adjudication detention and for Native-American youth, 24.0 percent received pre-adjudication detention. Hispanic youth comprise 4.4 percent of those referred with known race/ethnicity, but 8.8 percent of all those detained. African-American youth constitute 27.8 percent of the referral population, but 39.2 percent of those detained.

- Of all youth, 33.9 percent went to a juvenile court hearing. The rate was 40.8 percent for African-American youth, compared to 30.5 percent for nonminorities. For other groups the rates fell between these extremes.

- Only 3.1 percent of all referrals resulted in training school commitment. However, only 2.0 percent of nonminority referrals resulted in commitment compared to 6.3 percent of African-American referrals.

- Post-adjudication detention as a disposition occurred in 17.7 percent of all referrals. The rate of detention was 14.3 percent for nonminority youth, but 28.1 percent for Hispanic youth, 23.4 percent for African-American youth and 22.9 percent for Native-American youth.

Analysis of the cases that involved a formal hearing process (and the filing of a petition) showed the following disproportions:

- African Americans and other minorities are more likely to reach a formal hearing process level. Upon reaching this level, they are more likely to receive institutional commitment as a disposition. The training school commitment rates are 11.6 percent for African-American youth, 8.6 percent for Native-American youth, 4.6 percent for nonminority youth, 4.4 percent for Asian youth and 2.9 percent for Hispanic youth.

- African-American, Hispanic and Native-American youth reaching the hearing stage are more likely than nonminority or Asian youth to receive detention as a disposition. The rates are 58.1 percent for Hispanic youth, 51.4 percent for Native-American youth, 38.2 percent for nonminority youth and 37.7 percent for Asian youth.

When the referrals involving felony offenses were isolated and analyzed, the following discrepancies appeared:

- Of the 2,104 felony referrals, 56.5 percent involved nonminority youth. However, of the youth receiving pre-adjudication detention, only 38.7 percent were nonminority. African-American youth accounted for 30.0 percent of the felony referrals examined, but accounted for 40.1 percent of those detained. The rates of pretrial detention are over 2.5 times higher for Hispanic youth (62.8 percent) and nearly double for African-American youth (43.7 percent) than for white youth (23.1 percent).

- Only 15 of the 2,104 felony referrals resulted in remand to adult court; 12 of these 15, or 80 percent, involved African-American youth.

- As with pre-adjudication detention, Hispanic felony offenders have the highest detention rate as a disposition (50.5 percent) compared to African Americans (27.7 percent) and nonminorities (17.8 percent).

- Among adjudicated felony offenders, the training school commitment rate is nearly three times higher for African-American youth (11.4 percent) compared to nonminority youth (4.1 percent).

Qualitative Data from the Focus Groups

In each of the pilot counties the commission also conducted "focus group" interviews with carefully-selected participants, primarily juvenile justice system professionals. Certain general themes emerged from those discussions. The participants said that culturally appropriate placements, resources and services for minority youth were lacking. Secondly, the participants identified not only a lack of family involvement, but also a lack of family-centered services, providing few options even when families actively are involved. Third, many participants identified a nearly universal need for cross-cultural competency training for all juvenile justice system agencies across the continuum. Finally, some participants, particularly in Multnomah County, identified the "gang" label as problematic; many youth service programs simply will not take "gang involved" youths and refuse to review objectively a child's individual history and take placement risks.

Phase II: Development of Programs

Phase II currently is being conducted. The project is examining in detail how minority youth, especially African Americans, are processed in the juvenile justice system,

especially in Multnomah County, and how various factors play a role in the overrepresentation of these youth in all parts of the system, especially disproportionate confinement in detention and correctional facilities. Data analysis to date does not control for the influence of prior history and only in a limited way for the severity of offense in determining the exact extent to which minority youth are overrepresented, and it does not address in a refined way the reasons for the overrepresentation. Phase II research should provide a clearer picture, as well as explanations for the overrepresentation and disproportionate confinement. Finally, in addition to refining the data, the commission proposes to develop a planning process for addressing overrepresentation and to develop policies and program strategies to eliminate disproportionate confinement.

Task Force Hearings and Survey Results

Testimony at the task force hearings tended to focus on the adult criminal justice system, with relatively little discussion of the juvenile system. The task force, however, did hear anecdotal reports of selection bias at the arrest/referral stage, testimony about the need for cross-cultural awareness training, and demands for more culturally diverse or adequately trained experts and consultants. This testimony is summarized below as appropriate to the findings.

In addition to the main task force survey, a special Juvenile Justice System Survey was answered by 634 CSD counselors, juvenile court counselors, court-appointed special advocates, prosecutors, defense lawyers and others involved in the juvenile system. The survey findings are also summarized below.

Juvenile justice is a civil, rather than a criminal, process, and recommendations made for the civil justice system may well be applicable here, as well. For instance, 57.6 percent of all respondents to the juvenile survey, and 75 percent of those who had an opinion (those figures are 69 percent and 88 percent for minority respondents), said that juvenile court papers should be prepared in languages other than English. *See* Recommendation 2-2, *supra*.

Similarly, approximately 70 percent of respondents (more than 80 percent of those who had an opinion) believed that cross-cultural training in minority issues for all juvenile system personnel would promote fair treatment. *See* Recommendation 3-5, *supra*. A majority of respondents to the juvenile survey found insufficient minority representation among juvenile court staff (as well as CSD staff), and the recommendations set forth in Chapter 3 are equally applicable here.

Confinement of Minority Youth

Findings

It has been an axiom of popular wisdom that minority youth are simply more likely to become involved with the justice system than their nonminority counterparts. This cannot be characterized as a paranoid fantasy, nor can it be dismissed as a mere "perception." It was confirmed more than a decade ago in the 1982 court monitoring study; it was confirmed again in 1989 by the MHRC study; it was confirmed overwhelmingly by the summary and system data analyzed in the State Commission's *Phase I* Report. There are debates over the reasons why this overrepresentation exists, but overwhelming evidence demonstrates that it does exist.

The task force heard anecdotal reports indicating selection bias at the arrest/referral stage. In addition, responses to the task force surveys were consistent with the picture presented by the reports summarized above. Thirty percent of all respondents and more than 70 percent of minority respondents to the main task force survey believed that minority children were more likely to be found within the juvenile court's jurisdiction. Slightly less that 25 percent of all respondents to the main survey, but 50 percent of minority respondents, believed minority children are more likely to be removed from their family in dependency proceedings. In response to the juvenile survey, 28.8 percent of all respondents (43 percent of minority respondents) said minority youth were more likely to be committed to a state training school and 25.8 percent (50 percent of minority respondents) believed that a minority youth so committed would not be released on parole as early as a nonminority. Thirty-two percent of minority respondents (14.3 percent of all respondents) believed that a minority youth is more likely to be subjected to physical mistreatment while in custody.

Eighty-seven percent of respondents to the juvenile justice system survey agreed that minority families and children distrust the legal system more than do nonminority families and children. The task force believes that such perceptions are unlikely to be changed, despite public education efforts (*see* Recommendation 8-3, *infra*), until the problems of overrepresentation and disproportionate confinement are addressed and remedied.

The State Commission on Children and Families is developing a comprehensive plan to reduce disproportionate representation. The task force believes, therefore, that specific programs to address disproportionate minority representation should be developed and proposed by the commission as a part of the second phase of its research and report.

Recommendation Number 5-1

The State Commission on Children and Families should continue to develop and implement a comprehensive plan to reduce minority overrepresentation and disproportionate confinement in the juvenile justice system. The plan should include proposals for:

- **Increasing the availability of viable and credible community-based alternatives for minority youth involved in the juvenile justice system.**

- **Increasing the availability and improving the quality of diversion programs for minorities who come in contact with the juvenile justice system.**

- **Exploring alternatives to secure confinement for minority youth involved in the juvenile justice system.**

- **Providing support for after-care programs designed to facilitate reintegration of minority youth from state and county facilities back to their home communities.**

- **Supporting cross-cultural diversity training and education for juvenile justice personnel and practitioners, elected officials, the general public and the at-risk populations regarding the need for policy changes and program resources to reverse the trend toward overrepresentation.**

- **Developing a systematic ongoing monitoring procedure to determine at regular intervals the percent of minority youth being processed through each stage of the juvenile justice system, in order to target more specifically the decision points at which major disparities occur.**

Estimated date for implementation to be completed: July 15, 1996.

Estimated cost of implementation: Unknown.

Interpreters in the Juvenile System

Findings

The need for skilled interpreters is as critical in the juvenile justice system as it is elsewhere. The recommendations regarding interpreters contained in Chapter 2 need not be repeated here. The task force learned that the juvenile department of at least one county is opening files on children, when it would not otherwise do so, merely because the child and/or the child's parents do not speak English. Since an interpreter apparently is not funded unless a file is opened, the sole reason for opening the file is to obtain funds from the county for an interpreter. Furthermore, the fact that counties may have limited funds for interpreters may increase the pressure on juvenile court counselors to file petitions, rather than to handle the case informally, thus shifting the financial burden of providing interpreters to the state.

The juvenile justice survey also reflected the relative unavailability of interpreters in juvenile proceedings, particularly the informal end of the process. Approximately two-thirds of all respondents to the juvenile justice survey (three-fourths of minority respondents) agreed that a lack of readily available interpreters adversely affects non-English-speaking families in the juvenile justice system. Almost one-third of all respondents (half of those who had an opinion), and more than half of minority respondents (two-thirds of those who had an opinion), believe that qualified interpreters are not available for informal conferences with juvenile or CSD counselors. The task force believes that a consistent statewide policy is required for appointment and funding of interpreters in all activities of juvenile departments.

In addition, current state law authorizes appointment of interpreters for a *party* or *witness*. In some cases a parent is not a party and generally is not a witness and, therefore, interpreters may not always be appointed for the parents. The task force believes that it is critical to the integrity of the juvenile justice system, as well as to the child, parents and care-givers, that parents and care-givers have a clear understanding of what is happening in the juvenile proceeding. There must be a clear statewide policy regarding the appointment of interpreters to assist non-English-speaking parents and care-givers.

Recommendation Number 5-2

The legislature should enact a law requiring the appointment of interpreters for non-English-speaking children, parents and care-givers in all juvenile proceedings, including informal juvenile proceedings.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Unknown.

The Need for Trained, Culturally-Sensitive Experts

Findings

The task force received communications that pointed to the need for expert consultants (such as psychologists) who were either minority members or had appropriate cross-cultural experience or training that would lead them to consider facts and alternatives specific to the minority culture. For example, a consultant who is a minority member or who has appropriate education or training would be more likely to evaluate the extended family network, and would be in a position to explain its importance to the appropriate juvenile justice forum. In the juvenile justice system survey, approximately one-third of all respondents (51 percent of minority respondents) reported that, more than "rarely," testifying experts lacked knowledge of the cultural background of minority children.

