My experience in the criminal court is that the colored defendant, even in bailable cases, is unable to give bail. He has to stay in jail, and therefore his case is very quickly disposed of by the prosecutor. Defendants locked up are usually tried first. The colored man is more apt to be out of work than the White man, and that is a possible reason for the large number of arrests of Negroes. His sphere is very limited, and if there is any let up in the industry that is involved in that sphere, he is a victim. I have often wondered if you could change the skin of a thousand White men in the city of Chicago and handicap them the way the colored man is handicapped today, how many of those White men in ten years’ time would be law-abiding citizens.

—Judge Kickham Scanlan, as quoted in
The Negro in Chicago: A Study of Race Relations and a Race Riot in 1919
(Chicago Commission on Race Relations, 1922, p. 356)

As one of the key components of the criminal justice process, the courts represent an entity in which nationally, $90 billion dollars was invested in 1999 (Bureau of Justice Statistics, 2002). Moreover, according to the Bureau of Justice Statistics, in 2000, these courts dealt with more than 980,000 adults who were convicted of felonies (Durose & Langan, 2003), most of which were handled in state courts. Furthermore, nearly half (44%) of those convicted in these courts were Black (Durose & Langan, 2003). Given these statistics, prior to and following Judge Scanlan’s telling comments, the question of the courts and their treatment of persons of color has piqued scholarly interest.

Considering the significance of the courts in the race and crime discourse, our objectives for this chapter are threefold. First, we provide an overview of how American courts operate. This is followed by a brief historical overview of race and American courts. Last, we examine some contemporary
issues related to race and the courts. Our primary focus here is on the various aspects of the court process and whether discrimination (race or gender) remains a problem. In addition, we examine drug courts, which over the past decade have served as a way to handle the overflow of drug cases. Because racial minorities are frequently diverted to drug courts, after reviewing their structure and philosophy, we examine some recent evaluations.

Overview of American Courts: Actors and Processes

Like so many other facets of American life, the American court system owes much to the English justice system (Chapin, 1983). In general, as American society gained its independence, the courts became more complex with the development of the federal court system and the Supreme Court (Shelden, 2001). Today, because of these early changes, the U.S. court system is referred to as a “dual-court system.” There are both state and federal courts, each with trial courts at the lowest level and appellate courts at the top of the hierarchy. The federal court system starts with U.S. magistrate courts, “who hear minor offenses and conduct preliminary hearings” (Shelden & Brown, 2003, p. 196). U.S. district courts are trial courts that hear both civil and criminal cases. Positioned above the U.S. district courts is the U.S. Court of Appeals, which is the final step before reaching the Supreme Court. The Supreme Court represents the highest court in the land and has the final say on matters that make it to that level. The American court system (both state and federal) involves several actors and processes. Subsequently, over time, some of these actors and processes have come under scrutiny for a variety of reasons, including race (see Highlight Box 5.1) and class-related concerns (Reiman, 2004). As for actors, the court is generally comprised of three main figures: the judge, the prosecutor, and defense attorney. While the system is theoretically based on the ancient system of “trial by combat,” in practice, it has been suggested that these main figures are part of the “courtroom work group,” who actually work together to resolve matters brought before the court (Neubauer, 2002).

There are several processes involved when one is navigating through the court system. First, there is a pretrial process, where the decision is made whether or not to move forward with a particular case. If the case is moved forward, the question of pretrial detention and bail is decided next. Other processes in the court system include the preliminary hearing, grand jury proceedings, and the arraignment, where a defendant first enters his or her plea. While plea bargaining determines the outcome in most of the cases, if the case happens to go to trial, there are other processes that move the case along. Once the decision to go to trial is made, unless the case is going to be decided solely by a judge (referred to as a “bench trial”), the next process would be jury selection. Once the jury selection process is completed, the trial begins. And if the defendant is found guilty, the sentencing phase begins (this phase is discussed in detail in Chapter 6).
A Note on the Philosophy, Operation, and Structure of Native American Courts

Because of the unique history and worldview of Native Americans (Tarver, Walker, & Wallace, 2002), much of the previous dialogue does not apply to Native American courts. As such, we provide a brief overview of

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Highlight Box 5.1  Opinions About Courts Fall Along Racial Lines, National Survey Suggests:

Washington: Black Americans have far less confidence in state and local courts than their fellow citizens do, a new nationwide survey suggests. Surprisingly, Hispanics expressed greater overall satisfaction than non-Hispanic whites in the performance of courts.

“Opinion is divided sharply across racial lines,” said Frank Bennack Jr., president of Hearst Corp., which funded the survey for the National Center for State Courts. “Consensus is that the courts protect our constitutional rights, and that they are honest and fair. But there is also an overwhelming belief that equal justice under the law is more equal to some than to others,” he said.

The survey results, made public yesterday at a conference studying public perceptions of the courts, indicate that 68% of blacks believe “people like them” are treated worse than others in court. Conversely, only 33% of Hispanics said people in their ethnic group received worse treatment than others from the courts. More non-Hispanic whites (47%) and blacks (60%) said they think Hispanics receive less than equitable treatment.

About 42% of Hispanics and non-Hispanic whites believe blacks receive worse treatment, the survey indicated.

Among Hispanics, 33% said they strongly agreed with the statement that courts make reasonable efforts to ensure all litigants get adequate legal help. Only 29% of non-Hispanic whites and 27% of blacks said the same.

The survey was based on 1,826 interviews conducted between Jan. 13 and Feb. About 1,200 people were randomly chosen. An additional 300 Hispanics and 300 blacks were selected “to ensure that the findings reflect the voices of the major groups in American society,” the report said.

The sample was weighted so the three groups were represented in the same proportion as in American society: 12% black, 13% Hispanic, and 72% whites and others. The survey had a margin of error of plus or minus 2.3 percentage points.

Overall, 85% of Americans believe courts protect criminal defendants’ constitutional rights, and 18% prefer that a judge ignore the law to ensure a defendant’s conviction.

But 81% also say they believe judges’ decisions are influenced by political considerations, and 78% agreed with a statement saying elected judges “are influenced by having to raise campaign funds.”

Most Americans—80%—also believe that legal disputes “are not resolved in a timely manner.” Sixty-eight percent disagreed with the statement “it is affordable to bring a case to court.”

And 53% disagreed with this statement: “The media’s portrayal of the courts is mostly accurate.”

the philosophy, operation, and structure of their court system. The philosophy of tribal courts certainly follows a different paradigm than Anglo-American justice systems (see Table 5.1). Tarver et al. (2002) noted that the indigenous justice paradigm follows an approach that includes spirituality and oral customs, which are not welcome in traditional American courts.

As was previously mentioned in Chapter 4, since the enactment of Public Law 280 in 1953, the jurisdiction for criminal and civil cases on tribal lands in several states was turned over to local and state governments (Tarver et al., 2002). Other jurisdictions were also impacted by this new law, which “gave to state and local police the enforcement authority in Indian communities, and

<table>
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<tr>
<th>Table 5.1</th>
<th>Comparison of American &amp; Indigenous (Native) Justice Paradigm</th>
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<tr>
<td><strong>American Justice Paradigm</strong></td>
<td><strong>Indigenous (Native) Justice Paradigm</strong></td>
</tr>
<tr>
<td>Vertical power structure</td>
<td>Circular structure of empowerment</td>
</tr>
<tr>
<td>Communication is rehearsed</td>
<td>Communication is fluid</td>
</tr>
<tr>
<td>Written statutory law derived from rules and procedures</td>
<td>Oral customary law learned as a way of life</td>
</tr>
<tr>
<td>Separation of church and state</td>
<td>The spiritual realm is invoked in ceremonies and with prayer</td>
</tr>
<tr>
<td>Time-oriented process</td>
<td>No time limits on the process</td>
</tr>
</tbody>
</table>

cases would be adjudicated in state courts” (Tarver et al., 2002, p. 88). The complexity of jurisdictional issues on tribal land is illuminated by Table 5.2.

