5

THE COURTS:
A Quest for Justice during the Pretrial Process

[I]t is clear to me that if America ever is to eradicate racism, lawyers will have to lead. We must cleanse the justice system, because until the justice system is truly colorblind, we cannot have any genuine hope for the elimination of bias in the other segments of American life.

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LEARNING OBJECTIVES

In this chapter and in Chapter 6, we discuss the treatment of racial minorities in court. The focus in this chapter is on pretrial decision making. Our goal is to determine whether people of color are more likely than whites to be tried without adequate counsel to represent them or to be denied bail or detained in jail prior to trial. In addition, we review research on prosecutors' charging and plea bargaining decisions for evidence of differential treatment of racial minorities and whites. We argue that recent reforms adopted voluntarily by the states or mandated by court decisions have reduced, but not eliminated, racial discrimination in the pretrial process.

After you have read this chapter:

1. You will be able to explain the concept of "double jeopardy" as it applies to racial minorities who appear in court as criminal defendants.

2. You will be able to discuss the right to counsel and explain how the U.S. Supreme Court has interpreted the right.
3. You will be able to evaluate arguments regarding the quality of legal representation provided to indigent defendants.
4. You will be able to assess whether affirmative action has helped or hurt African-American law students.
5. You will be able to explain how decisions regarding bail and charging are affected by race/ethnicity and how these decisions, in turn, influence sentence severity.
6. You will be able to evaluate arguments regarding selective prosecution of African-American pregnant women who abuse drugs.

AFRICAN AMERICANS IN COURT: THE CASE OF THE SCOTTSBORO BOYS

In March 1931, nine African-American teenage boys were accused of raping ‹ white girls on a slow-moving freight train traveling through Alabama. They w arrested and taken to Scottsboro, Alabama, where they were indicted for rap capital offense. One week later, the first case was called for trial. When the de dant appeared without counsel, the judge hearing the case simply appointe members of the local bar to represent him and his codefendants. An out-of-s lawyer also volunteered to assist in the defendants' defense, but the judge pointed no counsel of record.

The nine defendants were tried and convicted, and eight were sentence death. They appealed their convictions, arguing that their right to counsel been denied. In 1932, the U.S. Supreme Court issued its ruling in the ca *Powell* v. *Alabama*,[2] one of the most famous Supreme Court cases in U.S. his The Court reversed the defendants' convictions and ruled that due process o required the appointment of counsel for young, inexperienced, illiterate, an digent defendants in capital cases.

The Supreme Court's ruling in *Powell* provided the so-called Scottsboro with only a short reprieve. They were quickly retried, reconvicted, and re tenced to death, despite the fact that one of the alleged victims had recante questions were raised about the credibility of the other victim's testimony. (again, the defendants appealed their convictions, this time contending that right to a fair trial by an impartial jury had been denied. All of the defendant been tried by all-white juries. They argued that the jury selection procedures in Alabama were racially biased. Although African Americans who were regis to vote were eligible for jury service, they were excluded in practice becaus officials refused to place their names on the lists from which jurors were ch In 1935, the Supreme Court, noting that the exclusion of all African Ame from jury service deprived African-American defendants of their right t equal protection of the laws guaranteed by the Fourteenth Amendment, reversed the convictions.[3]

The Supreme Court's decision was harshly criticized in the South. The Charleston *News and Courier*, for example, stated that racially mixed juries were "out of the question" and asserted that the Court's decision "can and will be evaded."[4] Southern sentiment also strongly favored yet another round of trials. Thomas Knight, Jr., the attorney who prosecuted the Scottsboro cases the second time, noted that "approximately ninety jurors have been found saying the defendants were guilty of the offense with which they are charged and for which the penalty is death." Knight reported that he had been "retained by the State to prosecute the cases and [would] prosecute the same to their conclusion."[5]

Less than eight months after the Supreme Court's decision, a grand jury composed of 13 whites and 1 African American returned new indictments against the 9 defendants. Haywood Patterson, the first defendant to be retried, again faced an all-white jury. Although there were 12 African Americans among the 100 potential jurors, 7 of the 12 asked to be excused and the prosecutor used his peremptory challenges to remove the remaining 5 African Americans. In his closing argument, the prosecutor also implied that an acquittal would force the women of Alabama "to buckle six-shooters about their middles" in order to protect their "sacred secret parts." He pleaded with the jurors to "get it done quick and protect the fair womanhood of this great State."[6]