Recommendation Number 5-3

CSD, juvenile departments and the Commission on Children and Families should develop a list of consultants and potential expert witnesses who have appropriate experience or training to evaluate the cultural background of youth and families of various minorities, to be made available to juvenile court staff and practitioners.

Estimated date for implementation to be completed: January 1, 1995.

Estimated cost of implementation: Minimal.

Chapter 6

Minorities in the Civil Courts as Litigants and Witnesses

This chapter, in a report on diversity, is itself diverse. It concerns all aspects of the judicial system as it relates to civil law, most simply defined as anything that doesn't relate to criminal law or juvenile justice. Many subjects not covered by the other subcommittees are subsumed under the "civil" heading: from workers' compensation to small claims, landlord-tenant disputes, civil jury trials and administrative hearings.

Testimony at task force hearings tended to focus on the criminal justice system, with correspondingly fewer comments addressed to problems arising in civil litigation. This could be interpreted to indicate that less bias is perceived in the civil system. The task force believes that such a conclusion is unwarranted and that the reduced number of complaints probably can be attributed to two factors: on the one hand, an overrepresentation of minorities at the charging level in the criminal justice system (regardless of the cause); and, on the other, an underrepresentation of minorities in civil litigation.

Testimony and communications from individuals, as well as responses to the task force surveys, fell into the following categories: (1) issues concerning the accessibility of the civil justice system to racial and ethnic minorities; (2) the conduct of litigation; and (3) the ongoing need for information, available to the public as well as the court system. A fourth issue, involving juries and the composition of jury pools, is discussed in Chapter 7.

Access

Findings

The task force heard anecdotal testimony indicating that minority litigants lack sufficient knowledge about the civil justice system. Moreover, many minorities believe they can obtain little if any help from it, and frequently may be unrepresented by counsel. More than half of all survey respondents (and more than two-thirds of minority respondents) agreed that minority litigants "use the courts less." Correspondingly, more than 80 percent of all respondents (and only slightly less than 80 percent of minority respondents) believed that minority litigants distrust the legal system more than do nonminority litigants. Almost three-fourths of all respondents (and slightly more of the

minority respondents) agree that minority litigants are less likely to understand the legal system.

Several witnesses at hearings emphasized the need to translate court forms into commonly used foreign languages, particularly in forcible entry, small claims and abuse prevention matters, where litigants often are unrepresented by counsel. More than 48 percent of all respondents to the survey (and two-thirds of those who had an opinion on the subject), agreed that more “court papers” should be prepared in other languages. Where court personnel as well as non-English-speaking individuals must also use the forms, at least one witness suggested that the language barrier could be lowered by preparing and making available, in the appropriate foreign languages, general informational materials that adequately describe the English content of the forms. Several witnesses suggested that all commonly used forms should ask whether an interpreter is needed for court events in order to facilitate appointment of interpreters where necessary. Oregon State Bar informational materials could be translated into common foreign languages and made available at courthouses in order to provide adequate information to litigants who do not speak English.

Many witnesses stated that true accessibility to the legal system requires the availability of bilingual court staff. A system is truly accessible when simple questions can be asked and answered regardless of the racial, cultural or linguistic background of the questioner. This concern is also addressed in Chapters 2 (Interpreters) and 3 (Minorities Working in Oregon Courts).

Problems relating to access do not result solely from language incompatibility. Several witnesses pointed out that even English-speaking members of racial or cultural minorities may need a form of “interpreter” just as much as persons who don’t speak English. Variously called “cultural interpreters,” “cultural advocates” or ombudspersons, these individuals would be available to respond to requests for assistance and information in civil cases, as well as to receive and forward complaints about discrimination or bias in the conduct of litigation, both civil and criminal. The task force believes that such an individual could help solve communication problems that arise for litigants, lawyers, court staff and judges and could assist in reducing the perception that the civil justice system is inaccessible and insensitive, if not discriminatory.

Accessibility issues arise also in relation to administrative remedies such as workers’ compensation. The task force heard testimony that Hispanics who are injured on the work site are not told about workers’ compensation benefits and frequently have no knowledge of their rights. Even if they know that benefits might be available, some Hispanic workers fear retribution and are reluctant to report that injuries are work-related, witnesses said. Even if these hurdles are overcome, lack of qualified interpreters and bilingual attorneys create ongoing difficulties. Even where interpreters are available, attorneys often do not have the necessary language skills and cultural understanding to evaluate their clients’ claims and communicate adequately with experts and referees. For example, physical complaints may be related stoically or with histrionics, either of which may cause a valid claim to be depreciated when, in fact, the claimant’s demeanor is a function of cultural tradition rather than lack of discomfort,

malingering or deviousness. Thus, multiple layers of problems result in decreased accessibility to compensation benefits for minority workers. The task force believes that similar problems probably reduce access to other statutory benefits as well.

Recommendations

Recommendation Number 6-1

The Chief Justice should ask the Uniform Trial Court Rules Committee (or other appropriate body) to consider a rule to the effect that relevant documents in languages other than English may be accepted by the court so long as they are accompanied by certified translations, or are themselves translations of English documents which are in the file.

Estimated date for implementation to be completed: March 1, 1995.

Estimated cost of implementation: Minimal.

Recommendation Number 6-2

The Oregon State Bar should translate "Tel-Law" tapes and other public informational materials into common foreign languages. These materials—both the English and the non-English versions—should then be made available in each county courthouse, so that courthouse personnel can refer the public to them for information.[11]

Estimated date for implementation to be completed: January 1, 1996.

Estimated cost of implementation: Unknown.

Recommendation Number 6-3

ORS 656.056 should be amended to require all employers subject to the Workers' Compensation Act, who know or should know that one or more employees do not speak English or read English, to post notices in the appropriate foreign languages that inform workers of their rights and to provide claims forms in the appropriate foreign languages. The law also should be changed to require the Workers' Compensation Division of the Department of Consumer and Business Services to prepare such notices and forms for use by employers when appropriate and to notify employers

of their availability. The legislation might include provisions that noncomplying employers, as well as their insurers, who fail to post the notices should not be able to avail themselves of time limitations in the Act, if the failure of a worker to file a claim results from the failure to post the notices. The legislature should also consider such legislation in other areas of the law.

Estimated date for implementation to be completed: July 1, 1996.

Estimated cost of implementation: Unknown.

Recommendation Number 6-4

The Oregon State Bar, as a part of its public outreach efforts and with the cooperation of other professional organizations, should engage in a public education campaign among minority communities regarding the civil justice system and available rights and remedies. The task force points out that the Oregon Workers' Compensation attorneys have, in a private communication, expressed interest in assisting the Bar with such a public education effort among minority workers. The task force believes that such a program could do much to diminish the perceived inaccessibility of the compensation system.

Estimated date for implementation to be completed: January 1, 1996.

Estimated cost of implementation: Unknown.

The Litigation Process

Findings

More than two-thirds of all respondents (and 80 percent of minority respondents) reported instances of lawyers having difficulty communicating with minority witnesses or litigants because of cultural differences that are not language-related. More than half of all respondents (and almost two-thirds of minority respondents) have observed instances of lawyers' stereotyping witnesses or litigants because of their race or ethnic origin. More than half of all respondents (two-thirds of those who had an opinion), and more than 60 percent of minority respondents (three out of four of those with an opinion) believed that cross-cultural diversity training for all legal personnel would help attain fair treatment.

A clear majority of all respondents indicated that they "never" or "rarely" observed courts showing disrespect or discourtesy toward minority litigants. On the other hand, it is

troubling to note that six percent of all respondents (and more than 20 percent of minority respondents) stated that they observed such behavior more often than “rarely.”

Fewer than nine percent of respondents believed that child support awards are enforced less vigorously for minority than for nonminority children; slightly less than 15 percent believed that the courts treat domestic violence cases more seriously when nonminorities are involved. Nevertheless, these figures are troubling. Stated another way, 10 to 15 percent of respondents perceive that minority litigants are treated less fairly than nonminority litigants. The task force believes that all lawyers should participate in the sort of cross-cultural diversity training that is recommended in Chapter 3 for judges and other court personnel.

Some witnesses at the hearings said attorneys handling workers’ compensation claims for minority claimants sometimes lack the necessary cultural understanding to evaluate adequately their clients’ claims and to communicate adequately with experts and referees.

Fewer than 25 percent of all respondents (but almost 45 percent of minority respondents) believe that juries will award less compensation to minority plaintiffs than to nonminorities. On the other hand, in answer to another question, 40 percent of all respondents (55 percent of minority respondents) agreed that minority litigants are less likely to win a personal injury suit, and slightly greater percentages in each category (almost 45 percent of all respondents and almost 60 percent of minority respondents) agreed that minority litigants are likely to receive less compensation from a jury. Approximately 40 percent of all respondents (and more than 60 percent of minority respondents) believe that claims for minority plaintiffs are settled for less money than would be recovered by nonminority plaintiffs. The task force believes that the best response to perceived differences in jury verdicts is to take steps to ensure diversity on the jury panels, as set forth in Chapter 7. Likewise, the task force believes that the perceived difference in settlement value will decrease as juries become less likely to award less compensation to minority litigants and as insurers become aware of this change.

Recommendation Number 6-5

As a part of the Mandatory Continuing Legal Education requirement, the Oregon State Bar and Supreme Court should require all lawyers to certify completion of at least three hours of cross-cultural diversity training during each reporting period. The bar should also certify appropriate cross-cultural diversity training programs to meet this requirement.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

The Need for Further Information

Findings

As already stated, review of the civil justice system was made more difficult by the lack of any statistical information of the sort that is more readily available in both criminal and juvenile justice systems. For example, the task force had no way of finding out the proportion of claims brought by minority as opposed to nonminority plaintiffs, much less tracking their disposition. If more complete court records were available, bias could be revealed where it exists and thereby reduced. More complete court records might also reveal the lack of bias and dispense with the need for taking steps to avoid a problem that does not exist. The task force believes that an adequate computerized record-keeping system and court forms that encourage litigants to provide voluntarily the necessary data would help immeasurably in terms of subsequent reviews by the Judicial Department, oversight committees and public interest groups.

Recommendation Number 6-6

The State Court Administrator should develop forms (to be filed with the initial appearance) asking civil litigants in all cases to provide information, including race and ethnic origin, for demographic, statistical and record-keeping purposes. The administrator should also be requested to develop a computerized record for this information, which would support searches using variables that include racial and ethnic origin and would be available to members of the public. (The task force notes ORS 18.425, which requires all attorneys to file, in every civil action for personal injuries, a civil action reporting form. This might be an avenue to obtain the information.)

Estimated date for implementation to be completed: January 1, 1996.

Estimated cost of implementation: Unknown.