While almost no research examines whether American Indians are discriminated against in their own court system, it remains important to provide an overview of how their courts operate. To do this, we focus on the courts of the Navajos, the second-largest American Indian tribe (U.S. Bureau of the Census, 1995). Tso (1996) noted that over the years, Navajo courts have been structured like Anglo courts. There are several judicial districts and, as is seen in Table 5.2, the jurisdiction is determined based on the parties involved (i.e., Indian or non-Indian). In general however,

<table>
<thead>
<tr>
<th>Suspect</th>
<th>Victim</th>
<th>Jurisdiction</th>
</tr>
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</table>
| Indian       | Indian     | Misdemeanor: Tribal jurisdiction  
|              | Felony: Federal jurisdiction  
|              | No state jurisdiction  
|              | No federal jurisdiction for misdemeanors                                   |
| Indian       | Non-Indian | Misdemeanor: Tribal jurisdiction  
|              | Felony: Federal jurisdiction  
|              | No state jurisdiction                                                    |
| Non-Indian   | Indian     | Misdemeanor: Federal jurisdiction  
|              | Felony: Federal jurisdiction  
|              | Normally not state jurisdiction (the U.S. Attorney may elect to defer prosecution to the state)  
|              | No tribal jurisdiction                                                |
| Non-Indian   | Non-Indian | Misdemeanor: State jurisdiction  
|              | Felony: State jurisdiction  
|              | Normally U.S. Attorney will decline prosecution  
|              | No tribal jurisdiction                                |
| Indian       | Victimless | Misdemeanor: Tribal jurisdiction  
|              | Felony: Federal jurisdiction  |
| Non-Indian   | Victimless | Misdemeanor: Usually state jurisdiction  
|              | Felony: Usually state jurisdiction  
|              | Normally U.S. Attorney will decline prosecution  

There are also children’s courts within each district. These courts hear “all matters concerning children except for custody, child support and visitation disputes arising from divorce proceedings, and probate matters” (Tso, 1996, p. 172).

The Navajo also have a Supreme Court and Peacemaker Courts. The Navajo Nation Supreme Court “hears appeals from final lower court decisions and from certain final administrative orders” (Tso, 1996, p. 173). Peacemaker Courts rely on mediation to resolve some lesser matters.

Judiciary selections are screened by the Judiciary Committee of the Navajo Tribal Council. Using the Navajo Tribal Code as its basis for selection, the committee selects those who are most qualified according to the code. In Navajo Courts, where the Navajo Tribal Code prevails, people can represent themselves; however, only members of the Navajo Bar Association can participate in the courts. These include actual lawyers who have attended law school and those who have followed nontraditional pathways (i.e., passing a certified Navajo Bar Training Course or having served as a legal apprentice).

The irony of the Navajo justice system is that with the emerging acceptance of the philosophy of restorative justice, American courts are trying to operate more like Native American Courts. This is especially true of juvenile justice systems in some states, where the guiding philosophy is now restorative justice. We now turn to a discussion of the historical overview of race and the courts.

### Historical Overview of Race and the Courts in America

Like much of the earlier discussions, historical materials tend to focus heavily on African Americans, with very little information on other groups. Because of this, we present limited relevant historical material on other racial/ethnic groups. Our historical review begins with a discussion of Native Americans and the courts.

#### Native Americans

It is widely accepted that America had its beginnings long before Europeans began arriving in colonial America, and the record shows that the Native Americans who were here had already created their own norms and ways of handling deviants. As Friedman (1993) noted, once European began to come en masse, there was a “clash of legal cultures” (p. 20). In many instances, this clash resulted in the conqueror Europeans imparting their system onto Native Americans and African Americans, who also began to arrive en masse after the slave trade began. Due to the smallness of
communities in colonial America, these early court procedures were more informal, which, as noted before, owed much to the English system. In fact, the courts were also places where community members looked for social drama (Friedman, 1993).

Early on, both Native Americans and African Americans had similarly low status in American society. As such, other than being a means of social control, the courts were generally not concerned about their lives. In Massachusetts, for example, the courts treated Native Americans with indifference (Higginbotham, 1978). For example, according to Higginbotham (1978), “The general court of the colony enforced the English right to take the Indians’ ‘unimproved’ land in 1633” (p. 69). This action was followed by the courts treating Native Americans more harshly (Higginbotham, 1978, p. 69). During this period, it was not unusual for the Massachusetts courts to either use the punishment of enslavement or banishment for Native Americans (Higginbotham, 1978). On occasion, however, magistrates were concerned about uprisings that could occur if Native Americans felt they were being mistreated by the courts. Because of this concern, on occasion, “The magistrates involved other Indians, either as viewers of the trial and punishment or ideally as witnesses of the accused” (Chapin, 1983, p. 117).

Over time, Native Americans were overrun by European Americans and had little fight left in them, so they were eventually targeted for assimilation (Friedman, 1993). In the process, following centuries of human genocide against Native Americans, cultural genocide began (Friedman, 1993). Thus, following these early times, for Native Americans, race and the courts became simply a part of the process of cultural imposition. As was seen by the earlier section on the Native American court and justice system, their processes for handling deviance and disputes were modified by Whites. Whether the courts were a place where justice prevailed for Native Americans is subject to debate, but in Chapter 6, we look a bit more closely at early sentencing patterns, which sheds some light on this topic. For now, we turn our attention to a brief historical overview of African Americans and the courts.

**African Americans**

It is important to note that early on, much of the early race-related legislation, which guided the courts, was directed at Blacks (Higginbotham, 1978). Some legislation did, however, target White ethnic group members. An example of such early legislation was ACT VI, which was passed by the Virginia legislature in the 1600s and “required Irish servants arriving in the colony without indentures to serve longer terms than their English counterparts” (Higginbotham, 1978, p. 33). As one reviews the early literature, it becomes apparent that legislation contributed to many of the inequities observed in the courts. Given these connections, it is also apparent that politics played a key role in how the courts ruled. Therefore, even after the
Revolutionary War and the subsequent ratification of the Constitution, southern states still had a vested interest in controlling African American slave labor. Legal scholar Randall Kennedy (1997) wrote,

In terms of substantive criminal law and in terms of punishment, slaves were . . . prohibited from testifying or contradicting Whites in court. Moreover, in some jurisdictions, such as Virginia, South Carolina, and Louisiana, slaves were tried before special tribunals—slave courts—designed to render quick, rough justice. (p. 77)

For those who didn’t go before slave courts, “plantation justice” prevailed, solely under the discretion of the master or overseer (Friedman, 1993). To refer to plantation justice as being brutal is an understatement. Even minor events resulted in serious punishments. Friedman (1993) provided an example of how one slave, Eugene, was disciplined:

William Byrd of Westover, Virginia, recorded the following in a dry, matter-of-fact tone in his diary: on November 30, 1709, Eugene, a house hand, “was whipped for pissing in bed.” On December 3, Eugene repeated this offense, “for which I made him drink a pint of piss.” On December 16, “Eugene was whipped for doing nothing yesterday.” Three years later, on December 18, 1712, “found Eugene asleep instead of being at work, for which I beat him severely.” (p. 53)

Byrd’s actions were sanctioned by slave codes, which, several decades earlier, had made it a minor offense for a master to kill a slave in colonial Virginia (see Highlight Box 5.2).

With the abolition of slavery in northern states and the arrival of Emancipation in 1863, it was anticipated that justice would prevail more often for African Americans. At least in the South, such conventional wisdom did not prevail. As is further discussed in Chapter 6, the courts became

### Highlight Box 5.2  An Act About the Casual Killings of Slaves (1669)

Whereas the only law in force for the punishment of refractory servants resisting their master, mistress, or overseer, cannot be inflicted on negroes [because the punishment was extension of time], Nor the obstinacy of many of them by other than violent meanes suppress. Be it enacted and declared by this grand assembly, if any slave resist his master . . . and by the extremity of the correction should chance to die, that his death shall not be accounted Felony, but the master (or that person appointed by the master to punish him) be acquit from molestation, since it cannot be presumed that propensed malice (which alone makes murther Felony) should induce any man to destroy his own estate.

a cog in the operation of the convict-lease system, which, as was noted in Chapter 1, allowed states to lease out convicts to southern landowners. Using familiar tactics, legislators enacted laws to snare African Americans. The courts were eager participants and ensured that an ample labor supply flowed to southern landowners. When these “legal” measures failed to produce the desired outcome, southerners resorted to trickery and violence (Friedman, 1993). Such actions led many African Americans to lose faith in both the political and justice systems (DuBois, 1901/2002).