Patterson was convicted and sentenced to 75 years in prison. The sentence, although harsh, represented "a victory of sorts."[7] As the *Birmingham Age-Herald* noted, the decision "represents probably the first time in the history of the South that a Negro has been convicted of a charge of rape upon a white woman and has been given less than a death sentence."[8]

Three of the remaining eight defendants were tried and convicted in July 1937. One of the three, Clarence Norris, was sentenced to death; the other two received prison sentences of 75 and 99 years. Shortly thereafter, Ozie Powell pled guilty to assaulting an officer after the state agreed to dismiss the rape charge. That same day, in an unexpected and controversial move, the state dropped all charges against the remaining four defendants. In a prepared statement, Attorney General Thomas Lawson asserted that the state was "convinced beyond any question of doubt . . . that the defendants that have been tried are guilty." However, "after careful consideration of all the testimony, every lawyer connected with the prosecution is convinced that the defendants Willie Roberson and Olen Montgomery are not guilty." Regarding the remaining two defendants, who were 12 and 13 years old when the crime occurred, Dawson stated that "the ends of justice would be met at this time by releasing these two juveniles on condition that they leave the State, never to return."[9]

The state's decision to drop charges against four of the nine defendants led editorial writers for newspapers throughout the United States to call for the immediate release of the defendants who previously had been convicted. The *Richmond Times-Dispatch* stated that the state's action "serves as a virtual clincher to the argument that all nine of the Negroes are innocent," and the *New York Times* called on the state to "do more complete justice later on."[10]

Charles Norris's death sentence was commuted to life imprisonment in 1938, but the Alabama Pardon and Parole Board repeatedly denied the five defendants' requests for parole. One of the defendants finally was granted parole in 1943, an by 1950 all of them had gained their freedom. Collectively, the nine Scottsbor Boys served 104 years in prison for a crime that many believe was "almost cer tainly, a hoax."[11]

THE SITUATION TODAY

The infamous Scottsboro case illustrates overt discrimination directed agains African-American criminal defendants. However, those events took place in th 1930s and 1940s, and much has changed since then. Legislative reforms and Su preme Court decisions protecting the rights of criminal defendants, coupled wit changes in attitudes, have made it less likely that criminal justice officials will tre defendants of different races differently. Racial minorities are no longer routinel denied bail and then tried by all-white juries without attorneys to assist the in their defense. They are no longer brought into court in chains and shack les. They are no longer referred to by prosecutors in demeaning and pejorati terms. They no longer receive "justice" at the hands of white lynch mobs.

Despite these reforms, inequities persist. Racial minorities, and particular those suspected of crimes against whites, remain the victims of unequal justice. I 1983, for example, Lenell Geter, an African-American man, was charged with tl armed robbery of a Kentucky Fried Chicken restaurant in Balch Springs, Texa Despite the absence of any physical evidence to connect him to the crime ar despite the prosecution's failure to establish his motive for the crime, Geter w convicted by an all-white jury and sentenced to life in prison.

Geter's conviction was particularly surprising given the fact that he had ironclad alibi. Nine of his coworkers, all of whom were white, testified that Get was at work on the day of the crime. His supervisor testified that there was way Geter could have made the 50-mile trip from work to the site of the cri by 3:20 P.M., the time the robbery occurred. According to one coworker, "Unl old Captain Kirk dematerialized him and beamed him over there, he could have made it back by then. He was here at work. There's no question in mind—none at all."[12]

Prosecutors in the county where Geter was tried denied that race playe role in Geter's conviction. As one of them put it, "To say this is a conviction bas on race is as far out in left field as you can get."[13] Geter's coworkers disagre they argued that Geter and his codefendant (who also was African Americ would not have been charged or convicted if they had been white.

Events that occurred following the trial suggest that Geter's coworkers w right. Another man arrested for a series of armed robberies eventually was lin to the robbery of the Kentucky Fried Chicken restaurant. Geter's conviction sentence were overturned after the employees who originally identified Ge picked this suspect out of a lineup. Geter served more than a year in prison fc crime he did not commit.