Chapter 7

Juries

Minority participation on juries, we found, is really made up of three issues. The first involves getting minority jurors to the courthouse. The second concerns how minorities participate on juries. The third concerns racial bias during jury deliberations.

Underrepresentation of Minorities on Jury Pools

Findings

The task force heard repeated testimony that jury pools in Oregon do not adequately represent the racial and ethnic diversity of courts' districts. The survey sought "opinions based on actual experience." When respondents without an opinion are eliminated, close to 60 percent of all respondents (and almost 75 percent of minority respondents) declared jury pools unrepresentative. The percentages increase slightly for both groups when the question is whether minorities are proportionally represented on juries rather than jury pools.

These perceptions were confirmed by an August 1993 study conducted by the Multnomah Bar Association. The report concluded:

> "Comparison of characteristics of those who served jury duty with census data for Multnomah County for 1990 shows over-representation in the jury pool for those with some college or college degrees, married people, home owners, those aged 35–74, and whites. It thus appears that the master list from which those to be subpoenaed are selected (created from voter registration and DMV records) is not including certain groups in proportion to their representation in the County: those under 35 and over 75, never married people, renters, and Black and Asian citizens." Report at 22.

The task force believes that similar results would be obtained if the same study were conducted in other areas of the state. The task force, therefore, agrees with the Multnomah Bar Association Report's conclusion that attention could—and should—be directed "toward improving the master list constructed by the Office of the State Court Administrator to include a broader range of citizens." *Id*. at 22.

The extent to which minorities have been underrepresented in juries has been the subject of considerable research. A consensus exists that “American jury systems tend to over represent white, middle-aged, suburban, middle-class people and under represent other groups.” National Jury Project, *Jurywork: Systematic Techniques* § 5.01, at 5-2 (2d ed 1987), quoted in Developments, *Race and the Criminal Process*, 101 Harv L Rev 1472, 1558 n 4 (1988). The failure of juries fairly to represent their communities is largely a function of the selection process. Drawing jury pools from voter registration lists tends systematically to underrepresent a number of different groups of people. National census data, for example, reveals that 73 percent of whites are registered to vote, but only 65 percent of African Americans and 44 percent of Hispanics are registered. Jury pools drawn from such lists necessarily exclude minorities even before subpoenas go out.

In other states, efforts have been made to draw from additional sources to capture a larger percentage of the eligible juror population. Connecticut is examining the possibility of using welfare lists. Illinois includes those with state-disabled-person identification cards. Minnesota uses a list of holders of a state identification card. Washington currently is considering the same practice. Iowa has used city directories and phone company lists. New York uses state income tax rolls.

In Oregon, the State Court Administrator prepares “master lists” from which counties select their jury pools. The master lists are the product of the merging of lists of registered voters and persons with drivers’ licenses or Department of Motor Vehicle identification cards. When a county notifies the State Court Administrator that it needs a particular number of jurors, a randomly selected list of jurors from a county’s combined list is generated. From that list, courts draw their own lists of persons to subpoena for jury service. Subpoenas are sent by mail. A large percentage of those who are sent the subpoenas (more than half in Multnomah County, for example) receive a deferral or an excuse from serving. These excuses are based on medical reasons, financial hardship, the need to care for small children, business hardship or other reasons. Some of those sent subpoenas do not respond at all. A relatively small percentage of those summoned (13 percent in Multnomah County) actually appear for service. Those that do show up are asked to serve jury terms of up to 30 days, although frequently their actual days of service may be much fewer.

The Multnomah Bar Report also concluded that “one is five times as likely to encounter a person of Hispanic origin in the group that was subpoenaed, but did not serve, as one is to encounter a person of Hispanic origin in the group that served in the jury pool.”

In addition to the fact that subpoenas are not enforced, other problems contribute to the disparity between those who are subpoenaed and those who actually serve. Some potential jurors seek to be excused—and are excused—from jury duty because it is too onerous for them. Jurors are too readily excused for reasons that are not legitimate, a point made several times by witnesses before the task force.

The service period in many counties is too lengthy and disruptive. Nationally, the trend is toward the one-day/one-trial system, described in detail in the Multnomah Bar Report

at 23–26. We note this recommendation by the Oregon Trial Lawyers Association (*Trial Lawyer*, November 1993, page 2):

> "*Make jury service rewarding*, by pushing for a one trial/one day rule… [and] by raising the per diem, lunch, parking and mileage allowance." (Emphasis in original.)

In addition, juror compensation is inadequate. (Jurors currently receive $10 per day, plus mileage at eight cents per mile. ORS 10.060, 10.065.) Many jurors are not used efficiently during their service, too often waiting in master jury rooms with nothing to do. This causes frustration and dissatisfaction (which no doubt is communicated to other potential jurors in the community).

Recommendations

Recommendation Number 7-1

Pursuant to authority granted by ORS 10.215(1), the Chief Justice should increase the number of minorities on the source list of persons called to serve on juries and implement changes permissible under existing law. Such changes might include the use of public utility customer lists, city directories, tribal rolls and income tax lists.

Estimated date for implementation to be completed: January 1, 1995.

Estimated cost of implementation: Minimal.

Recommendation Number 7-2

The 1995 Legislative Assembly should consider legislation to change the method of selecting persons to be included in the "source list" for possible jury service in order to include more minorities in the jury pool.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

Recommendation Number 7-3

The Chief Justice, presiding judges, State Court Administrator and trial court administrators should shorten jury terms and implement one-day/one-trial practices wherever practicable.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Unknown.

Recommendation Number 7-4

ORS 10.060 should be amended to increase juror compensation. This change has also been proposed by the Multnomah Bar Report. In view of the financial exigencies faced by the state, such legislation would be more likely to receive legislative approval if combined with other procedural changes (such as the one-trial/one-day system), if it can be demonstrated that more efficient use of jurors would minimize the total cost of an increase in juror compensation.

Estimated date for implementation to be complete: July 1, 1995.

Estimated cost of implementation: Modest.

Recommendation Number 7-5

The Judicial Department (either the Chief Justice or presiding judges) should promulgate guidelines for stricter enforcement of excuse and deferral rules. The task force believes that excuses should be the exception, not the rule, and that service should be deferred rather than excused altogether.

Estimated date for implementation to be complete: January 1, 1995.

Estimated cost of implementation: Minimal.

Note: With stricter policies for excusing and deferring juror service, fewer jurors could be summoned, with resultant reduction in cost.

Recommendation Number 7-6

The State Court Administrator or trial court administrators should implement a follow-up procedure to contact jurors who do not respond to the subpoena.

Estimated date for implementation to be complete: January 1, 1995.

Estimated cost of implementation: Minimal.

Recommendation Number 7-7

The Oregon State Bar, with the cooperation of the Office of the State Court Administrator and the Judicial Department, should be asked to lead an intensive public relations and education effort across the state, appropriate for all media, regarding the importance and significance of jury service, the critical importance of each individual juror, and the role juries play in our judicial system. In addition to such general themes, an effort should be made to communicate specific information, including the length of required service, the amount of compensation, and the fact that an employer may not retaliate when absence from the job is attributable to jury service. Local television and radio stations may be able to assist with the development of public service announcements or short programs. Other professional organizations (such as the Oregon Trial Lawyers Association, the Oregon Association of Defense Counsel, the Oregon District Attorneys Association, the Oregon Criminal Defense Lawyers Association and the Oregon Minority Lawyers Association) may be interested in providing volunteer participants, if not financial assistance.

By itself, such a public relations effort cannot succeed in increasing the diversity of jury panels. In combination with the other changes proposed above, however, such a program could play an important role in improving public perceptions and attitudes about jury service and the justice system. The program likely will encourage participation, which increases diversity (socioeconomic as well as racial and ethnic) on jury panels.

Estimated date for implementation to be complete: July 1, 1995.

Estimated cost of implementation: Modest.

Selection of the Jury Panel and Perceived Bias

During Deliberations

Findings

The Supreme Court of the United States has observed:

> "When any large 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 in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may be of unsuspected importance in any case that may be presented." *Peters v. Kiff*, 407 US 493, 503–04 (1972).

In ORS 10.030(1), this state has already declared its public policy:

> "[T]he opportunity for jury service shall not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation or any other factor that discriminates against a cognizable group in this state."

One African-American witness said, in speaking of a criminal case, that it would have made him feel better if he could have seen a black person on the jury. That sentiment applies equally to civil actions. Another witness observed that people must be able to look at a jury and feel they are going to get a fair trial. The perception of fairness can be critical, and it is difficult to achieve that without racial or ethnic diversity among the jurors who are deciding a case, particularly when one of the litigants is a member of a racial or ethnic minority. Therefore, it is hard to overstate the significance of the lack of diversity on jury panels or the need for effective change.

In part, that change can come about through the mechanisms suggested above for ensuring better representation in the jury pools. In part, however, changes must be made in the selection process.

When asked for opinions based on their actual experience, two-thirds of the survey respondents having an opinion on the issue agreed that peremptory challenges are used to eliminate minorities from the jury based solely on the juror's race or ethnicity. Approximately one-third of all respondents (and half of those who had an opinion on the issue) believed that peremptory challenges are used to remove a nonminority based solely on race or ethnicity. Among minority respondents, 87 percent of those who had an opinion believed that lawyers use peremptory challenges to remove minorities. More than half of those who had an opinion believed that peremptory challenges are used to remove nonminorities based solely on race or ethnicity. Thus, while discriminatory challenges may be used to eliminate nonminorities, they are perceived to be more frequently used to remove minorities from the jury. Exercising peremptory

challenges solely on the basis of race, whether the juror is a minority or a nonminority, should not be permitted.

The task force is also aware that more than 40 percent of all respondents (55 percent of minority respondents) believe that a minority litigant is less likely to win a personal injury suit. Almost 45 percent of all respondents (almost 60 percent of minority respondents) agree that a minority litigant who does win is likely to receive less compensation from a jury than a nonminority litigant would. The task force believes that these perceptions could be modified if jury panels were more representational and diverse. Steps should, therefore, be taken to modify jury selection procedures in order to reduce discriminatory challenges and achieve this objective.

In *Batson v. Kentucky*, 476 US 79 (1986), the Supreme Court of the United States held that the Equal Protection Clause of the Fourteenth Amendment forbids prosecutors from challenging prospective jurors solely on account of their race. In *Edmonson v. Leesville Concrete Co.*, 111 S Ct 2077 (1991), the Court extended that principle to civil cases. Pointing out that a jury "is a quintessential governmental body, having no attributes of a private actor," the court held that "courts must entertain a challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial." To summarize the *Batson* process: a party who feels that an opponent's challenge is racially-based must establish a *prima facie* case of purposeful discrimination—which the party can do by showing that he or she is a member of a cognizable racial or ethnic group and that the opponent has exercised a peremptory challenge to remove from the jury panel a member of that same group. The burden then shifts to the opponent to provide a neutral explanation for the challenge. Although the burden of coming forward with an explanation shifts to the opponent, ultimately the burden of proving purposeful discrimination continues to lie with the party who objects to the exercise of the challenge. See the summary of the rule set forth by the Oregon Supreme Court in *State v. Henderson*, 315 Or 1, 843 P2d 859 (1992).