Well into the 20th century, little changed regarding the treatment of African Americans and the courts. Higginbotham (1996) provided a classic review of how courts were bastions of racism. By the very nature of the segregated practices that prevailed in courtrooms, one could presume that the courts were places where White supremacy prevailed and African Americans received little justice. Providing reviews of cases where there were segregated courtroom seating, cafeterias, and restrooms, Higginbotham (1996) noted how such “Apartheid” stood in the way of African Americans receiving equal standing in court. Of equal concern was the practice of referring to African Americans by their first names, while addressing Whites by their last names and using their appropriate titles (e.g., Mr. or Mrs.). Again, such forms of disrespect produced an air of inequality, which translated into African Americans being at a disadvantage in courts.

During the 1960s and 1970s, there were national inquiries into civil disorders (riots) and also the state of racism in the criminal justice system. One such inquiry looking at the courts was prepared by the National Minority Advisory Council on Criminal Justice (NMAC, 1979), which was created in 1976. The report, “Racism in the Criminal Courts,” surveyed the literature to determine the prevalence of racism in the courts. Drawing on the literature and public hearings in 13 cities, the report noted particular concerns with the paucity of minority judges at both the federal and state levels (NMAC, 1979, pp. 5–16). Many of the other concerns expressed with the courts remain with us today (see section below on “Contemporary Issues in Race and the Courts”). For example, the council expressed concerns about unfairness in the bail process, the potentially discriminatory use of peremptory challenges in jury selection, the quality of public defense, and prosecutorial misconduct in the plea-bargaining process (NMAC, 1979, pp. 17–56).

Latinos

The early literature on Latinos and the courts is quite sparse. Much of the early literature discussed Mexicans and immigration concerns. Another central focus of the literature is Mexicans’ experience with the criminal justice system in the western and midwestern United States. The 1931 Wickersham Commission report. Crime and the Foreign Born, noted a common problem when dealing with persons, such as Mexicans, who did not speak English:
With the best intentions in the world, an investigating officer, a prosecutor, or a court will have the greatest difficulty in getting at the exact truth and all the facts in the case when the accused is a non-English-speaking immigrant. (National Commission on Law Observance and Enforcement, 1931, p. 173)

The report also noted that in California, Mexican defendants were abused by bail bondsmen, loan sharks, and “shyster lawyers” (p. 175). The report also mentioned that Los Angeles had an excellent public defender system in the 1920s, which “very frequently appear[ed] on behalf of the foreign born, especially the penniless Mexican” (p. 175).

Within the Wickersham Commission report, Paul Warnshuis conducted a study of how Mexicans were faring with criminal justice agencies in Illinois. Besides the notion that Mexicans were often arrested on flimsy charges, an overriding theme in the report is that Mexicans were at a serious disadvantage in the court process because of language concerns (Warnshuis, 1931). In many instances, interpreters, though needed, were not used, which resulted in the swift conviction of Mexicans. In some instances, judges simply ruled on the evidence and if convinced of the defendants’ guilt, proceeded without hearing testimony (Warnshuis, 1931, p. 293). As one can imagine, the courts were a place where, for Mexicans, justice was not always received.

During the 1940s, the “Sleepy Lagoon Case” became the high-profile case that brought the issue of Latinos and the courts to the fore. The case revolved around the murder of Jose Diaz. Following the murder, 22 Mexicans were arrested, with 17 being convicted (the convictions were overturned 2 years later). According to most reports, the trial was unfair. The media played a large role in this by creating a moral panic. Friedman (1993) wrote that the media spewed headlines calling for concern about the “zoot-suit gangsters” and “pachuco killers.” One representative from law enforcement stated the following to the grand jury:

Mexicans [have] a “biological” tendency to violence. They were the descendants of “tribes of Indians” who were given over to human sacrifice,” in which bodies were “opened by stone knives and their hearts torn out while still beating.” Mexicans had “total disregard for human life”; the Mexican, in a fight, will always use a knife; he feels “a desire . . . to kill.” (Friedman, 1993, p. 382)

Outrageous statements such as these colored the way in which society viewed Mexicans. So, a year after the Sleepy Lagoon case, the city of Los Angeles exploded with the “zoot suit riots.” The riots ignited after rumors spread that a Mexican had killed a serviceman, and the city broke out into 4 days of rioting. During this time, “servicemen and off-duty policemen chased, beat, and stripped ‘zoot-suiters’” (Friedman, 1993, p. 382). As for the courts, very little is ever mentioned of them punishing those who attacked the Mexicans.
In later years, the NMAC (1979) would also express concern about the treatment of Hispanics in the courts. And, as in the case of African Americans, they expressed concern about the treatment of Hispanics throughout the court system. Particularly disturbing to the council was the lack of Hispanics in significant judiciary roles. The report also noted that nearly 50 years after the Wickersham report, language remained a problem, commenting,

Non-English speaking minorities have special problems of access to courts, to legal counsel and representation because of language and the failure of the courts and priorities of resources to have trained, impartial translators at every stage of courts and trial related proceedings. (NMAC, 1979, p. 63)

Asian Americans

As noted at the beginning of this section, very little historical material exists on Asian Americans and the courts. As was mentioned in Chapter 1, when Asians began arriving in the United States, they were primarily located on the West Coast. And like other immigrants, they were despised by many. Friedman (1993) described some of the more gruesome early incidents:

In 1871, a mob in Los Angeles killed nineteen Chinese. In the 1880s, riots in Rock Springs, Wyoming, left twenty-eight Chinese dead; Whites in Tacoma, Washington, put the torch to the Chinatown in that city; and there were outrages in Oregon, Colorado, and Nevada. (p. 98)

Eventually, as in the case of other minorities, legislation in concert with the courts was used to deal with Asian Americans. But in the case of Asian Americans, the aim of such actions was to remove them from the country. Friedman (1993) put it best, writing, “The goal of anti-Chinese policy was not suppression but expulsion... The Keystone of Asian policy was immigration law, exclusion, and deportation” (p 100).

Though our focus now turns to contemporary issues in race and the courts, the unfortunate reality is that many of the same issues from our brief historical overviews are still with us. One would have anticipated that problems from centuries ago would have been resolved, but from the literature we review below, we can see that while some things have changed, many things have stayed the same.

___________ Contemporary Issues in Race and the Courts

Many of the contemporary issues pertaining to race and the courts are related to whether there is either race and/or gender discrimination in the various court processes (Free, 2002a, 2002b; Walker, Spohn, & DeLone,
2004). In a span of about 14 years, drug courts have also emerged as an institution that has provided some hope in stemming the tide of drug addiction and its residual effects. Given the heavy presence of racial minorities circulating through drug courts, we examine the structure, philosophy, and effectiveness of these specialized courts. We begin with a review of the literature that examines whether race or gender has been found to have an influence on each respective court process. Our first review examines the role of race and gender in the pretrial processes.