Like Lenell Geter, James Newsome, an African American sentenced to lif prison for the armed robbery and murder of a white man, also had an alibi. At trial for the 1979 murder of Mickey Cohen, the owner of Mickey's Grocery Store in Chicago, Newsome's girlfriend and her two sisters testified that he was with them at the time of the murder. The prosecutor trying the case argued that Newsome's girlfriend, who was a convicted burglar, was not a credible witness. He also introduced the testimony of three eyewitnesses who identified Newsome as Cohen's killer.[14]

Despite the fact that there was no physical evidence linking Newsome to the crime, and despite the fact that Newsome's fingerprints were not found on the items in the store handled by the killer, the jury hearing the case found Newsome guilty. Although Cook County prosecutors had sought the death penalty, the jury recommended life in prison.

Newsome, who steadfastly maintained his innocence, spent the next 15 years appealing his conviction. With the help of Norval Morris, a University of Chicago Law School professor, and two noted Chicago defense attorneys, Newsome was able to convince the Cook County Circuit Court to order that the fingerprints obtained from the crime scene be run through the police department's computerized fingerprint database to see if they matched any of those on file. The tests revealed that the fingerprints matched those of Dennis Emerson, a 45-year-old Illinois death row inmate who, at the time of Cohen's murder, was out on parole after serving three years for armed robbery.

Two weeks later, Newsome was released from prison. Shortly thereafter, Illinois governor Jim Edgar pardoned Newsome and ordered his criminal record expunged. Following his release, James Newsome, who spent 15 years in prison for a crime he did not commit, said, "I finally felt vindicated. I had defeated a criminal-justice giant. Fifteen years ago, they told me that I would never walk the streets again in my life. What did I do? I slayed a giant—a criminal justice giant."[15]

Like Geter, Newsome contended that race played a role in his arrest and conviction. "In the most [racially] polarized city in the world," Newsome stated, "racism was a factor. I was a suspect and I was convenient."[16]

Race also played a role in the case of Clarence Brandley, an African American who in 1981 was sentenced to death for the rape and murder of Cheryl Dee Ferguson, a white student at a high school north of Houston where Brandley worked as a janitor. Brandley and a coworker found the body and were the initial suspects in the case. Brandley's coworker, who was white, reported that during their interrogation one of the police officers stated, "One of you two is going to hang for this." Then he turned to Brandley and said, "Since you're the nigger, you're elected."[17] The police investigating the case claimed that three hairs found on the victim implicated Brandley. Although the hairs were never forensically tested, the police claimed that they were identical "in all observable characteristics" to Brandley's.

Brandley was indicted by an all-white grand jury and tried before an all-white jury, which hung 11-to-1 in favor of conviction. He was retried by a second all-white jury after the district attorney trying the case used his peremptory challenges to strike all of the prospective African-American jurors. During his closing argument, the district attorney referred to Brandley as a "necrophiliac" and a "depraved sex maniac." This time, the jurors found Brandley guilty and recommended a death sentence, which the judge imposed.

Brandley spent six years on death row before a Texas district court, citing misconduct on the part of police and prosecutors, threw out his conviction. The judge, who noted that there was strong evidence that the crime was committed by two white men, stated that "the color of Clarence Brandley's skin was a substantial factor which pervaded all aspects of the State's capital prosecution against him, and was an impermissible factor which significantly influenced the investigation, trial and post-trial proceedings of [Brandley's] case."[18]

In 2014, Ricky Jackson, an African-American man who had been imprisoned for 39 years for murder, was exonerated after the only witness to the case recanted his testimony. Jackson, who was 18 years old at the time, and two other teenagers were convicted of murdering a money-order collector in Cleveland after a 12-year-old boy testified that he saw them commit the crime. Nearly four decades later, the witness admitted that the police had fed him details about the crime and coached him regarding how to testify; they also threatened to imprison his parents if he failed to cooperate. There were no other witnesses and no evidence connecting any of the three teens to the crime. In 2015, the Ohio Court of Claims awarded Jackson $2 million for his wrongful imprisonment.