The *Batson/Edmonson* rule is no panacea. Proving purposeful discrimination may be as difficult as it is easy for the opponent to articulate a nondiscriminatory rationale for the challenge. The task force believes that the *Batson* procedure might be a more powerful tool for avoiding discriminatory challenges if the burden shifted to the proponent of the challenge once a preliminary showing of discrimination has been made.

Some suggest that the answer to the problem posed by discriminatory peremptory challenges lies in the elimination of peremptory challenges altogether. *See, e.g.*, the concurrence of Justice Thurgood Marshall in *Batson, supra*, 476 US at 100–08. The task force suggests two alternative approaches: (1) an amendment to ORCP 57D to permit a challenge of a juror for cause for the possible existence of bias against a racial or ethnic minority, where that bias may affect the juror's determination on a relevant issue, and where the challenging party can point to specific facts (from the juror's background or in answer to questions on *voir dire*) that indicate such a possibility; and (2) to reduce peremptory challenges based on race, a legislative codification of the *Batson* principle, with certain differences designed to make the rule more effective.

The task force heard anecdotal reports of racial and ethnic bias playing a determinative role during jury deliberation, and of jurors who felt intimidated and discouraged from reporting that fact to the court after the verdict or who believed that nothing would be done if they did report it to the court. The procedures for dealing with evidence of misconduct during jury deliberation appear to be limited in this state, and present particular problems.

First of all, it may be impossible to ascertain whether bias has played a part in the deliberative process. Under Oregon law, a lawyer may have no contact with a juror unless the lawyer can demonstrate to the court a reasonable ground for believing that a juror or the jury has engaged in fraud or misconduct that would be sufficient to justify setting aside the verdict. Once such a showing is made, contact with a juror can only occur in the presence of the court and the opposing party. Uniform Trial Court Rules (UTCR) 3.120(2)(b). UTCR 3.120(2)(b) codifies a long-standing proposition in Oregon law. It represents a public policy decision that the risk of interference with a juror's independence and privacy, and the finality which should be accorded to a verdict, are not outweighed by a risk of misconduct in a jury room that will continue undiscovered unless questioning is permitted. The task force believes that the rule represents a reasonable compromise between these interests, and that questioning of jurors should continue to occur in the presence of the court and only after the court is presented with reasonable grounds for conducting the questioning.

More problematic under this model is the procedure after questioning of the jurors has elicited persuasive evidence of bias that tainted the deliberative process. In *Erstgaard v Beard*, 310 Or 486, 800 P2d 759 (1990), the Oregon Supreme Court held that a juror's statements during deliberation cannot, without more evidence, be the basis for setting aside the resulting verdict. The court said:

> "The posture a juror takes for or against a party during deliberations can always be attacked as bias; no verdict would ever be safe if such a meaningless label could justify a new trial…In the relatively few cases in which this court has either permitted or required a new trial for juror misconduct that occurred during the deliberating process, we have found none in which the misconduct consisted solely of juror argument. All the cases have involved specific acts by jurors designed…by the particular offending jurors to give them special knowledge concerning one of the disputed facts in the case then under consideration…[This juror's] actions were different. She did not obtain new information relating to [defendant]. She simply disclosed the basis of her pre-existing bias." 310 Or at 497–98.

The task force heard troubling tales from dismayed jurors that other jurors had argued—successfully—that a particular factual determination be made solely because the party was a member of a racial or ethnic minority. *Ertsgaard v. Beard* would appear to foreclose any remedy for such conduct, even if it is disclosed to the court and the court finds that in fact it happened. The task force, therefore, proposes legislation that

would make it easier to challenge jurors who give responses suggestive of racial or ethnic bias.

The main task force survey asked a series of questions comparing the fairness of juries to that of judges in the treatment of minorities. Question 10(k) asked respondents whether they agreed, disagreed, or had no opinion concerning the following statement: "A criminal jury trial is more 'winnable' by prosecutors if the defendant is a minority." Table 7-1 shows the responses.

Table 7-1

Respondents who agree that "a criminal jury trial is more 'winnable' by prosecutors if the defendant is a minority."

Respondents	**Percentage who agree**
All Respondents	30%
Minority respondents	44
Nonminority respondents	29
Judges	27
Minority lawyers	58
Nonminority lawyers	43
Prosecutors	25
All lawyers	44
Criminal defense lawyers	74
Court personnel	13

Question 10(l) then asked respondents to comment on whether "A criminal trial WITHOUT A JURY is more 'winnable' by prosecutors if the defendant is a minority."

Table 7-2

Respondents who agree that "a criminal trial without a jury is more 'winnable' by prosecutors if the defendant is a minority."

Respondents	Percentage who agree
All respondents	18%
Minority respondents	33
Nonminority respondents	17
Judges	11
Minority lawyers	41
Nonminority lawyers	26
All Lawyers	27
Prosecutors	10
Criminal defense lawyers	46
Court personnel	8

These questions asked for responses "based on your ACTUAL experience." The responses indicated in Tables 7-1 and 7-2 suggest that juries are more biased against minority defendants than are judges. Forty-four percent of all lawyers and 30 percent of all respondents believed a criminal jury trial is more winnable by prosecutors if the defendant is a minority, while over one quarter (27 percent) of all lawyers and 18 percent of all respondents believed a criminal trial *before a judge* is more winnable by prosecutors if the defendant is a minority. (These are substantial percentages, in regard to trials of minorities by both juries and judges.) Question 10(g) of the main survey asked for a response to the statement: "A criminal jury trial is more 'winnable' by the defense if the defendant is a nonminority."

Table 7-3

Respondents who agree that "a criminal jury trial is more 'winnable' by the defense if the defendant is a nonminority."

Respondents	Percentage who agree
All respondents	35%
Minority respondents	52
Nonminority respondents	34
Judges	28
Minority lawyers	67

Nonminority lawyers	49
All Lawyers	51
Prosecutors	34
Criminal defense lawyers	80
Court personnel	18

Eighty percent of criminal defense lawyers agreed. A substantial percentage of prosecutors also agreed.

Question 10(h) then asked whether “A criminal trial WITHOUT A JURY is more ‘winnable’ by the defense if the defendant is a nonminority.”

Table 7-4

Respondents who agree that “a criminal trial without a jury is more ‘winnable’ by the defense if the defendant is a nonminority.”

Respondents	**Percentage Who Agree**
All respondents	20%
Minority respondents	36
Nonminority respondents	18
Judges	10
Minority lawyers	44
Nonminority lawyers	28
Prosecutors	9
Criminal defense lawyers	50
Court personnel	10

In every category of respondents, the perception is that, to the extent a criminal trial is biased, juries are more biased in favor of nonminority defendants than are judges. Even so, half of all criminal defense lawyers, 44 percent of minority lawyers, 36 percent of all minority respondents and 29 percent of all lawyers perceived bias by judges.

Recommendations

Recommendation Number 7-8

Every potential juror should receive an orientation (perhaps by videotape) that not only describes the jury process, but that also includes a succinct statement of the reasons why it is essential for every potential juror to disclose any predisposition to judge a party or assess a witness based solely on racial or ethnic grounds.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Less than $25,000.

Recommendation Number 7-9

The oath given to potential jurors should include specific reference to the obligation to disclose to the court, during the jury selection process, their own bias against a racial or ethnic minority (including a specific group if appropriate), and the obligation to decide the case free from ethnic or racial bias.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

Recommendation Number 7-10

Prior to the *voir dire* examination, when requested by a party or when a court believes it is appropriate, a trial court should conduct an initial *voir dire* of potential jurors designed to elicit any evidence of bias against a racial or ethnic minority that may affect the juror's deliberations.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

Recommendation Number 7-11

The Council on Court Procedures and the legislature should amend ORCP 57D, adding the following as grounds for a challenge for cause: any evidence which would reasonably suggest that the juror may possibly reach a decision based in whole or in part on racial or ethnic bias against a party or a potential witness.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

Comment: Unlike the other grounds for challenges for cause, this proposed basis is phrased in terms of a "possibility" rather than a proven fact. The task force believes that this addition is required to preserve the integrity of the jury process by avoiding even the perception of juror bias.

Recommendation Number 7-12

The Judicial Department should seek the following proposed legislation (codifying *Batson/Edmundson*):

***Section 1*: Section 2 of this Act is added to and made a part of ORS chapter 10 or ORCP 57:**

***Section 2*: (1) A party in a civil or criminal trial may not exercise peremptory challenges primarily on the basis that jurors to be challenged belong to a particular cognizable group with respect to race or ethnicity. A rebuttable presumption exists that peremptory challenges do not violate this subsection.**

(2) If a party believes the adverse party has exercised peremptory challenges on a basis prohibited under subsection (1) of this section, the party so believing may move for a mistrial before the jury is sworn and outside of the presence of potential jurors. The moving party has the burden of establishing:

(a) That the prospective jurors excluded belong to a cognizable group with respect to race or color; and

(b) That there is a likelihood that the adverse party has challenged the potential jurors primarily on the basis that they belong to the cognizable group.

(3) If the court finds that the circumstances as presented by the moving party create a likelihood that the adverse party is challenging prospective jurors primarily on the basis that they belong to the cognizable group, the burden shifts to the adverse party to show that the peremptory challenges in question were not exercised primarily on the basis of membership by the prospective juror in a cognizable group. If the adverse party fails to meet the burden of justification as to the questioned challenges, the presumption that the challenges do not violate subsection (1) of this section is rebutted.

Note: This is a modified version of a bill that was introduced in the 1993 legislative session; it was referred to the House Judiciary Committee, where it died.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

Recommendation Number 7-14

The Oregon State Bar and Oregon Supreme Court should promulgate disciplinary rules that the use of a peremptory challenge to excuse a juror solely on the basis of race or ethnicity is unethical.

Estimated date for implementation to be completed: January 1, 1995.

Estimated cost of implementation: Minimal.

Suggestions for implementation: Changes in the Disciplinary Rules require concurrence of the Oregon State Bar and the Supreme Court. ORS 9.490.

Recommendation Number 7-15

The Oregon State Bar should draft a rule of professional responsibility concerning the status of persons. Such a rule could be patterned after the ABA Code of Judicial Conduct 3B(6):

> **"Lawyers in proceedings before the court shall refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, or socio-economic status, against parties, witnesses, counsel or others. This section, however, shall not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socio-economic status, or other similar factors, are issues in the proceedings."**

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

Persons responsible: Oregon State Bar and Oregon Supreme Court.