Bail and the Pretrial Process

While bail is not guaranteed by the Constitution, the Eighth Amendment does state that when given, it should not be “excessive.” Since the creation of this amendment, various types of pretrial release options have been used. During the early 1950s and 1960s, the Vera Institute of New York conducted studies on bail practices in Philadelphia and New York. The early study in Philadelphia found that “18% of persons jailed pending trial because they could not afford bail were acquitted, whereas 48% of persons released on bail were acquitted” (Anderson & Newman, 1998, p. 215). In the 1960s, the Vera Institute created the Manhattan Bail Project, which was meant to see whether those released on their own recognizance (ROR), absconded any more often than those released on monetary bail. The project convincingly showed that “the rate of return for ROR releases was consistently equal to or better than the rate for those on monetary bail” (Anderson & Newman, 1998, p. 215). Mann (1993) has noted that many of the defendants in the pioneering Manhattan Bail Project were minorities, most of whom did return for trial (pp. 167–168). Even with these findings, during the Reagan presidency, the Bail Reform Act of 1984 provided judges more discretion as to who can be given pretrial release. In general, judges can hold defendants in jail if they consider them either a risk for flight or if they pose a danger to the community (Robinson, 2002). Because of risk concerns, the courts consider a variety of factors when making the decision as to whether to grant pretrial release on bail. In fact, some states, such as New York, have bail statutes, which, when deciding whether or not to grant bail, require judges to consider risk factors such as the nature of the offense, prior record, previous record in appearing when required in court, employment status, community ties, and the weight of the evidence against a defendant (Inciardi, 1999, p. 328).

There are generally three broad categories of pretrial release: nonfinancial release, financial release, and emergency release (Reaves & Perez, 1994). Nonfinancial release is when someone is released without having to provide any monetary collateral. This typically comes in the form of ROR, citation releases, which are typically administered by law enforcement. Other such releases include some kind of conditional release that involves having to either contact or report to some official to ensure compliance with the
conditions of release (e.g., drug treatment). Under this type of release, a third party can also be entrusted to ensure the return of someone (Anderson & Newman, 1998). According to Reaves and Perez (1994),

About 2 in 5 defendants released before case dispositions received that release through financial terms involving a surety, full cash, deposit, or property bond. Deposit, full cash, and property bonds are posted directly with the court, while surety bonds involve the services of a bail bond company. (p. 3)

The final release is referred to as an “emergency release” and occurs when, due to jail crowding, the defendant is given pretrial release under generally nonstringent release conditions.

Race and Pretrial Release

Analyzing pretrial release data on 28,000 felony defendants from 75 of the largest American counties, Reaves and Perez (1994) provided some basic data on race and the pretrial process. A review of the racial characteristics of the various types of releases showed that Blacks, Whites, and Hispanics appeared to have access to financial, nonfinancial, and emergency bail. Undoubtedly, some of these figures were tied to the nature of the offenses committed by each defendant. Nevertheless, Reaves and Perez’s national data provided some useful information on the race of those who failed to appear and those who were rearrested.

Data on felony defendants who failed to appear, by race, showed that 72% of Blacks, 81% of Whites, 86% of “Other,” and 70% of Hispanics made all court appearances. Of those who failed to appear, 19% of Blacks, 13% of Whites, 9% of Other, and 17% of Hispanic defendants eventually returned to court. Only 8% of Blacks, 6% of Whites, and 5% of Whites remained fugitives. In the case of Hispanics, 13% remained fugitives (Reaves & Perez, 1994, p. 10).

Of those who were released prior to trial on any type of release, 85% of Blacks, 91% of Whites, 94% of Other, and 84% of Hispanics, were not rearrested (Reaves & Perez, 1994, p. 11). Hispanics (12%) and Blacks (11%) were rearrested for felonies more often than Whites (7%) and Other (6%) (p. 11). A similar pattern emerged when the authors reviewed the racial characteristics of defendants who were charged with some sort of misconduct (e.g., new charge, failure to appear, technical violation) when they were on pretrial release: Hispanics (38%) and Blacks (35%) had the highest rates, with Whites (25%) and Other (19%) having lower rates (p. 12).

While nearly 95% of criminal defendants are charged in state courts (Wolf Harlow, 2000), the remaining 5%, or 57,000, other defendants are annually charged with a federal offense (Scalia, 1999). As with counties, federal officials adhere to the Bail Reform Act of 1984 to decide who will receive
pretrial release and under what circumstances. In general, persons charged
with the following characteristics were more likely to be detained prior to
trial: had committed violent offenses, extensive criminal histories, history of
pretrial misconduct, and no established community ties (Scalia, 1999).

More than a third (34%) of federal defendants were ordered detained
prior to trial. Hispanic defendants were detained at the highest rate (46.7%),
with Blacks (35.9%), Other (32.8%), and Whites (19.3%) following behind
(Scalia, 1999). According to Scalia (1999), the high rate of detention for
Hispanics was caused because they were identified as noncitizens, which
contributed in part to them not being able to show established community
ties in America. In addition, they were often also charged with the more
severe drug-trafficking offenses (Scalia, 1999, p. 10). Like Hispanics, Blacks
were also charged with the more serious drug-trafficking offenses. They also
had more serious criminal histories, with 75% of them having been arrested
on a prior occasion (as opposed to 61% of Whites and 57% of Hispanics).
Moreover, “38.9% of Black defendants had been arrested at least five times
compared to 23.1% of Hispanics, 24% of Whites, and 15% of other non-
White defendants” (Scalia, 1999, p. 10). Nearly half (46%) of the Black
defendants had been previously convicted of a felony, with half of them
being a violent felony and another 33% being a drug offense. Given these
figures, scholars have sought to determine whether discrimination (race or
gender) plays any role in the bail and pretrial process. In the next section, we
review some of the recent literature in this area.

Recent Scholarship on Bail and Pretrial Release

In a recent comprehensive review of scholarship on race and its role in the
pretrial process, Free (2002b) examined numerous methodologically sophis-
ticated studies (those using multivariate techniques) published since 1970
(after the application of the 1966 Bail Reform Act). Using the “no discrimi-
nation thesis” (NDT) and the “discrimination thesis” (DT) as his contextual
framework (see Chapter 3), he identified 12 studies that supported the DT
in the bail and pretrial process and 5 studies that supported the NDT (Free,

Some of the NDT literature has found both race and gender differences.
In one of these studies,

Non-Whites were less likely than Whites to receive low bail (i.e., bail
below the guidelines). Further, the gender differences prevalent among
White defendants, in which females were more likely than males to
receive low bail, was not replicated among non-White defendants.
(Free, 2002b, p. 203)

Free also aptly pointed to bail severity and pretrial release as areas of inter-
est. In both processes, his review of studies revealed that African Americans
or non-Whites are at a disadvantage. Specifically, in the case of bail severity, “being lower class poses a greater disadvantage for African Americans than Whites” (Free, 2002b, p. 203). In a few of the studies he reviewed, in order to be released, African Americans and Hispanics were required more often than Whites to post cash or surety bonds (Free, 2002b). In studies related to pretrial release, non-Whites fared no better, with Whites receiving more favorable recommendations for release; and when age and employment were considered, one study found “African Americans were 1.6 times more likely than White defendants to be detained” (Free, 2002b, p. 203).

A more recent study by Demuth and Steffensmeier (2004) examining 75 of the most populous counties in the United States (from 1990 to 1996) found that “in general, female defendants receive more favorable decisions and outcomes than males across all racial-ethnic groups” (p. 234). In addition, the research found that Hispanic and African American males were less likely than White males to be granted pretrial release. Overall, though, Hispanics received the least favorable pretrial decisions.

In contrast to the studies supporting the DT, as noted earlier, Free (2002b) found five studies that were supportive of the NDT. He noted that such studies generally suffer from several shortcomings, including the use of an additive model in assessing the impact of race and bail and pretrial decisions, inattention to the role the race of the victim might have on these decisions, use of single-stage analyses, and the failure to control for evidentiary strength.

With the use of additive models that simply take into account a race effect and not the interactive role that social class and prior felony might play in the findings, Free (2000b) asserted that studies that find support for the NDT might unintentionally mask such effects. Furthermore, the race of the victim in the bail and pretrial process could also play a role in who is released prior to trial, and how. In line with the work of scholars such as Russell (1998), Free (2002b) also noted that single-stage research might support the NDT, but when cases are followed through other stages of the system, discrimination might be uncovered. And finally, Free noted that most of the NDT studies do not control for evidentiary strength, which might also have an impact on who gets released prior to trial. That is, if non-Whites are often brought to court on cases based on less evidence than Whites, it is likely that they would be able to secure pretrial release at a higher rate than Whites (Free, 2002b, p. 206).