These four recent cases, of course, do not prove that there is a pattern of *systematic* discrimination directed against racial minorities in courts throughout the United States. One might argue, in fact, that these four cases are simply exceptions to the general rule of impartiality. As we explained in Chapter 1, the validity of the discrimination thesis rests not on anecdotal evidence that racial minorities are treated differently than whites but on the results of empirical studies of criminal justice decision making.

DECISIONS REGARDING COUNSEL AND BAIL

As we explained in Chapter 3, racial minorities are at a disadvantage in court both because of their race and because they are more likely than whites to be poor. This "double jeopardy" makes it more difficult for minority defendants to obtain competent attorneys or secure release from jail prior to trial. This, in turn, hinders their defense and may increase the odds that they will be convicted and sentenced harshly. Given these consequences, decisions regarding provision of counsel and bail obviously are important.

Racial Minorities and the Right to Counsel

The Sixth Amendment to the U.S. Constitution states, "In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." Historically, this meant simply that if someone had an attorney, he could bring the attorney along to defend him. The problem, of course, was that this was of no help to the majority of defendants, and particularly minority defendants who were too poor to hire their own attorneys.

The U.S. Supreme Court, recognizing that defendants could not obtain fair trials without the assistance of counsel, began to interpret the Sixth Amendment to require the appointment of counsel for indigent defendants. The process began in 1932, when the Court ruled in *Powell* v. *Alabama*[19] that states must provide attorneys for indigent defendants charged with capital crimes (see the earlier discussion of the Scottsboro case). The Court's decision in a 1938 case, *Johnson* v. *Zerbst*,[20] required the appointment of counsel for all indigent defendants in federal criminal cases, but the requirement was not extended to the states until *Gideon* v. *Wainwright*[21] was decided in 1963. In that 1963 decision, Justice Black's majority opinion stated:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him . . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.

(See "The Importance of a Lawyer in a Criminal Case" for further evidence of this.)

The Importance of a Lawyer in a Criminal Case

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

– *POWELL V. ALABAMA*, 287 U.S., 45, PP. 68–69 (1932).

In subsequent decisions, the Court ruled that "no person may be imprisoned, for any offense, whether classified as petty, misdemeanor, or felony, unless he is represented by counsel,"[22] and that the right to counsel is not limited to trial but applies to all "critical stages" in the criminal justice process.[23] As a result of these rulings, most defendants must be provided with counsel from arrest and interrogation through sentencing and the appellate process. As illustrated in Box 5.1, the Supreme Court also has ruled that defendants are entitled to *effective* assistance of counsel.[24]

At the time the *Gideon* decision was handed down, 13 states had no statewide requirement for appointment of counsel except in capital cases.[25] Other states relied on members of local bar associations to defend indigents, often on a *pro bono*

basis. Following *Gideon*, it became obvious that other procedures would b
quired if all felony defendants were to be provided attorneys.

States moved quickly to implement the constitutional requirement a
lated in *Gideon*, either by establishing public defender systems or by appropr
money for court-appointed attorneys. The number of public defender sy
grew rapidly. In 1951, there were only seven public defender organizations i
United States; in 1964, there were 136; by 1973, the total had increased to 5
According to a 2010 Bureau of Justice Statistics report, in 2007 there wer
public defender offices across the nation; they received more than 5.5 m

In the News: The New Orleans Public Defenders' Office Is Sued for Refusing New Cases.

In January 2016, the American Civil Liberties Union (ACLU) filed a class-action laws
against the Orleans Parish (New Orleans) public defenders' office, and the Louisia
Public Defender Board after the public defenders' office said that it would no long
take certain felony cases where defendants were facing long prison sentences. Thi
move followed a November 2015 request from the public defenders' office that th
office not be assigned new cases until its resources were increased and its workloa
reduced. According to Brandon Buskey, a staff attorney with the ACLU's Criminal Law Reform Project, the lack of legal representation for indigent defendants in New Orleans violates defendants' Sixth Amendment rights, adding that "so long a
you're on the public defender waiting list in New Orleans, you're helpless. Your leg
defense erodes along with your constitutional rights."