Chapter 8

The Role of Oregon Law Schools in Addressing Racial Problems in the Oregon Legal Community

Each Oregon law school—University of Oregon School of Law, Willamette University College of Law, and Northwestern School of Law at Lewis and Clark College—completed a general questionnaire sent by the task force.[12] Each law school also responded to specific follow-up questions.

Minorities comprise 9.35 percent of the Oregon population, but minority lawyers make up only 2.66 percent of the members of the Oregon State Bar. The task force believes that the state's three law schools, in conjunction with the Oregon State Bar, must address the problem of minority underrepresentation in Oregon's legal community in four areas: (1) recruitment of minority law students; (2) support, retention and graduation of minority law students; (3) assistance in passing the bar exam; and (4) placement in Oregon jobs. Action in each area is an essential step in achieving the ultimate goal—increasing the number of and opportunities for minority attorneys in Oregon.

Recruitment of Minority Law Students

Findings

Since the 1987–88 school year, applications to the three Oregon law schools have grown steadily. For example, 1993–94 saw 5,628 applicants compared to 2,306 in 1987–88. Although the number of minority applicants has also grown steadily, the percentage of the total number of applicants who are minorities has remained, for the most part, constant. Minorities made up 13 percent of all applicants in 1987–88, 14 percent in 1988–89, 12 percent in 1989–90, 13 percent in 1990–91, 13 percent in 1991–92, 17 percent in 1992–93, and 16 percent in 1993–94.

Similar figures exist for the number of Oregon residents who applied to other law schools approved by the American Bar Association. For the 1987–88 academic year, 428 applications were reported from Oregon residents; 49 (11.44 percent) of those from minorities. For 1988–89, 522 applicants, 51 (9.77 percent) from minorities; for 1989–90, 528 applicants, 55 (10.41 percent) from minorities; for 1990–91, 563

applicants, 57 (10.12 percent) from minorities; and for 1991–92, 560 applicants, 69 (12.32 percent) from minorities.

Since 1987, 10.87 percent of Oregon residents who applied to an American Bar Association (ABA) approved law school were minorities, while 9.35 percent of Oregon's population consisted of minorities. Thus, the percentage of law school minority applicants from Oregon slightly exceeded the percentage of minorities in the Oregon population. Law schools and the Oregon State Bar must work together to recruit Oregon minority students to remain in Oregon for law school and become active members of the bar.

Nationwide, the percentage of minority law school applicants is less than the percentage of minorities in the general population. In 1990, African Americans were 12.05 percent of the United States population, but only 8.03 percent of all law school applicants in 1987–92. Asians/Pacific Islanders were 2.92 percent of the population and were 3.92 percent of all law school applicants. Hispanics/Latinos were 8.98 percent of the population and a mere 4.91 percent of all law school applicants. Native Americans were .78 percent of the population and .52 percent of all law school applicants.

During 1987–93, total student matriculation at Oregon law schools fluctuated. Entering Oregon law schools for the 1987–88 year were 543 students, compared to 575 in 1993–94. The high for the period surveyed was 610 in 1989–90, with a low of 515 in 1991–92.[13] In those same years, the number of minority students entering Oregon law schools ranged from a high of 84 in 1993–94 to a low of 59 in 1989–90.

In the three Oregon law schools, minorities constituted 13 percent of matriculating students in 1987–88, 11 percent in 1988–89, 10 percent in 1989–90, 13 percent in 1990–91, 15 percent in 1991–92, 12 percent in 1992–93, and 15 percent in 1993–94. African-American students ranged from a high of four percent in 1993–94 to a low of one percent in 1988–89. Asians/Pacific Islanders ranged from a high of seven percent in 1991–92 to a low in 1992–93 and 1989–90 of four percent. Hispanics/Latinos comprised two percent of the entering class in every year except 1991–93, when they comprised three percent. In every year, Native Americans represented two percent of the total number of entering law students.

These statistics demonstrate that Oregon law schools are recruiting minority students in relative proportion to Oregon's minority population. Over the last six years, 12 percent of students who matriculated at Oregon law schools were minorities. Increasing the number of and opportunities for minority attorneys in Oregon, however, requires more than mere statistical correlations. Innovative methods and ideas must be utilized to increase the diversity of entering classes at Oregon's three law schools, the first step in creating a truly diverse bar.

All Oregon law schools use one or more of the following techniques to attract minority applicants: direct mail campaigns to minorities who have applied to take the LSAT; hosting Minority Law Day, where high school and college students are invited to visit

with minority law students, lawyers and judges; attending regional and national law forums; recognizing in the admissions process the value of a diverse class; involving minority students in recruitment, and follow-up contact with minority applicants.

The offer of a scholarship is the most effective means of attracting minority students. All three Oregon law schools have minority scholarship programs. Northwestern School of Law at Lewis and Clark College has a $100,000 Native American endowed scholarship fund, and an ethnic scholarship program at Willamette University College of Law is more than two decades old. All three Oregon law schools have received significant, yet rapidly diminishing, funding for minority scholarships from the Oregon Law Foundation. The University of Oregon stated in its survey response, "[We are] still behind many law schools across the country who are able to offer full tuition for all three years of law school and if we were able to compete with more scholarship money, the numbers of minorities would clearly increase."

The Oregon State Bar provides two types of financial assistance to minority students to encourage them to enroll at an Oregon law school as well as to remain in Oregon through a waiver-of-repayment incentive. The first type of assistance is a conditional loan. These loans are made to financially-needy minority students. If the borrower takes the Oregon bar exam before taking an exam of any other state and passes within one year of graduation, repayment of the loan is waived. The second type of assistance is a minority scholarship. Repayment is also waived if the borrower becomes an active member of the Oregon State Bar within one year of graduation. These are effective ways to increase minority lawyers in Oregon.

The three Oregon law schools also have taken steps to increase the pool of minorities interested in a legal career. These steps include visiting minority organizations on undergraduate campuses and inviting minority youth to the Minority Law Day. The University of Oregon School of Law offers a program in which undergraduate minority students interested in a legal career are matched with law students in a mentoring relationship.

The task force received extensive testimony concerning the need for bilingual attorneys. As noted throughout this report, non-English-speaking persons face significant barriers in the legal system. The number of bilingual attorneys is believed to be small in comparison to the number of non-English-speaking litigants. One method of remedying this problem is to increase the number of bilingual law students and afford them an opportunity to pursue a legal career in Oregon. Currently, Oregon law schools have no programs that aim to increase the number of bilingual law school students.

As the minority population of Oregon continues to grow, more residents will not speak English. There is a great need now, and there will be an increasing need in the future, for bilingual attorneys. Oregon law schools should encourage students to be proficient in a second language.

Support, Retention and Graduation

Findings

All three schools recognize that the ultimate goal is not to just encourage minorities to attend law school, but to provide support for those students once they arrive, and to ensure that they graduate. The total number of students who graduated at Oregon law schools increased over the period surveyed. In 1988–89, 446 students graduated; in 1992–93, 534 students graduated. The number of minority graduates over the same period was 32 in 1988–89, 48 in 1989–90 and 1991–92, 42 in 1990–91, and 63 in 1992–93.

For those five academic years, minorities were 7.17 percent of all graduates in 1988–89, 9.79 percent in 1989–90, 8.46 percent in 1990–91, 8.90 percent in 1991–92, and 12 percent in 1992–93. African-American graduates represented a high of 2.80 percent in 1992–93 and a low of .44 percent in 1988–89. Asian/Pacific Islanders constituted a high of 5.24 percent in 1992–93 and a low of 3.13 percent in 1988–89. Hispanics/Latinos were a high of 2.44 percent in 1989–90 and a .60 percent low in 1990–91. Native Americans ranged from a high of 1.48 percent in 1991–92 to a low of .93 percent in 1992–93.

Disturbingly, the average percentage of minority students who graduated from Oregon law schools between 1989–93, 9.26 percent, was significantly lower than the average percentage of minority students who matriculated over that same period, 12.20 percent. Enrolling larger numbers of minority law students is only one step in eliminating underrepresentation. Efforts must be made to ensure that minority students who enroll at Oregon law schools remain to graduate. The average attrition rate among minority students, 25 percent, is significantly higher than among nonminority students, eight percent. *See* Table 8-9, *infra*.

Retention and graduation of minority students requires attention to two areas. The first is academic support for those in need of it. In order to assist minority students academically, each law school has an Academic Support Program that provides tutorial services for minority students. The tutors assist students with analytical and writing skills, exam preparation and study skills. In addition, at the University of Oregon and Northwestern School of Law, a summer orientation program is offered before the first semester.

Presently, Academic Support Programs focus on first year courses with some time spent, at least at one law school, on “bar exam courses” in a student’s second and third year. We believe that law schools should emphasize the importance of and provide tutorial assistance for all “bar exam courses.” Minority students needing assistance would have access to—and we hope be encouraged to take advantage of—tutorial assistance while earning credit towards graduation.

The second type of support that law schools should provide is cultural. A law school environment should be culturally sensitive and integrative. To provide a reasonable level of comfort and acceptability for minority students, the cultural support of nonminorities is as important as the support of other minorities. As noted throughout

this report, whether one is a minority or nonminority, one's cultural background has a significant impact on one's relation to the legal system. All law professors, students and staff should have some understanding of cross-cultural differences that contribute to the problems discussed in this report. ***The group that is most likely to lack cross-cultural sensitivity is the nonminority group. The same attitudes that commend cross-cultural training of judges, court staff and lawyers commend cross-cultural training of law students and law faculty.***

All three Oregon law schools have various activities to promote the level of cultural awareness. Northwestern School of Law has several seminars that address topics such as "Racism and the Law" and Native-American law. The University of Oregon has had two special summer classes for law students and members of the community. The courses were titled "Racial Issues in the Criminal Justice System," and "Civil Rights and Civil Wrongs." Willamette College of Law sent a faculty member to a conference that focused on incorporating different ethnic and gender perspectives into course content and also offers a course titled "Civil Rights." Each school has extra-curricular activities ranging from "Minority Law Day" and "Diversity Week" presentations to Martin Luther King, Jr. birthday celebrations.

Although each law school offers some classes and/or activities designed to constructively build upon racial and cultural differences, all such programs are voluntary. Due to the amount of work required of a law student, it is likely that only those students specifically interested in these issues will attend such activities. The task force's experience is that the audience at such affairs was mainly minorities. Further, the focus of some extra-curricular activities may be more social than what is traditionally thought of as educational.

In addition to the efforts of the law schools, the Oregon State Bar Affirmative Action Program is also active in supporting law students during law school. The Bar offers a Professional Partnership Program. This program is designed to provide a bridge between minority students and members of the professional legal community. Students are matched with attorney mentors who are active members of the Oregon State Bar. Mentors offer support, advice and guidance to the student partner concerning the realities of the legal profession, information concerning preparation for and sitting for the bar exam, and other helpful tips concerning law school.