The decision about whether to prosecute, reject, or dismiss charges represents another area of investigation related to the courts. Again, researchers have suggested that race or gender might play a role in these highly discretionary decisions. In Free’s (2002b) review of the empirical literature, he found that “African Americans receive more severe dispositions than Whites for less serious offenses” (p. 206). Thus, in the few studies that have examined the topic, Whites were more likely to have their cases dismissed than African Americans. Moreover, Free also found “moderate support for the contention that prosecutors are more likely to seek the death penalty in cases involving
African American defendants than White defendants” (p. 206). These findings are in stark contrast to the previously discussed work of Wilbanks (1987, pp. 84–102), who argued that such charges were largely anecdotal.

When considering these decisions and interjecting the role of gender in the court process, some researchers have noted the potential influence of stereotypes (Huey & Lynch, 1996; Young, 1986). More recently, Manatu-Rupert (2001) argued that the media representation of Black women leads prosecutors to use stereotypes in the decision-making process. Drawing on research in several disciplines, she suggested,

How these [Black] women are perceived in the culture, particularly by criminal justice officials, is directly linked largely to how Black women are sexually positioned in film, which may well result in their becoming vulnerable to sexual assaults and less likely to be believed when victimized. (Manatu-Rupert, 2001, p. 184)

Using Spike Lee’s movie She’s Gotta Have It and the first Lethal Weapon movie as case studies, Manatu-Rupert highlighted how the myth of Black female promiscuity was perpetuated. To explore her ideas, she showed a scene from the movie She’s Got to Have It to her students, many of whom were headed into criminal justice occupations, including the legal profession, to see their interpretation of the interaction between a male and female. Her findings supported the notion that Black women were viewed as oversexed, which, as she noted earlier, could impact on their treatment in the court system, particularly if they were ever sexually assaulted.

Legal Counsel

As a result of the blatant racism in the previously discussed Scottsboro case, since 1932, the U.S. Supreme Court has mandated that indigent defendants in capital cases have the right to counsel (see Powell v. Alabama, 1932). Four decades later, in Gideon v. Wainwright (1963), the Court ruled that all felony defendants have a right to counsel, a ruling that was expanded in 1972 when the Court mandated that counsel be provided for defendants in misdemeanor cases where there was the possibility of incarceration (see Argersinger v. Hamlin, 1972). To meet these Supreme Court mandates, states created several legal defense systems. Many states have adopted a public defender system where, as with a district attorney, the local or state government hires a full-time attorney to provide legal counsel for indigent defendants. In other cases, defendants are assigned counsel from a list of private attorneys, who are selected on a case-by-case basis by a judge. Another option is the use of contract attorneys. These are people who are also private attorneys who are contracted to provide legal representation to an indigent defendant (DeFrances & Litras, 2000). Below, we review some recent national governmental studies that examine the operation of these systems.
Defense Counsel

Over the past few years, the federal government has conducted studies to determine the state of counsel in criminal cases (DeFrances, 2001; DeFrances & Litras, 2000; Wolf Harlow, 2000). According to one of these studies, the 100 most populous counties (encompassing 42% of the U.S. population) spent more than $1.2 billion dollars on indigent defense (DeFrances & Litras, 2000). DeFrances and Litras found that of the three previously described indigent defense systems, 82% were handled by public defenders, 15% were handled by assigned counsel attorneys, and 3% were handled by contract attorneys. At the federal level, 66% of felony defendants were represented by public defenders (Wolf Harlow, 2000).

Most observers of indigent defense wonder whether there are different outcomes depending upon whether you are represented by public or private counsel. Looking at the outcomes of cases at both the state and federal levels, Wolf Harlow (2000) wrote,

> In both Federal and large State courts, conviction rates were the same for defendants represented by publicly financed and private attorneys. Approximately 9 in 10 Federal defendants and 3 in 4 State defendants in the 75 largest counties were found guilty, regardless of type of attorney. (p. 1)

One difference noted in the same study was that at both court levels, those represented by public defense were more likely to be incarcerated. At the federal court level, the difference was 11% (88% public vs. 77% private). On the state level, however, the differences were more dramatic: “In large State courts 71% with public counsel and 54% with private attorneys were sentenced to incarceration” (Wolf Harlow, 2000, p. 1). It is also interesting to note that more than 90% of federal defendants were found guilty, irrespective of type of counsel (Wolf Harlow, 2000).

Turning to the representation of those who were incarcerated, minorities used public defense systems more than Whites (Wolf Harlow, 2000). Approximately 75% of Black and Hispanic state inmates and 69% of Whites had public defenders or assigned counsel (Wolf Harlow, 2000, p. 9). In the case of federal inmates, 65% of Black inmates had public defenders, and Hispanics and Whites used public defense at a similar level (56% v. 57%).

To provide a more detailed examination of public defense systems, we review the findings from a recent report that examined in detail the indigent defense system in Pennsylvania.

Statewide Study of Pennsylvania’s Public Defense System

Using Pennsylvania as an example, we examine how the public defense system is working in the sixth most populous state. In Pennsylvania, 80% of all criminal defendants rely on public defense (Pennsylvania Supreme Court,
A recent survey sent to Pennsylvania counties has provided a snapshot of the functioning of the system. The survey revealed some troubling findings. First, only the Philadelphia office provided any formalized training to their new public defenders. Even with this training, the public defenders were then thrust into positions where they were overworked and underpaid (Pennsylvania Supreme Court, 2003, p. 174). They generally also had fewer resources than the district attorney’s office. These findings were repeated when comparing them with the data from the other Pennsylvania jurisdictions. Most troubling was that “most court-appointed lawyers and many public defenders do not make use of investigators, and therefore do not conduct independent investigations of cases” (Pennsylvania Supreme Court, 2003, p. 185). Because of the paucity of resources, one jurisdiction pointed out “that a case that might require a psychologist or forensic expert might exhaust the whole budget” (p. 185).

There was also a serious imbalance in technology and salaries between district attorneys and public defenders. In many counties, technology in the form of computers was passed down from district attorneys’ offices to public defenders’ offices. In terms of salaries, researchers found that public defenders’ salaries were considerably lower than those for district attorneys. Even student loan forgiveness programs attached more importance to the role of the district attorney, considering that public defenders were not eligible for the programs (Pennsylvania Supreme Court, 2003, p. 187). Such findings suggest that in Pennsylvania, defendants who are poor and people of color are being represented by inadequate counsel. Give these facts, it is no wonder that plea bargaining pervades court systems. We review plea bargaining in the next section.

Plea Bargaining

Before actually proceeding to the trial phase, in any given year, an estimated 96% of convictions are reconciled through a guilty plea in the plea-bargaining process (Reaves, 2001, p. 28). Early in American history, however, plea bargaining was frowned upon by justice system officials and, as a result, comprised a small percentage of how cases were resolved. Only since the 20th century have courts accepted it as an important part of the criminal justice process (Shelden & Brown, 2003). Predictably, a process involving no real oversight and such broad discretion has come under scrutiny because of concerns related to race and class. The intersection of race and class is well articulated by Robinson (2002), who wrote,

Plea bargaining results in a bias against poor clients, who are typically minorities, as well as the uneducated, who may not even know what is being done to them in the criminal justice process. (p. 247)

An example of how racial bias can influence the plea-bargaining process can be seen by a comprehensive study of California criminal cases conducted...
by the San Jose Mercury News in 1991. Using a computer analysis of nearly 700,000 criminal cases from 1981 to 1990, the study found,

At virtually every stage of pretrial plea bargaining Whites were more successful than minorities. All else being equal, Whites did better than African-Americans and Hispanics at getting charges dropped, getting cases dismissed, avoiding harsher punishment, avoiding extra charges, and having their records wiped clean. (Donzinger, 1996, p. 112)

In addition, the study found that while one third of Whites who started out with felony charges had their charges reduced to misdemeanors, African Americans and Hispanics received this benefit only 25% of the time (Donzinger, 1996, p. 112). Seeking to explain some of these results, one California judge stated that there was no conspiracy among judges to produce such outcomes. When put to a public defender, he explained the disparities this way:

If a White person can put together a halfway plausible excuse, people will bend over backward to accommodate that person. It’s a feeling, “You’ve got a nice person screwing up,” as opposed to the feeling that “this minority person is on track and eventually they’re going to end up in state prison.” It’s an unfortunate racial stereotype that pervades the system. It’s an unconscious thing. (Donzinger, 1996, p. 113)

One can only imagine the compounded impact of such attitudes if they are pervasive nationwide.