Derwyn Bunton, chief of the Orleans Parish Public Defenders' Office, testified
the November hearing that cuts to his budget, and staff attrition had made it impo
sible for his office to perform its work and meet the standards imposed by the U.S. Constitution and the Louisiana Rules of Professional Conduct. Bunton also pointed out that his budget was about half of that of the district attorney's and that the D
Office had more than 80 attorneys and 30 investigators helping prepare cases, com
pared to the 53 attorneys and 8 investigators in his office.

Ellen Yaroshefsky, a legal ethics professor at New York's Cardozo School of La
agreed with Bunton's analysis. Noting that attorneys in the office were handling caseloads that were two to three times heavier than that recommended by nationa
standards, she stated that she was "very troubled by the situation this public defen
ers' office is in. To call this a 'justice system' is really a misnomer . . . I believe that th
entire office is operating as a conflict of interest. The lawyers here are compromisi
some clients in order to represent others. They make a decision to triage, and triag
is a conflict of interest." Yaroshefsky also stated that she agreed with Bunton's deci
sion to not take any new cases. Otherwise, she said, the courthouse would become nothing more than "a plea mill," where defendants' only option is to enter a guilty plea "without even the most basic level of investigation and counsel" by the public defenders' office.

SOURCE: Ken Daley, "Orleans Public Defenders' Bombshell: No New Cases for Us, Please." *The Times-Picayune*, November 20, 2015. For information about the history and development of the New Orleans Public Defenders' Office, see Albert Samaha, "Indefensible: The Story of the New Orleans' Public Defenders." BuzzFee
August 13, 2105. http://www.buzzfeed.com/albertsamaha/indefensible-new-orleans-public-defenders-office#.ewdG7xBbR.

Box 5.1 The Supreme Court and "Effective" Assistance of Counsel

In 1984, the Supreme Court articulated constitutional standards for determining whether a defendant had ineffective assistance of counsel. The Court ruled, in the case of *Strickland* v. *Washington* (466 U.S. 668 [1984], at 687), that to establish ineffectiveness, a defendant must prove:

- First, "that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."
- Second, "that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliance."

The so-called Strickland test thus consists of both a performance prong and a prejudice prong. The Court also stated that to establish ineffective performance, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." To establish prejudice, he or she "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

The Court revisited this issue in 2000, ruling that Terry Williams had been denied effective assistance of counsel (*Williams* v. *Taylor* 529 U.S. 420 [2000]). Williams was convicted of robbery and murder and sentenced to death after a Virginia jury concluded that he had a high probability of future dangerousness.

At the sentencing hearing, Williams's lawyer failed to introduce evidence that Williams was borderline mentally retarded and did not advance beyond sixth grade. He also failed to introduce the testimony of prison officials, who described Williams as among the inmates "least likely to act in a violent, dangerous, or provocative way." Instead Williams's lawyer spent most of his time explaining that he realized it would be difficult for the jury to find a reason to spare Williams's life. His comments included the following: "I will admit too that it is very difficult to ask you to show mercy to a man who maybe has not shown much mercy himself . . . . Admittedly, it is very difficult to . . . ask that you give this man mercy when he has shown so little of it himself. But I would ask that you would."

The Supreme Court ruled that Williams's right to effective assistance of counsel had been violated. According to the Court, "There was a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence."

The rulings discussed above establish that defendants are entitled to effective assistance of counsel at trial. Two recent Supreme Court cases make it clear that the right extends to plea negotiations as well. In one case, *Missouri* v. *Frye* (132 S. Ct. 1399, 2012), the defense attorney failed to make the defendant aware of a plea offer from the prosecutor and the defendant subsequently pled guilty not knowing that the prosecutor had offered to reduce the seriousness of the charge. In the second case, *Lafler* v. *Cooper* (132 S. Ct. 1376, 2012), the defense attorney advised the defendant, who was charged with assault with intent to murder, to reject a plea offer that would have resulted in a sentence of 52–85 months in prison because, in his view, the prosecutor would be unable to prove intent to murder given that Lafler had shot the victim below the waist. The defendant went to trial, was convicted, and was sentenced to 185–360 months in prison. In both cases, the Supreme Court ruled 5-4 that the defendants had not been provided effective assistance of counsel. Given that 90–95 percent of all criminal convictions result from guilty pleas, these decisions clearly have consequences for criminal defendants.