The task force's experience is that the law school students and faculty that participate in cross-cultural activities are those least in need of cross-cultural training.

Assistance in Passing the Bar Exam

Findings

Exhaustive figures on bar exam results were provided by the Oregon State Bar Affirmative Action Program and the Oregon State Bar for the years 1983 to 1993. *See*

Table 8-10, *infra*. Disappointingly, in each of those years, the minority passage rate was lower than the nonminority passage rate, the worst differential occurring on the July 1983 exam when the nonminority passage rate was 73 percent, and 29 percent for all minorities. The passage rates for five recent exams are:

Table 8-1

Passage rates of state bar exams

Date of exam	Nonminority passage percentage	Minority passage percentage	Oregon law schools minority pass rate
July 1991	74%	36%	29%
Feb 1992	78	33	29
July 1992	86	49	45
Feb 1993	79	42	43
July 1993	76	54	55

For the most recent exam, July 1993, individual minority groups statistics were: (1) Asian American, 19 of 25 (76 percent) passed; (2) African American, 3 of 13 (23 percent) passed; (3) Hispanic, 6 of 12 (50 percent) passed; and (4) Native American, 3 of 7 (42 percent) passed. Of male minorities, 21 of 36 (58 percent) passed, while 10 of 21 (48 percent) of female minorities passed. These consistently lower minority passage rates are troubling.

The Oregon State Bar Affirmative Action Program offers various forms of bar exam assistance to minority applicants. The bar offers low interest bar exam loans to defer exam costs and also holds workshops before the bar exam to prepare participants on exam-taking techniques. Further, the bar maintains a library of materials, such as preparatory books, cassettes and flash cards, that are available to minority applicants to assist them in preparing for the exam.

Currently, aside from providing rooms for bar review courses, Oregon law schools play no part in preparing a law student for the bar exam after the student has graduated. The law schools, either in conjunction with the bar or by utilizing resources at their institutions, should consider a program to complement, not replace, current bar preparation courses. We envision that such a program might select one person—an alumnus, professor or interested lawyer—to serve as a specialist in each of the 18 or so subjects that are covered on the Oregon bar exam. This specialist would be available to meet with minority students to clarify and answer questions about a particular subject. The administration of programs such as this might be handled by the school's career services.

Placement in Oregon Jobs

Findings

The discussion above should be considered in light of the ultimate goal—to increase the number of and opportunities for minority attorneys in Oregon, so that, in *all* respects, they stand on equal footing with nonminority lawyers. The most recent census figures establish that the population of Oregon in 1990 was 2,842,000. The Caucasian/White population was 2,637,000, or 92.78 percent of the total population. Minorities and Hispanics were 266,000, or 9.35 percent. (Some Hispanics also are counted in the total of nonminorities.)

The latest data shows 9,653 active members of the Oregon State Bar. Of those active members, 257 or 2.66 percent are minorities. In 1990, the African-American population of Oregon was 46,000, 1.61 percent. In 1993, this same group had 48 active members in the bar, .49 percent. The 1990 Asian/Pacific Islander population of Oregon was 69,000, 2.42 percent. In 1993, Asian/Pacific Islanders had 100 active members in the bar, 1.03 percent. The 1990 Hispanic/Latino population was 113,000, 3.97 percent. In 1993, this group had 74 active members in the bar, .76 percent. The 1990 Native American population was 38,000, 1.33 percent. In 1993, Native Americans had 35 active members in the bar, .36 percent.

Officials at the University of Oregon School of Law said that their efforts to place minority graduates in legal positions in Oregon have been quite successful "with two minority graduates clerking for Oregon Supreme Court Justices in the coming year, three others working for Portland law firms, one working for a Eugene law firm and one continuing in graduate work." Willamette University College of Law noted that "part of our goal is to graduate more ethnic students. Where they choose to practice is not essential, though we strongly desire that they practice in Oregon." Northwestern School of Law stated, "Our placement office tries to find employment for graduates wherever there are jobs."

We believe that minority placement assistance should begin with the students' first summer position. The Oregon State Bar Affirmative Action Program encourages minority graduates to stay in Oregon. The bar, in conjunction with the three law schools and a distinguished group of legal employers, offers the First-Year Honors Program. This program is designed to provide summer job opportunities for minority law students in Oregon.

A pool of qualified first-year minority students is chosen by each of the three schools. Participating Oregon legal employers, including the largest firms in the state, may then select students to work as law clerks during the summer after the students' first year. With early exposure to the legal market, minority students are afforded an opportunity to develop skills and abilities that will assist them in obtaining a job upon graduation.

In addition, the Affirmative Action Program operates the Minority Clerkship Program. This program encourages legal employers to hire minority law students for summer or

school-year clerkships by providing a wage stipend to employers who hire these students. The Affirmative Action Program also has engaged the services of an attorney search-and-placement firm to assist with employment opportunities and mail job notices to all minority students.

Law school placement offices should continue to alert minority applicants to job opportunities, to offer comprehensive assistance to these students in finding positions, and to explore new ways that they might be helpful in these efforts. For example, the University of Oregon provides "mock interviews" to prepare and sharpen minority students' interviewing skills.

Oregon law schools have a problem. The theme appears to be that they do reasonably well in attracting and admitting minorities, less well in graduating them, and dreadfully in equipping them to pass the bar examinations. We suggest that the law schools must find out why this situation exists and address the problem more effectively than in the past. (In this connection, see an article written by an African-American psychology professor from Stanford, *Race and the Schooling of Black Americans*, The Atlantic Monthly 68 (April 1992).) Law schools that undertake to educate students have an obligation to educate them well enough to pass the bar examination. For their minority students, the law schools are not doing this well.

Law Schools and Minorities

Recommendations

Preliminary Comment: The task force recognizes the important and substantial work of all three Oregon law schools in increasing the number of minority lawyers. The law schools have a unique opportunity to influence future Oregon lawyers because most new members of the Oregon State Bar are their graduates. Consequently, a heavy burden necessarily falls on Oregon law schools to address issues that can best be addressed through the educational process.

Recommendation Number 8-1

Oregon law schools should intensify their efforts to recruit more minority students, especially Hispanic/Latino students.

Recommendation Number 8-2

Organizations that provide funding and scholarships, such as the Oregon Law Foundation, should increase their efforts to provide funds to Oregon law schools. Funding assistance has enabled Oregon law schools recently

to make tremendous progress. A loss of or decrease in funding frustrates these efforts.

Recommendation Number 8-3

Law schools should commit more of the money they obtain from their fund raising efforts to programs targeting minority students and applicants.

Recommendation Number 8-4

Still greater efforts must be made to enlarge the pool of *Oregon* minorities interested in a legal career, to relieve the need for inter-school competition for minority students.

The University of Oregon mentorship program between undergraduates and law students is a fine example. Programs enlisting law students in the education of elementary school and high school students may help. In addition, we encourage the Oregon law schools to work with the Oregon State Bar Law Related Education Committee. Law students could be encouraged to participate in the bar's Mentor Program or Classroom Law Project. Elsewhere in this report, *see* Chapter 9, the task force recommends that the bar implement a program designed to work with secondary school minority students in order to assist them through college and into law school. We encourage the law schools to work with the bar, as appropriate, to implement the program.

Recommendation Number 8-5

Each law school should address the lower graduation rates among minority law students. This should include an objective evaluation of the scope and effectiveness of each school's academic support programs.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost: Unknown.

Recommendation Number 8-6

Each law school should endeavor to guarantee academic support, from matriculation to graduation, for those minority students who need it; at a

minimum, providing academic support for all first-year courses and all "bar exam courses."

Recommendation Number 8-7

We encourage each law school to consider weighing bilingual skills in the admissions process.

Recommendation Number 8-8

To help eliminate racial/ethnic bias in the legal system, law school curriculum should place a greater emphasis on cultural differences and disparate treatment of minorities in the judicial system by encouraging faculty to incorporate in their course materials discussions of the legal issues that particularly affect minorities. For example, in a course on criminal procedure, a professor might discuss whether minorities are stopped by the police based solely on race. These issues should also arise in clinical programs and law school competitions. For example, in a client counseling competition, students might be required to represent non-English-speaking persons or persons unfamiliar with the United States legal system.

Recommendation Number 8-9

In addition to revising their curricula, law schools should also offer several lectures or presentations each year that directly focus on how cultural differences affect legal rights. Nonminority students and faculty should be required to participate and attend.

Recommendation Number 8-10

Minority alumni from all three schools should continue to take an active role in providing support and counseling to law students. Minority Oregon lawyers are valuable role models to demonstrate to minority students that they can succeed and should remain in Oregon.

Table 8-2

Applications to Oregon law schools

				Years			
Applications	**1993–94**	**1992–93**	**1991–92**	**1990–91**	**1989–90**	**1988–89**	**1987–88**
Total Applications	5628	5868	5413	4800	3576	2718	2306
Minority Applications	924	997	716	613	432	392	295
Percentage of total applications by minorities	16%	17%	13%	13%	12%	14%	13%

Table 8-3

Matriculation at Oregon law schools

				Years			
Students	**1993–94**	**1992–93**	**1991–92**	**1990–91**	**1989–90**	**1988–89**	**1987–88**
Total students who matriculated	575	529	515	576	610	568	543
Minority students who matriculated	84	61	77	74	59	64	71
Percentage of matriculating students							

who were minorities	15%	12%	15%	13%	10%	11%	13%
Total African-American students who matriculated	21	10	11	17	7	10	15
Percentage of African-American students who matriculated	4%	2%	2%	3%	1%	2%	3%
Total Asian/Pacific Islander students who matriculated	36	26	38	36	27	35	31
Percentage of Asian/ Pacific Islander students who matriculated	6%	4%	7%	6%	4%	6%	6%
Total Hispanic/Latino students who matriculated	14	13	18	14	15	10	13
Percentage of Hispanic/Latino students who matriculated	2%	2%	3%	2%	2%	2%	2%
Total Native-American students who matriculated	12	11	10	5	9	7	8
Percentage of Native-American students who matriculated	2%	2%	2%	2%	2%	2%	2%

Table 8-4

Graduation at Oregon law schools

			Years*		
Graduates	**1992–93**	**1991–92**	**1990–91**	**1989–90**	**1988–89***
Total students who graduated	534	539	496	490	446
Minority students who graduated	63	48	42	48	32

Percentage of graduating students who were minorities	12.00%	8.90%	8.46%	9.79%	7.17%
Total African-American students who matriculated	15	5	11	10	2
Percentage of African-American students who matriculated	2.80%	0.92%	2.21%	2.04%	0.44%
Total Asian/Pacific Islander students who matriculated	28	25	25	19	14
Percentage of Asian/Pacific Islander students who matriculated	5.24%	4.63%	5.04%	3.87%	3.13%
Total Hispanic/Latino students who matriculated	13	9	3	12	7
Percentage of Hispanic/Latino students who matriculated	2.43%	1.66%	0.60%	2.44%	1.56%
Total Native-American students who matriculated	5	8	5	7	6
Percentage of Native-American students who matriculated	0.93%	1.48%	1.00%	1.42%	1.34%