In the rare event that a case isn’t resolved during the plea-bargaining process, the next stage of the process requires the preparation for a jury trial. Jury selection begins this phase of the process.

Jury Selection

Once it is decided that a case is going to trial, the case is decided either by a jury or by a judge in a bench trial (where a judge is responsible for the determination of guilt or innocence). In the event of a jury trial, the jury selection process begins with a venire, or the selection of a jury pool. This provides the court with a list of persons from which to select the final jury members. The Constitution suggests that citizens are entitled to a jury of their peers. Those in the legal profession generally agree that this should translate into juries being representative of the communities in which the defendant resides. In the jury selection process, however, race and gender concerns have continued to pervade the process. The Scottsboro case discussed in Chapter 1 was an example of how racial bias in jury selection resulted in all-White juries trying African Americans because of long-standing discrimination in the courts. While times have changed, in some jurisdictions, when minorities are
underrepresented on juries in their own communities, questions have been raised and radical action taken (see Highlight Box 5.3). But in other instances, the courts have refused to intervene. Recent results from a study commissioned by the Pennsylvania Supreme Court on racial and gender bias have provided some examples of how issues related to race and gender influence who ends up in jury pools (Pennsylvania Supreme Court, 2003).

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**Highlight Box 5.3  Judge’s Decision Stirs Debate on Jury Makeup**

Pittsburgh: A Judge’s decision that a black murderer defendant can postpone his trial until blacks make up at least 10% of the jury pool is spurring debate about how minorities are picked for juries and whether the judge’s remedy is practical.

Judge Lester Nauhaus issued Friday’s ruling after a public defender argued that less than 5% of the people on jury duty in Allegheny County during one five-month period were black, even though the county’s black population is about 12%.

While some analysts say the judge’s ruling contradicts the ideal that justice should be colorblind, others believe the judge’s decision was likely needed to spur reforms.

“If a logjam is the kind of thing needed to get the attention of the county jury commissioner, so be it,” Duquesne University law professor Kenneth Hirsch said. “Once it’s been out in the newspapers that this has been a ruling in one case, it won’t take the other defense attorneys long to start raising the issue on a regular basis.”

County officials said they’ll announce various jury selection reforms at a news conference today, including tracking the race of jurors and improving efforts to contact people who don’t respond to jury screening questionnaires and summonses.

Under state law, potential jurors are drawn at random from voter registration lists. Counties may also use driver’s license and telephone records—and citizens can simply sign up for jury duty.

The public defender who raised the issue, Christopher Patarini, said any system that routinely results in too few blacks on jurors is unfair.

“We’re not saying it’s intentional or malicious, but if the end result indicates that the system itself does not reasonably reflect a cross section of the community, it has to change,” Patarini said.

The U.S. Supreme Court has ruled that defendants can’t pick the racial makeup of their specific juries, but systems that don’t produce jury pools that reflect a cross section of the community are illegal.

A *Pittsburgh Tribune-Review* study last year concluded that blacks were underrepresented on county juror, prompting the state to study the matter.

The Joint State Government Commission concluded that only 8.1% of county jurors were black, compared to the 12.4% black population counted in the 2000 U.S. Census.

Chris Mount, the director of court research for the New York State Unified Court System, said Allegheny County could probably improve its system—but he disagrees with Nauhaus’ decision.

Mount said Chief Judge Judith Kaye began reforming New York’s system in 1993, pushing to improve jury pay, remove the state’s numerous exemptions from jury service—and most importantly—expand the list of potential jurors. New York picks its jurors from voter, driver, state, tax, welfare, and unemployment lists, Mount said.
To investigate ethnic and gender bias in jury selection in Pennsylvania, researchers sent surveys to every county in the state to assess the various practices. More than 80% of the 67 counties returned the surveys (Pennsylvania Supreme Court, 2003). Once the surveys were tabulated, it was revealed that there were a variety of barriers to minorities and women participating in jury service. For minorities, these barriers included receiving fewer summonses for jury duty, transportation issues, child care issues, and employer issues (Pennsylvania Supreme Court, 2003, p. 54). In general, minorities do not receive as many summonses to serve on juries. In addition, minorities more so than others have transportation difficulties that result in them being unable to serve on juries. Often, they are also impeded from serving on juries because they are unable to secure appropriate child care. And for hourly wage employees, in some instances, employers are unsupportive of jury service. The second part of the study, which looked in depth at four of Pennsylvania’s largest counties (Allegheny, Lehigh, Montgomery, & Philadelphia), found that “African Americans were under-represented in juror yield in all four counties; Latinos were under-represented in juror yield in three of the counties; and Asian Americans were under-represented in juror yield in Philadelphia County” (Pennsylvania Supreme Court, 2003, p. 70).

In addition to surveys, the committee charged with completing the study also heard public testimony. When they queried one Pittsburgh attorney on the state of affairs concerning the racial composition of juries, he responded,

In all of the cases which I have tried on behalf of African American plaintiffs in the past five years, a grand total of one African American was involved in the deliberations that determined the outcome of the case. Indeed, in most of the cases, the only African American in the courtroom was my client. (Pennsylvania Supreme Court, 2003, p. 74)
Turning to the underrepresentation of women on juries, the report revealed some of the interconnections between race and gender. Women were generally the ones responsible for child care; therefore, they were often unable to serve on juries. The committee also noted that women had difficulty reaching the courthouse, a concern shared by non-Whites. And in certain situations, women, like men, were unable to serve on juries due to economic hardships. A final gender-related concern was “[the finding of] evidence that the interpersonal dynamics within the jury room can operate to the detriment of female jurors” (Pennsylvania Supreme Court, 2003, p. 106). More specifically, “Women in Pennsylvania were less likely than men to be chosen as presiding jurors” (p. 106).

Once the jury pool is formed, the opportunity for race and gender bias does not end there. There have been concerns with the subsequent **voir dire** process, where jurors are screened for their fitness to serve on a particular case.

**Voir Dire**

Considering the difficulty in locating non-White jurors, it would seem that once the final juror selection process began, non-White jurors would not be the targets for removal. To the surprise of some, this is not the case. Both the defense and prosecution often use their peremptory challenges to remove jurors based in large part on their race. In general, peremptory challenges can be used to remove jurors without cause. This was challenged in the 1965 case of **Swain v. Alabama**. In the case, Robert Swain, a Black teenager, was accused and convicted of raping a White teenager (Cole, 1999). During the case, the prosecution “struck all six prospective jurors,” and after investigation, it was revealed “that no Black had ever served on a trial jury in Talladega, County, Alabama,” despite the fact that Blacks made up 25% of the county population (Cole, 1999, p. 119). Based on this information, the conviction was challenged, and the Supreme Court decided to hear the case. However, the Supreme Court found no problem with striking the prospective Black jurors, indicating among other things that “in the quest for an impartial and qualified jury, Negro and White, Protestants and Catholic, are alike subject to being challenged without cause” (as cited in Cole, 1999, p. 119). But according to the 1986 Supreme Court decision in **Batson v. Kentucky**, race must not be the deciding factor. Prior to this decision, studies of jurisdictions in Texas and Georgia found that peremptory challenges were used to strike 90% of Black jurors (Cole, 1999). In fact, in large cities such as Philadelphia, district attorneys were given clear instructions to strike non-White jurors. A now infamous training tape by one Philadelphia assistant district attorney declared,

Young Black women are very bad. There’s an antagonism. I guess maybe they’re downtrodden in two respects. They are women and they’re Black . . . so they somehow want to take it out on somebody, and you don’t want it to be you. (Cole, 1999, p. 118)
Scholars have also noted that in certain instances, defense attorneys follow similar practices (Cole, 1999).