indigent cases, employed more than 15,000 full-time attorneys, and their expenditures exceeded $2.3 billion.[27] A survey of inmates incarcerated in state and federal prisons in 1997 revealed that about 73 percent of the state inmates and 60 percent of the federal inmates were represented by a public defender or assigned counsel. This survey also revealed that African Americans and Hispanics were more likely than whites to be represented by a public defender or assigned counsel. Among state prison inmates, for example, 77 percent of the African Americans, 73 percent of the Hispanics, and 69 percent of the whites reported that they were represented by a publicly funded attorney.[28] (See "In the News: The New Orleans Public Defenders Office Is Sued for Refusing New Cases.")

Quality of Legal Representation As a result of Supreme Court decisions expanding the right to counsel and the development of federal and state policies implementing these decisions, African Americans and other racial minorities are no longer routinely denied legal representation at trial or at any of the other critical stages in the process. Questions have been raised, however, about the quality of legal representation provided to indigent defendants by public defenders. An article in the *Harvard Law Review*, for example, claimed:

> Nearly four decades after *Gideon*, the states have largely, and often outrageously, failed to meet the Court's constitutional command. The widespread, lingering deficiencies in the quality of indigent counsel have led some to wonder whether this right, so fundamental to a fair and accurate adversarial criminal process, is unenforceable.[29]

A 2003 report on Mississippi's indigent defense system reached a similar con clusion. The authors of the report, who noted that the system was "among th most poorly funded in the nation," concluded that "in Mississippi justice is avail able only to those with the means to pay for it. And sadly, our country's shamefi history of racial discrimination is still readily apparent in the low quality represer tation provided to the State's poor, predominately black defendants."[30]

There is evidence suggesting that defendants share this view. In fact, one the most oft-quoted statements about public defenders is the answer given by unidentified prisoner in a Connecticut jail to the question of whether he h a lawyer when he went to court. "No," he replied, "I had a public defender." David Neubauer similarly notes that in prison "'PD' stands not for 'public d fender' but for 'prison deliverer.'"[32] Some social scientists echo this negative sessment, charging that public defenders, as part of the courtroom workgro are more concerned with securing guilty pleas as efficiently and as expeditiou as possible than with aggressively defending their clients.[33] As Ronald Weitze notes (and as the examples in Box 5.2 confirm), "In many jurisdictions, pub defenders and state-appointed attorneys are grossly underpaid, poorly trained, simply lack the resources and time to prepare for a case—a pattern documen in cases ranging from the most minor to the most consequential, capital crime

Other social scientists disagree. Citing studies showing that criminal fendants represented by public defenders do not fare worse than those rep sented by private attorneys,[35] these researchers suggest that critics "have tende

Box 5.2 Are Indigent Capital Defendants Represented by Incompetent Attorneys?

In "Judges and the Politics of Death," Stephen Bright and Patrick Keenan claimed, "Judges often fail to enforce the most fundamental protection of an accused, the Sixth Amendment right to counsel, by assigning an inexperienced or incompetent lawyer to represent the accused." In support of their assertion, they offered the following examples:

- A capital defendant who was represented by a lawyer who had passed the bar exam only six months earlier, had not taken any classes in criminal law or criminal procedure, and had never tried a jury or a felony trial.
- An attorney who described his client as "a little old nigger boy" during the penalty phase of the trial.
- A judge in Harris County, Texas, who responded to a capital defendant's complaints about his attorney sleeping during the trial with the assertion that "the Constitution doesn't say the lawyer has to be awake."
- A Florida attorney who stated during the penalty phase of a capital case, "Judge, I'm at a loss. I really don't know what to do in this type of proceeding. If I'd been through one, I would, but I've never handled one except this time."
- A study of capital cases in Philadelphia that found that "even officials in charge of the system say they wouldn't want to be represented in Traffic Court by some of the people appointed to defend poor people accused of murder."