* Figures for 1993–94 and 1987–88 were not available

The following statistics are taken from the *Statistical Abstract of the United States 1992* 112th edition, and are based on figures compiled from the 1990 national census.[14]

Table 8-5

Quantity and percentage of Oregon population in 1990

Population	**Quantity of Oregon population**	**Percentage of Oregon population**
Total population	2,842,000	100.00%
All minorities	266,000	9.35
African American	46,000	1.61
Asian/Pacific Islander	69,000	2.42
Hispanic/Latino	113,000	3.97
Native American	38,000	1.33
Caucasian/White	2,637,000	92.78

Table 8-6

Number of Oregon residents who applied to an ABA approved law school[15]

Applicants	**1991–92**	**1990–91**	**1989–90**	**1988–89**	**1987–88**
Total applicants	560	563	528	522	428
Minorities	69	57	55	51	49
Percentage of applicants who were minorities	12.32%	10.12%	10.41%	9.77%	11.44%

The following statistics were provided by the Oregon State Bar as of July 1993.[16]

Table 8-7

Quantity and percentage of active members of the Oregon State Bar

Members	Number of active members of the bar	Percentage of bar membership
Total number	9,653	100.00%
Minorities	257	2.66
African American	48	0.49
Asian/Pacific Islander	100	1.03
Hispanic/Latino	74	0.76
Native American	35	0.36

Table 8-8

Percentage of U.S. population and law school applicants by racial group

Racial Group	Percentage of U.S. population	Percentage of law school applicants in U.S. from 1987–92
African American	12.05%	8.03%
Asian/Pacific Islander	2.92	3.92
Hispanic/Latino	8.98	4.91
Native American[17]	0.78	0.52

Table 8-9

Attrition rates at Oregon law schools

Students	Graduation year 1992–93	1991–92	1990–91	1989–90
Total students who matriculated	576	610	568	543
Minorities who matriculated	74	59	64	71
Nonminorities who matriculated	502	551	504	472
Total students who graduated	534	539	496	490
Minorities who graduated	63	48	42	48
Nonminorities who graduated	471	491	454	442
Attrition rate of minorities	15%	19%	34%	32%
Attrition rate of nonminorities	6%	11%	10%	6%

Table 8-10

Bar exam results:
Number and percentage of test-takers who passed

Year		Ethnicity* A	AA	H	NA	Total Minority	Gender M	F	Non-Minority	Law School U/O	WU	L&C	Other	First Taker	Multi-Taker
FEB	#	5/7	0/2	2/3	1/1	8/14	3/6	5/8		2/2	1/1	3/8	2/3	4/8	4/6
’83	%	71	0	67	100	57	50	63	63%	100	100	38	67	50	67
JLY	#	3/12	0/5	1/2	2/2	6/21	3/11	3/10		4/6	1/3	1/10	0/2	6/18	0/3
’83	%	25	0	50	100	29	27	30	73%	67	33	10	0	33	0
FEB	#	3/10	0/5	1/3	0/1	4/19	4/12	0/7		1/3	1/3	1/9	1/4	3/10	1/9
’84	%	30	0	33	0	21	33	0	62%	33	33	11	25	30	11
JLY	#	7/15	1/6	1/2	1/2	10/25	3/14	7/11		4/5	0/0	5/9	1/11	7/19	3/6
’84	%	47	17	50	50	40	21	64	77%	80	0	56	9	37	50
FEB	#	4/10	1/7	1/1	0/1	6/19	5/12	1/7		2/2	0/2	2/5	2/10	4/13	2/6
’85	%	40	14	100	0	32	42	14	63%	100	0	40	20	31	33
JLY	#	6/11	2/11	1/7	2/5	11/34	7/18	4/16		4/6	0/4	2/10	5/14	6/27	5/8
’85	%	55	18	14	40	32	70	25	78%	67	0	20	36	22	63
FEB	#	3/5	3/5	2/5	1/3	9/18	6/9	3/9		0/0	3/3	1/6	5/9	3/3	6/15
’86	%	60	60	40	33	50	67	33	75%	0	100	17	56	100	40
JLY	#	4/5	1/6	5/9	3/7	13/27	9/17	4/10		4/7	3/6	3/6	3/8	10/16	3/11
’86	%	80	17	56	43	48	53	40	67%	57	50	50	38	63	27
FEB	#	3/4	3/4	2/4	3/4	11/16	7/10	4/6		3/3	1/1	3/4	4/8	4/7	7/9
’87	%	75	75	50	75	69	70	67	74%	100	100	75	50	57	78

JLY	#	5/10	3/5	3/4	4/7	15/26	8/13	7/13		5/5	4/7	5/9	1/5	12/23	3/3
’87	%	50	60	75	57	58	62	54	60%	100	57	56	20	52	100
FEB	#	4/7	0/2	3/4	1/1	8/14	3/7	5/7		2/2	0/3	2/3	4/6	4/5	4/9
’88	%	57	0	75	100	57	43	71	64%	100	0	67	67	80	44
JLY	#	2/5	0/1	3/3	1/4	6/13	2/8	4/6		0/1	½	5/6	0/5	6/12	0/2
’88	%	40	0	100	25	46	25	67	61%	0	50	83	0	50	0
FEB	#	4/6	3/7	1/4	1/1	9/18	5/11	4/7		1/3	3/4	1/4	4/7	6/12	3/6
’89	%	67	43	25	100	50	45	57	70%	33	75	25	57	50	50
JLY	#	4/6	1/5	5/6	0/4	10/21	5/14	5/7		1/7	3/3	3/5	3/6	7/13	3/8
’89	%	67	20	83	0	48	36	71	76%	14	100	60	50	54	38
FEB	#	0/1	2/6	3/4	1/2	6/13	4/9	2/4		3/5	0/1	1/2	2/5	4/4	2/9
’90	%	0	34	75	50	46	45	50	69%	60	0	50	40	100	22
JLY	#	8/17	4/8	4/9	1/4	17/38	12/27	5/11		5/11	3/6	2/11	7/10	14/34	2/4
’90	%	47	50	45	25	45	44	45	72%	45	50	18	70	41	50
FEB	#	4/7	4/7	4/4	1/3	13/21	9/14	4/7		4/5	4/6	4/6	4/8	5/9	7/12
’91	%	57	57	100	33	62	64	57	77%	80	67	67	50	56	58
JLY	#	3/11	2/9	3/4	2/4	10/28	2/13	8/15		2/4	1/2	2/11	5/11	9/23	1/5
’91	%	27	22	75	50	36	15	53	74%	50	50	18	45	39	20
FEB	#	5/11	1/8	2/3	0/2	8/24	3/14	5/10		0/1	2/4	3/12	3/7	5/12	2/11
’92	%	45	13	67	0	33	21	50	78%	0	50	25	43	42	18
JLY	#	6/10	1/8	6/11	4/6	17/35	10/20	7/15		3/6	2/2	4/12	7/14	15/23	2/12
’92	%	60	13	55	67	49	50	47	86%	50	100	34	50	65	17
FEB	#	4/7	2/10	4/7	1/2	11/26	3/14	8/12		2/2	0/2	5/12	4/10	6/11	5/15
’93	%	57	20	57	50	42	21	67	79%	100	0	42	40	55	33
JLY	#	19/25	3/13	6/12	3/7	31/57	21/36	10/21		5/10	7/10	8/16	10/21	29/46	2/11
’93	%	76	23	50	43	54	58	48	76%	50	70	50	48	63	18

* A = Asian/Pacific Islander AA = African American H = Hispanic NA = Native American

Chapter 9

Minority Lawyers in the Legal Profession

Minority membership in the Oregon State Bar is significantly below the percentage of minorities in the general population of Oregon. The following statistics were provided by the affirmative action office of the Oregon State Bar and were current as of July 1993.

Table 9-1

Quantity and percentage of active members of the Oregon State Bar

Members	Number of active members of the bar	Percentage of Bar membership
Total number	9,653	100.00%
All minorities	257	2.66
African American	48	0.49
Asian/Pacific Islander	100	1.03
Hispanic/Latino	74	0.76
Native American	35	0.36

The following statistics are taken from the *Statistical Abstract of the United States 1992* 112th edition, and are based on figures compiled from the 1990 national census.

Table 9-2

Quantity and percentage of Oregon population in 1990

Population	Quantity of Oregon population	Percentage of Oregon population
Total population	2,842,000	100.00%
All minorities[18]	266,000	9.35
African American	46,000	1.61
Asian/Pacific Islander	69,000	2.42
Hispanic/Latino[19]	113,000	3.97
Native American	38,000	1.33
Caucasian/White	2,637,000	92.78

Tables 9-1 and 9-2 show that minorities are greatly underrepresented in the Oregon legal profession. Approximately 9.35 percent of the general Oregon population are minorities, but only 2.66 percent of the active members of the Oregon State Bar are minorities.

The task force believes that a bar that reflects the racial and ethnic makeup of society is essential. However, it is difficult to dramatically increase the number of minority attorneys in Oregon in the short term. As Professors Holley and Kleven noted in their article, *Minorities and the Legal Profession: Current Platitudes, Current Barriers*, 12 T. Marshall L Rev 299, 304 (1987),

> "[H]igh school and college drop-out rates are disproportionately high for both Blacks and Hispanics. For our purposes, what the numbers mean is that much of the explanation for minority underrepresentation in law school and in the profession relates to factors *the current hierarchy will have difficulty impacting directly*." (Footnote omitted; emphasis added.)

What is needed is a long-term plan to increase minority high school and college graduation rates, and *to enlarge the pool* of minority persons interested in a legal career.

All components of the Oregon legal system (including the Oregon State Bar, Oregon law schools and Oregon practicing attorneys) as well as Oregon public and private elementary and secondary schools must focus their efforts on this challenge and work

together to deal creatively with the problem. For example, the Oregon State Bar in partnership with Oregon public and private high schools can effectively implement a program targeting minority freshman high school students to inform them of future legal opportunities as well as the academic standards necessary to reach those goals. Although worthwhile efforts have been made to interest minority students in the legal profession, no statewide comprehensive effort has been made to target them at a crucial time in their educational development.

The task force notes two programs. One is the *I Have a Dream* program now in existence in Portland, and in other cities nationwide. Under that program, the sponsors encourage elementary school children to commit to going to college, promising assistance with college costs and giving ongoing assistance to the children through elementary school and high school. A second program, the YEEP program, is designed to keep at-risk young people out of gangs and into jobs. The Oregon Trial Lawyers Association is participating in this program.