Since the *Batson* decision, prosecutors have turned to deception to strike non-White jurors. According to Cole (1999), prosecutors are masking their race-based actions by using neutral explanations to remove jurors. In some instances, for example,

Courts have accepted explanations that the juror was too old, too young, was employed as a teacher or unemployed, or practiced a certain religion. They have accepted unverifiable explanations based on demeanor: the juror did not make eye contact or made too much eye contact, appeared inattentive or headstrong, nervous or too casual, grimaced or smiled. And they have accepted explanations that might often be correlated to race: the juror lacked education, was single or poor, lived or worked in the same neighborhood as the defendant or a witness, or had previously been involved with the criminal justice system. (Cole, 1999, pp. 120–121)

Given the numerous measures being taken in some jurisdictions to diversify jury pools, one would think that keeping non-Whites on the jury would be a high priority. On the contrary, as discussed above, prosecutors and defense attorneys alike often eliminate jurors based on race if they believe it will help them secure a victory. The underlying premise behind such thinking is surely a lack of trust, particularly of non-White jurors. Why else would someone not want non-Whites on juries? The concern here relates to the practice of jury nullification. According to Walker et al. (2004),

Jury nullification . . . occurs when a juror believes that the evidence presented at trial establishes the defendant’s guilt, but nonetheless votes to acquit. The juror’s decision may be motivated either by a belief that the law under which the defendant is being prosecuted is unfair or by an application of the law to a particular defendant. (p. 195)

In recent years, there has been increasing debate on this practice. In 1995, Paul Butler, a professor of law at George Washington University, published a seminal and controversial article on the utility of African Americans engaging in jury nullification.

**Jury Nullification**

Since Professor Butler published his controversial article, there has been continuing discussion about the practice. During the beginning of his tenure as a federal prosecutor, Butler (1995) wrote that “we would lose many of our cases, despite having persuaded a jury beyond a reasonable
doubt that the defendant was guilty. We would lose because some Black
jurors would refuse to convict Black defendants who they knew were
guilty” (p. 678). After considering the concept, Butler used two case
studies to show how the practice can send a message to society regarding
injustices. The first case study reviewed the case of United States v. Barry
(1991). After a long and expensive federal investigation, Marion Barry, the
former Mayor of Washington, D.C., was observed on videotape in a sting
operation smoking crack cocaine. During his trial, two prominent and
controversial African American leaders, Reverend George Stallings and
Minister Louis Farrakhan, were provided with passes by Barry to attend
the trial. However, in both cases, they were denied access because the
presiding judge felt as though they might influence juror sentiment. The
American Civil Liberties Union (ACLU) took up the cases and argued
that they both had a right to attend the trial. In the end, the trial court
conceded and let the two attend the trial; however, they were given
“special rules” that had to be followed (Butler, 1995, p. 684). While Barry
was clearly guilty, at the end of the trial, he was found guilty of only 1 out
of 14 charges.

The second case study involved John T. Harvey III, a prominent
Washington, D.C., attorney. During a trial in the early 1990s, Harvey’s
attire became the subject of controversy while he was representing a client.
Along with a traditional suit, Harvey wore a stole made of Kente cloth,
which has roots in African culture. During the pretrial process, a judge
warned him about wearing the cloth. Apparently, the judge felt that wearing
the cloth would “send a hidden message to jurors” (Butler, 1995, p. 685).
Given his convictions on the matter, the judge offered Harvey three options:
“He could refrain from wearing the Kente cloth; he could withdraw from the
case; or he could agree to try the case before the judge, without a jury”
(p. 685). After considerable wrangling, Harvey was allowed to wear the
Kente cloth. The judge even suggested that Harvey be charged for the time
devoted to the Kente cloth issue. Eventually, “Harvey’s client is tried before
an all-Black jury and is acquitted” (p. 686).

On the whole, Professor Butler (1995) advocated the use of jury nullifi-
cation to fight against unfair practices, which are outlined in his two case
studies, as well as unjust laws, such as the controversial crack cocaine laws,
which annually send a disproportionate number of people of color to jail
and prison. In Butler’s (1995) words,

The Black community is better off when some nonviolent lawbreakers
remain in the community rather than go to prison. The decision as to
what kind of conduct by African-Americans ought to be punished is
better made by African-Americans themselves, based on the costs and
benefits to their community, than by the traditional criminal justice
process, which is controlled by White lawmakers and White law
enforcers. Legally, the doctrine of jury nullification gives the power to
make this decision to African-American defendants. (p. 679)
While acknowledging some merits of Professor Butler’s arguments, Krauss and Schulman (1997) see the general concern of Black juror nullification as being based on anecdotal evidence. In their analysis, the discussion comes down to the following equation: “Black defendant + Black jurors + non-conviction = miscarriage of justice” (Krauss & Schulman, 1997, p. 2). As they see it, those who believe in this equation ignore the fact that in some of these cases, “Black jurors are being condemned for doing exactly what jurors are supposed to do: demanding that the prosecution prove its case beyond a reasonable doubt” (Krauss & Schulman, 1997, p. 2). Furthermore, they view the continuing outrage over jury nullification as a response to an article published in *The Wall Street Journal* shortly after the conclusion of the O. J. Simpson trial, in 1995. The article provided figures showing that nationwide, there was an overall acquittal rate of 17%, while in jurisdictions such as the Bronx, New York, and Washington, D.C., the acquittal rates were 47.6% and 28.7%, respectively. The authors countered these figures, showing that the acquittal rate nationally was closer to 28% (Krauss & Schulman, 1997, p. 3). Subsequently, contrary to the notion of jury nullification, the authors noted that the Bronx rate was likely a result of “(1) jurors doing their jobs well, [and] (2) prosecutors who are not doing their jobs well” (Krauss & Schulman, 1997, p. 3).

Krauss & Schulman (1997) also noted that there is the belief that only White jurors can be color-blind. They responded that it is impossible to have a color-blind jury because race is the first thing that people see in others. Another important point discussed by the authors relates to police testimony. While in many instances, the testimony of police officers is believed without challenge, the authors pointed out that because of their historically negative experiences with police officers, persons of color give equal weight to police testimony and that of other witnesses, even when they differ (Krauss & Schulman, 1997, p. 6).

Drug courts represent a fairly recent initiative. Dade County, Florida is credited with starting the first one in 1989 (Goldkamp & Weiland, 1993). Since then, partly as a result of Title V of the Violent Crime Control and Law Enforcement Act of 1994, which awarded federal monies to drug court programs (U.S. General Accounting Office [GAO], 1997), the number of drug courts has risen to more than 800, with another 450 under development (Harrell, 2003). These courts surfaced when drug-related cases began to overwhelm traditional courts, which was largely due to the wide-scale use of mandatory minimum drug sentences (Fox & Huddleston, 2003). This sentencing approach had a disparate impact on minorities (see Chapter 6), and consequently, a large share of those diverted to drug courts have been minorities (Fielding, Tye, Ogawa, Imam, & Long, 2002). Before we discuss the effectiveness of drug courts, we review the structure and philosophy of the courts.
Structure and Philosophy of Drug Courts

Court Structure

Drug courts (also referred to as “drug treatment courts,” or DTCs, attempt to provide “a bridge between criminal justice and health services” (Wenzel, Longshore, Turner, & Ridgely, 2001, p. 241). This bridge results in a combination of court oversight and therapeutic services (Fox & Huddleston, 2003). This results in the use of “an intense regimen of drug treatment, case management, drug testing, and supervision, while reporting to regularly scheduled status hearings before a judge” (Fox & Huddleston, 2003, p. 13). In addition to the judge, the prosecutor, defense attorney, treatment provider, law enforcement officer, probation officer, case manager, and program coordinator are part of the “drug court team” (Fox & Huddleston, 2003, p. 13).