SOURCE: Stephen Bright and Patrick Keenan 1995, 800.

underestimate the quality of defense provided by the public defender."[36] Paul B. Wice, in fact, concluded that the public defender is able to establish a working relationship with prosecutors and judges "in which the exchange of favors, so necessary to greasing the squeaky wheel of justice, can directly benefit the indigent defendant."[37] As part of the courtroom workgroup, in other words, public defenders are in a better position than private attorneys to negotiate favorable plea bargains and thus to mitigate punishment. A 2008 survey of 666 federal and state judges confirmed these perceptions, at least with respect to public defenders who represent criminal defendants in the federal court system.[38] This study found that although both federal and state judges believed that there were significant differences in the quality of legal representation in criminal cases, federal judges did not believe that these differences were due to the type of attorney; in fact, federal judges rated public defenders as comparable to prosecutors and as significantly more competent than court-appointed attorneys or privately retained counsel. In contrast, state court judges gave somewhat higher ratings to private attorneys than to either public defenders or court-appointed counsel.

The results of studies investigating case outcomes for defendants represented by different types of attorneys are inconclusive. For example, a 2000 report by the Bureau of Justice Statistics (BJS) revealed that case outcomes for state and federal defendants represented by public attorneys do not differ dramatically from those represented by private counsel.[39] There were only very slight differences in the conviction rates of defendants represented by public and private attorneys but somewhat larger differences in the incarceration rates. At the federal level, 87.6 percent of the defendants represented by public attorneys were sentenced to prison, compared with 76.5 percent of the defendants with private attorneys. The authors of the report attributed this to the fact that public counsel represented a higher percentage of violent, drug, and public-order offenders, whereas private attorneys represented a higher percentage of white-collar defendants. Felony defendants in state courts also faced lower odds of incarceration if they were represented by private attorneys (53.9 percent) rather than public defenders (71.3 percent). In both state and federal court, on the other hand, defendants represented by private attorneys got somewhat longer sentences than those represented by public defenders. At the federal level, the mean sentences were 58 months (public attorneys) and 62 months (private attorneys); at the state level, they were 31.2 months (public attorneys) and 38.3 months (private attorneys).[40]

A more nuanced and methodologically sophisticated study of the effect of type of counsel on outcomes in murder cases found very different results.[41] Anderson and Heaton used data on more than 3,000 defendants charged with murder between 1994 and 2005 in Philadelphia. In this jurisdiction, one in every five indigent murder defendants is randomly assigned representation by a nonprofit public defender organization, the Defender Association of Philadelphia; the remaining defendants are assigned to attorneys in private practice who are appointed by a judge and paid by the county. The authors of the study found that although the likelihood of conviction was not affected by the type of attorney, there were large and statistically significant differences on a number of outcomes examined. Defendants represented by public defenders were less likely to be convicted of murder and less likely to receive a life sentence; they also received sentences that were significantly shorter than those imposed on defendants represented by assigned attorneys. In Philadelphia, in other words, murder defendants represented by public defenders fared better than those represented by private attorneys.

Interviews with criminal justice officials in Philadelphia revealed that these differences may reflect the fact that appointed counsel receive minimal compensation and thus have few if any incentives to mount a vigorous defense, as well as the fact that, compared to public defenders, appointed attorneys operate in relative isolation. As the authors noted, "We believe that these systemic factors cause appointed counsel generally to spend less time with defendants and investigate and prepare cases less thoroughly."[42] The fact that the type of attorney to which the case was assigned had an impact on the outcome of the case obviously is troubling. According to the authors, "Perhaps the most disturbing aspect of our analysis is the fact that we identify a factor—whether or not a defendant is initially assigned to the public defender—that has an important impact on case outcomes but that is completely unrelated to the culpability or conduct of the defendant."[43]

What Makes a Good Lawyer? What makes a good lawyer? Is it the training that he/she receives? The ranking of the law school that he/she attended? His/her years of experience, gender, race, or other demographic characteristics?

A study published in *The University of Chicago Law Review* attempted to answer this question using data on felony cases prosecuted by the public defender's office in Clark County, Nevada (Las Vegas is the largest city in the county) between 2003 and 2005.[44]

In this jurisdiction, felony cases are randomly assigned to public defenders; thus, there should be no differences in the characteristics of cases assigned to attorneys, and differences in case outcomes can therefore be attributed, not to the characteristics of the case but to the background and experience of the attorney to whom the case is assigned.