As noted in Chapter 8, the percentage of minority law school applicants nationwide is much less than the percentage of minorities in the general population. This means that nationwide, law schools will continue to compete for a finite pool of minority students. As a result, still greater efforts are needed to expand the pool of minority persons interested in a legal career.

Minorities Practicing Law in Oregon

Findings

We turn to a discussion of the task force survey to consider the lot of Oregon minority attorneys. Question 3 asked the respondents to give their *opinion* concerning how minority lawyers are perceived and treated. Actual experience with minority lawyers was not required to answer this question. Respondents were asked to agree or disagree with the following statement: “Minority lawyers need better grades in law school to be hired.”

Table 9-3

Respondents who agree that "minority lawyers need better grades in law school to be hired."

Respondents	Percentage who agree
All respondents	22%
Nonminority lawyers	25
Minority lawyers	51
Prosecutors	8
Criminal defense attorneys	32

Question 3 also asked whether "minority lawyers have fewer opportunities for advancement."

Table 9-4

Respondents who agree that "minority lawyers have fewer opportunities for advancement."

Respondents	Percentage who agree
All respondents	37%
Nonminority lawyers	46
Minority lawyers	76
Prosecutors	20
Criminal defense attorneys	51
All lawyers	46

These numbers indicate that a significant percentage of all respondents believe that minority lawyers receive disparate treatment in their legal careers. A significant number of all respondents believe that minority lawyers find it harder to get jobs and to be promoted after they get a job. Question 3 also asked if minority lawyers lack mentors. The responses:

Table 9-5

Respondents who agree that minority lawyers lack mentors

Respondents	Percentage who agree
All respondents	48%
Nonminority lawyers	54
Minority lawyers	74
Prosecutors	44
Criminal defense attorneys	54
Judges	56
All lawyers	56

More than half of all lawyers agree that minority lawyers lack mentors. Over 74 percent of the minority lawyers have that opinion.

The task force also conducted a survey of some of the largest law firms in Portland and discovered that the percentage of minority attorneys in those law firms was 3.05 percent. Only one African American is a partner in any large Portland firm.

Legal scholars have identified a phenomenon that may partly explain why minority lawyers, once hired, have difficulty advancing. Professors Holley and Kleven noted the perception that affirmative action "cheapens" a law degree, and may "adversely affect the careers of minorities whether or not they were admitted under affirmative action programs." *Minorities and the Legal Profession, supra*, 12 T. Marshall L Rev 299, 310–11 (1987). Some commentators have referred to this as "stigmatizing" minority lawyers. A minority lawyer, once hired, may be stigmatized as an affirmative action "hiree" whether or not that lawyer was in fact hired in an affirmative action program. This stigma may result in more difficulties in career advancement.

The task force also notes that there are other difficulties involved in being a racial minority in a predominantly white profession. A law review article addressed a relevant consideration when discussing the career difficulties of minority lawyers:

> "When faced with the choice of assimilation with a white-dominated, establishment firm or separatism with a 'hardy band of brothers,'…a minority lawyer may be strongly motivated to go where he will not risk rejection by mere virtue of being different and will not have to cope with the daily pressure of being *the* Hispanic in the office." *The Underrepresentation of Hispanic Attorneys in Corporate Law Firms*, 39 Stan L Rev 1403, 1414 (1987).

A comment by the lone minority partner at a large Portland firm provides some support for this observation. He said that his firm had made major efforts to hire three African-American associates during the last three years, only to lose them to offers from more racially diverse metropolitan areas.

Few minority lawyers occupy positions of responsibility in the Oregon State Bar or in bar-related organizations. The task force is convinced that it is as difficult to *be* a minority attorney in Oregon as it is to *become* one. Major efforts by the legal community must be mounted to support minority lawyers that successfully clear the difficult hurdles of law school and bar passage. Although "self-help" among minorities is admirable, it is not enough. Prestigious components of the legal community, including law firms and Oregon law schools, have made some admirable efforts, but they have not, to date, used the pressure of their prestige to ensure that minority attorneys are represented *at all levels* of the profession. The power and prestige of these groups should focus on the need to ensure that minority attorneys gain a meaningful place in the practice of law in Oregon.

Recommendations

Recommendation Number 9-1

In order to encourage more minority Oregonians to consider legal careers, the Oregon State Bar and the legal profession must assume lead roles. Grade school and high school students should be exposed to persons in a legal career. Lawyers should participate in a variety of programs to teach minority youth about the legal system.

The Oregon State Bar should initiate a partnership with Oregon public and private schools to provide information to minority high school students, to outline career opportunities in the legal profession and encourage academic achievement necessary to reach such goals.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

Suggestions for implementation: The Oregon State Bar should develop an ongoing program using the committee structure commonly utilized by the bar.

Recommendation Number 9-2

Law schools should be encouraged to cooperate in Recommendation 4-1 by encouraging law students and faculty to commit themselves to a "pro bono" requirement directed toward encouraging minority youth to consider a legal career by participating in the high school program as guest speakers and mentors.

Estimated date for implementation to be completed: September 1, 1995.

Estimated cost of implementation: Modest.

Suggestions for implementation: Develop a program with local elementary and high schools for law students and faculty to work with interested minority students. Include in law school catalog details about the program. The program could be administered by law students.

Recommendation Number 9-3

Law firms, state agencies and other employers of lawyers should evaluate their hiring practices to avoid bias in the hiring process. The Oregon State Bar should have a program to assist law firms, including education in "how to insure that your hiring practices are free of racial and ethnic bias."

Managing partners in law firms and representatives from the Oregon law schools should work in partnership with the Oregon State Bar to focus on the need for immediate measurable gains in minority participation in private practice. A high profile effort in this area is necessary to dissolve the "status quo" that has prevented meaningful minority participation in big firm practice. Success in this area is the first step to ensuring that minorities attain meaningful participation at all levels of the legal profession.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Less than $2,500.

Recommendation Number 9-4

The Oregon State Bar, and other bar-related organizations, should implement plans to involve more minority lawyers in positions of responsibility. Affirmative action plans for such organizations are as relevant, as important and as needed as affirmative action plans for

employers (such as law firms and the Judicial Department). A high profile effort in this area is necessary to change the status quo.

Estimated date for implementation to be completed: January 1, 1995.

Estimated cost of implementation: Minimal.

NOTES

1. In the task force surveys, the term "minorities" was defined as racial minorities including African Americans, Native Americans, Asian Americans, East Indians, Hispanics, Latinos, Mexican Americans and persons of Middle Eastern ancestry. Unless the text indicates otherwise, that is the meaning that applies in this report.

In a more general sense, "minority groups" are people who are singled out for unequal treatment, and who regard themselves as objects of unequal discrimination. Discrimination excludes minority groups from full participation in the life of their society.

2. Justice Peterson served as Chief Justice for eight years (1983–91) and retired from the Oregon Supreme Court on December 31, 1993.

3. Thomas, *From Affirmative Action to Affirming Diversity*, Harvard Business Review, March-April 1990, 107, 109.

4. Findings regarding the minority representation of nonjudicial court employees are based upon a 1993 Affirmative Action Plan (Appendix 2) prepared by the Judicial Department.

5. For example, a 1989 poll found that nearly 80 percent of all Americans believe that racism exists throughout the criminal justice system. Strasser, *One Nation Under Siege*, Nat'l L J § 2 at 1 (August 7, 1989). Whether or not that perception is true, it certainly is cause for serious concern.

6. Studies by Dean Alfred Blumstein of Carnegie-Mellon and by Joan Petersilia of the RAND Corporation, for example, conclude that approximately 80 percent of black over-representation in prison can be explained by differential involvement in crime and about 20 percent by subsequent racially discriminatory processes. Morris, *Race and Crime: What Evidence Is There That Race Influences Results in the Criminal Justice System?*, 72 Judicature 111 (1988). *See also* Shelley, *Structural Influences on the Problem of Race, Crime, and Criminal Justice Discrimination*, 67 Tulane L Rev 2273 (1993).

7. Defendants charged with murder or treason are, in some cases, not entitled to release. ORS 135.240(2).

8. Consider the cumulative significance of the training of young children recounted by Robert MacNeil in *Wordstruck* (1989), at pages 25-26:

> My parents thought good manners very important. [They]... gave me lessons in politeness. I was five and not getting it very swiftly. In retrospect, it sounds a little like Henry Higgins with Eliza in *Pygmalion*.
> “Now you’re meeting Mrs. Grant. What do you say?”
> No answer. Mrs. Grant was my godmother. I saw her often.
> “You say, ‘How do you do, Mrs. Grant. How are you today?’ You say it.”
> “How do you do, Mrs. Grant, and how are you today?”
> “No, don’t mumble it; say it very clearly.” ...
> “... And look her in the eye. All right now: again, I’m Mrs. Grant and you are meeting me. What do you say?”
> From the looks they exchanged I thought they must have suspected they had engendered a social retard, because I was not a quick study at this stuff. They were quite stern about it, and about shaking hands and looking people in the eye. Stern enough–and I remember the scene clearly–to make me very upset, not seeing the point, wanting to stop but being made to go on.

> "No one trusts someone who doesn't look them in the eye. They'll think there is something shifty about you. So look me in the eye and shake hands...."
> ...If I was going to make my way in the world, I had to say *sir* and *how do you do*, look people in the eye, shake hands firmly, and get up whenever a woman entered the room.

9. In all other counties the percentages of downward dispositional departures were 8.2 percent for whites, 7.3 percent for Hispanics and 5.7 percent for African Americans. These differences were not deemed to be statistically significant.

10. It should be noted that the data for this report was collected before implementation of The Juvenile Justice and Delinquency Prevention Act, which led to such studies as the one conducted in Oregon by the State Commission on Children and Families, summarized below.

11. *See also* Chapter 2, Recommendation Number 2-1, concerning courthouse user guides for minorities.

12. See Appendix 6.

13. The 1991-92 low was due, in part, to the University of Oregon temporarily downsizing its first-year class.

14. According to the U.S. Bureau of the Census, persons of Hispanic origin may be of any race. Therefore, the sum of the percentages of citizens in Oregon exceeds 100 percent.

15. Provided by Robert Carr, Director of Data Services for Law School Admission Services, Inc.

16. The affirmative action office of the Oregon State Bar provided these statistics.

17. Statistics from the 1990 U.S. Census and Law School Admissions Services, Inc.

18. The U.S. Bureau of the Census states that persons of Hispanic origin may be of any race. Therefore, the sum of the percentages slightly exceeds 100 percent.

19. Oregon Department of Education statistics for 1990–92 indicate that in 1990, 4.37 percent of all Oregon secondary school students were of Hispanic ancestry. In 1992, 5.32 percent of all Oregon secondary school students were of Hispanic ancestry. It is reasonable to assume that, in the general population, the percentage of Oregonians of Hispanic origin has correspondingly increased since 1990.

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