Based on a report commissioned by the U.S. Department of Justice and the National Association of Drug Court Professionals, there are 10 key components of drug courts (Fox & Huddleston, 2003). To receive federal funding, drug courts must adhere to the following components. First, they must use a multidisciplinary process to address the needs of persons who are diverted to the court. Second, the courts are also seen as nonadversarial. Going against the traditional philosophy of courts, all parties work together, again, to ensure that the participant has the best chance at success. Early identification is the third component of drug courts. Here, the courts try to get to prospective participants as early in the criminal justice process as possible. The fourth component of the court is to offer a “continuum of treatment and rehabilitation services” (Fox & Huddleston, 2003, p. 16). This acknowledges the diverse needs of those who come under the purview of the court. Regular alcohol and drug testing is another key component. Such random testing, which should be observed by a program official, is essential to ensure participants have not had relapses.

The sixth key component of the court is to have regular meetings to discuss the progress of participants. Philosophically, these meetings should not take on a punitive tone (Fox & Huddleston, 2003). In line with the sixth component, the seventh requires that there should be ongoing interaction with the judge. Evaluation is the eighth essential component of a drug court. Using goals and objectives as a starting point, each court should periodically measure its effectiveness. The ninth component requires that team members seek out additional education or training to stay abreast of current drug court practices. The final key component of drug courts is developing community partnerships. Drug courts are encouraged to make links to “enhance program effectiveness and general local support” (Fox & Huddleston, 2003, p. 17).

Court Philosophy

In short, the underlying philosophy of the court is that persons with drug addictions need treatment vis-à-vis prison sentences. That is, since some of
the problems that result from drug abuse are related to criminal justice, drug courts seek to address the addiction problem through treatment services, in hopes of producing the following positive outcomes: a reduction in drug use, less criminal activity, lower recidivism, better health, better social and family functioning, better educational/vocational status, and residential stability (Fischer, 2003; Wenzel et al., 2001). Taking into consideration the unique approach and philosophy of drug courts, the next section looks to see how effective they have been.

Effectiveness of Drug Courts

Approaching nearly 15 years in existence, drug courts have been the focus of a considerable amount of evaluations. In 1997, the GAO reviewed 20 studies that evaluated the effectiveness of drug courts. The GAO noted the serious shortcomings in many of the evaluations that had been done up to that point. In general, the report found mixed results. Some programs recorded relapse rates from 7% to 80%, with some programs reporting recidivism rates ranging from 0% to 58% (GAO, 1997, p. 74). In addition, completion rates were mixed, ranging from 1% to 70%, with an average of 43% (GAO, 1997, p. 77). A review of studies conducted of drug courts in California, Florida, and Delaware found that Hispanics and African Americans were less likely to complete the programs. In Nevada, however, researchers reported “no difference in the termination rates between ethnic groups and between male and female participants” (GAO, 1997, p. 77). More recent research has continued to yield mixed results (Anderson, 2001; Bavon, 2001; Cooper, 2003; Fischer, 2003; Johnson Listwan, Sundt, Holsinger, & Latessa, 2003). We review a few of these recent studies to show the impact of drug courts.

Recent Drug Court Studies

Los Angeles County started its first drug court in 1994. By June 2001, there were “11 pre-plea drug court programs . . . operating in parts of 11 Los Angeles County’s 24 judicial districts” (Fielding et al., 2002, p. 218). Like others around the country, the court “provide[s] a treatment alternative to prosecution for non-violent felony drug offenders” (p. 218). To measure the effectiveness of the drug court, the researchers used a quasi-experimental design with three sample groups. The first group included those who participated in the drug court program. The second group participated in another diversion program, while the third group comprised felony defendants who went to trial. The study aimed to investigate the program completion and recidivism rates of the groups (p. 220). Most of the persons in the three groups were male and minorities, with an average age in the low 30s. When Fielding et al. (2002) examined recidivism among the three groups, they found,
Drug court participants were less likely to be re-arrested than drug diversion participants or felony defendants. However, results differ by risk strata. Low risk study participants’ re-arrest rates did not differ significantly from those of the diversion sample. However, for those classified at medium or high risk, the re-arrest rate for drug court participants was significantly below those of the diversion and/or felony defendant groups. (pp. 221–222)

Moreover, the time to rearrest was longer for those who participated in drug courts than those who were in the other groups. This held true for time to new drug arrests. On the whole, drug court graduates fared better than those in the other groups. A final area of interest to the researchers was cost. The cost for drug court ranged from nearly $4,000 to nearly $9,000. Yet the alternatives to drug courts, prison ($16,500) and residential treatment centers ($13,000) were considerably more expensive.

Gottfredson, Najaka, & Kearley (2003) evaluated the effectiveness of a drug treatment court in Baltimore. The researchers randomly assigned offenders to drug treatment court or another more traditional treatment. Both groups (N = 235) comprised almost 90% African Americans, with three quarters of the participants being male. The study revealed that drug court participants were not only less likely to be rearrested (66.2% vs. 81.3%), but the number of new arrests and charges were also lower for drug court participants.

In contrast to the other studies reviewed, a recent study of a drug court in Cincinnati, Ohio, where there were 66% non-White participants, found less dramatic differences between drug court participants and a comparison group. Specifically, 30.8% of the drug court participants and 37.4% of the comparison group had new arrests (Johnson Listwan et al., 2003). The drug court participants were also less likely than the comparison group to be rearrested for a new drug offense.

Cresswell and Deschenes (2001) surveyed White and non-White drug court participants in California to determine their perceptions of the severity and effectiveness of the drug court program. They found that Whites and non-Whites did view the various penalties differently, with minorities viewing various diversion programs as being more severe than did nonminorities. Nonminorities rated sentences of 18 months to 3 years in prison as being more severe than did minorities. While most of the participants viewed the program as being effective in keeping them drug, alcohol, and crime free, minorities found the court to be particularly effective in getting them jobs, helping them remain employed, and “gaining a better self-image” (Cresswell & Deschenes, 2001, p. 274).

Though there have been mixed results for drug courts, the vast majority of the reviews have some positive outcome. That is, in most studies, drug court participants are faring better than those in comparison groups. Even when the outcomes are quite similar, the cost of the drug court is far lower than the alternative.
Conclusion

This chapter examined the American court system, beginning with an overview of the key processes and actors. Next, a historical overview of race and the courts noted how the courts have traditionally dealt with racial/ethnic minorities. Racial minorities have had to deal with a variety of legislation, which has guided the courts and shaped their experience in America. Many of these early experiences have been found to be colored by stereotypes that shaped the often negative treatment they received in the courts. Turning to contemporary issues, we reviewed each area of the court system to see whether race and gender bias are still impacting on the various processes. It was found that all stages still have some form of discrimination. Particularly disturbing is the jury selection process, where the use of peremptory challenges continues to be used to deny minority defendants the opportunity to have minorities on their juries.

Finally, as a way to reduce the prison population, while also giving drug-addicted offenders the treatment they need, we focused on drug courts. We reviewed their structure, philosophy, and their promise for dealing with some of the addiction problems. While the results of the evaluate studies reviewed were mixed, overall, the initiative has shown considerable promise for diverting racial minorities out of regular courts. Intimately tied to the courts is the sentencing process. Chapter 6 looks at how racial minorities fare in the sentencing phase of the court process.

Internet Activities

✦ Internet Exercise

Go to the following Web site, http://members.tripod.com/~jctMac/jurynull.html, and read the statements from significant American figures concerning jury nullification. Do any of their thoughts sway your feelings on jury nullification? Take a look at the other links and see whether you agree with the suggestions for improving the jury system.

✦ Internet Sites

National Center for State Courts: www.ncsconline.org/
National Criminal Justice Reference Service: www.ncjrs.org
Supreme Court of the United States: http://www.supremecourts.gov/
References