The authors of the study found that the likelihood of incarceration and the length of the sentence were affected by the attorney's experience; attorneys who had served longer in the public defender's office got more favorable outcomes for their clients. Neither outcome was affected by the ranking of the law school that the attorney attended or by the attorney's gender, and the likelihood of incarceration did not vary based on the race of the attorney. In contrast, Hispanic public defenders obtained significantly shorter sentences for their clients than either white or African-American public defenders. These results led the authors to conclude that "drawing a good attorney in the random assignment process can save a defendant several months of incarceration, on average . . . [and] a veteran PD could reduce the likelihood of incarceration by as much as a fourth" (p. 1176).

Race, Type of Counsel, and Case Outcome The data presented thus far do not address the question of racial discrimination in the provision of counsel. Although it is true that African-American and Hispanic defendants are more likely than white defendants to be represented by public defenders, it does not necessarily follow from this that racial minorities will be treated more harshly than whites as their cases move through the criminal justice system. As we have noted, studies have not consistently shown that defendants represented by public defenders fare worse than defendants represented by private attorneys.

Most studies have not directly compared the treatment of African-American, Hispanic, and white defendants represented by public defenders and private attorneys. It is possible that racial minorities represented by public defenders receive more punitive sentences than whites represented by public defenders or that whites who hire their own attorneys receive more lenient sentences than racial minorities who hire their own attorneys. To put it another way, it is possible that hiring an attorney provides more benefits to whites than to racial minorities, and representation by a public defender has more negative consequences for racial minorities than for whites.

Malcolm D. Holmes, Harmon M. Hosch, Howard C. Daudistel, Dolores A. Perez, and Joseph B. Graves found evidence supporting these possibilities in one of the two Texas counties where they explored the interrelationships among race/ethnicity, legal resources, and case outcomes.[45] The authors of this study found that in Bexar County (San Antonio) both African-American and Hispani defendants were significantly less likely than white defendants to be represente by a private attorney, even after such things as the seriousness of the crime, th defendant's prior criminal record, and the defendant's gender, age, and employ ment status were taken into account. The authors also found that defendants wh retained a private attorney were more likely to be released prior to trial and re ceived more lenient sentences than those represented by a public defender.[46] I this particular jurisdiction, then, African-American and Hispanic defendants wer less likely than whites to be represented by a private attorney, and as a result, the received more punitive treatment than whites.

An examination of the sentences imposed on defendants convicted of fel onies in three large urban jurisdictions in 1993 and 1994 produced somewha different results. Cassia Spohn and Miriam DeLone[47] compared the proportion of white, African-American, and Hispanic defendants who were represented b a private attorney in Chicago, Miami, and Kansas City. As shown in Table 5.1, i all three jurisdictions, whites were substantially more likely than African Amer icans to have private attorneys. In Chicago, 22.5 percent of white defendant but only 6.9 percent of African-American defendants, had a private attorney. I Miami, Hispanics also were less likely than whites to be represented by a privat attorney.

Although the data presented in Table 5.1 reveal that smaller proportion of racial minorities than whites had access to the services of a private attorne they do not provide evidence of differential treatment based on either typ of attorney or race/ethnicity. In fact, when Spohn and DeLone examined th sentences imposed on racial minorities and whites in each jurisdiction, the found an interesting pattern of results. As shown in Figure 5.1, in Chicago an Kansas City only whites benefited from having a private attorney. Among Af rican Americans, the incarceration rates for defendants represented by privat attorneys were only slightly lower than the rates for defendants represented b public defenders; among Hispanics in Chicago, the rate for defendants wit private attorneys was actually somewhat *higher* than the rate for those wit public defenders. In Miami, both whites and African Americans benefited fro representation by private counsel, but Hispanics with private attorneys wer

TABLE 5.1 Race/Ethnicity and Type of Attorney in Chicago, Miami, and Kansas City

	Percentage Represented by a Private Attorney		
Race of Defendant	Chicago	Miami	Kansas City
White	22.5	34.5	37.8
African American	6.9	23.4	24.8
Hispanic	21.2	27.3	NA[a]

[a]There were only 47 Hispanic defendants in Kansas City.