ADR, for the most part, it has become a firmly entrenched element in the American system of justice.

ISSUES OF GENDER AND RACE

Beginning in the 1960s, concerns started to be raised by social scientists and some in the legal profession that the courts did not dispense justice in a fair and totally even-handed fashion when it came to issues of gender and race (see, for example, Gabbidon 2009; Reiman 2006; Van Wormer and Bartollas 2007). While the discriminatory application of the law to certain groups can work both ways—either for or against a particular group—questions about the unequal application of the law and the resulting injustice remain.

GENDER ISSUES

Gender issues really cut along two dimensions in the judicial process. First, consideration must be given to the way women are treated by the courts as victims, offenders, plaintiffs, defendants, and witnesses. Second, the issue of the position of women in the administration of justice—particularly in the roles of attorneys and judges—must also be addressed. We consider both of these issues in this section.

Women as Victims

In terms of the situation in which women are victims, there have been significant concerns expressed in regard to two sets of circumstances. First, when women have been the victims of sexual assaults, concern has been expressed about the possibility of the victim being twice-victimized: once by the offender and a second time by the justice system. In order to deal with this consideration, a number of changes in case processing have occurred since the 1970s. Some police departments now utilize female officers to investigate sexual assaults when there is a female victim. Additionally, officers may receive training on how to be more sensitive when processing cases of females who have been raped. Prosecuting attorneys' offices in some jurisdictions now employ victims' advocates who are specially trained to deal with a variety of crime victims who have suffered some sort of trauma. Finally, quite a few jurisdictions in the United States have now enacted what are called **rape shield laws**. These laws prevent defense attorneys from questioning victims about or making reference to the victim's prior sexual history with the accused person or with anyone else.

Women as Offenders

A quick look at some of the figures released by the U.S. Bureau of the Census shows that in 2010 there were 156,964,000 females in the United States, or slightly over half the nation's population (50.8 percent). Of this number 116,290,000 were over the age of 20 (74 percent of the female population and 41.3 percent of the total population) (U.S. Census Bureau 2010). By contrast, in 2006 females constituted only 17 percent of those convicted of all felonies and 11 percent of those convicted of violent felonies

(Rosenmerkel, Durose, and Farole 2009:17). Why are there such disparities in the numbers of women convicted of felonies compared with their male counterparts? Are they less inclined to engage in criminal activity, or are there forces at work within the criminal justice system that offset these numbers? The available statistics warrant a closer look at the ways female offenders are processed by the courts at the stages of prosecution, adjudication, and sentencing.

In terms of filing criminal charges against women, 2013 arrest statistics from the Federal Bureau of Investigation (FBI) demonstrate that nationwide, women constitute roughly 1.87 million or less than one-third of the persons arrested (FBI 2015). Obviously this has an impact on the prosecution of criminal cases as well. Two explanations have been offered for this substantial underrepresentation of females in the nation's arrest and prosecution statistics. First, some people maintain that either by biological makeup or by culture, women are simply less criminally inclined than men. Second, however, there has been a strong argument made that the justice system is much less punitive and much more forgiving toward women accused of most crimes. This is often called the **chivalry hypothesis**, and, as we discussed earlier in the text, it suggests that agents of the justice system act in ways that show leniency toward accused female offenders (Embry and Lyons 2012; Mays and Ruddell 2015:157).

There also is the likelihood that the justice system can act in ways that are much more punitive toward female offenders. This is known as **paternalism** perspective, and it suggests that when females commit crimes normally associated with males, or they commit crimes in a more male-like fashion, then the justice system should respond in a way to protect society from these female offenders and to protect the women from themselves (see, for example, Spivak et al. 2014). Thus, in the prosecution of women accused of committing crimes, it is entirely likely that they will be treated either more leniently or more harshly than their male counterparts for a variety of reasons.

When it comes to adjudication, again women may be treated differently from men. Judges and juries are often more sympathetic to female offenders, at least in cases where their crimes are consistent with female stereotypes. This has become apparent in states that have moved to the use of sentencing guidelines. Without guided sentences, judges traditionally have had a great deal of discretion in deciding which sentences to impose. However, in the jurisdictions that have implemented sentencing guidelines, the disparities among convicted offenders have decreased, as sentencing guidelines do not take into account the offender's gender. This especially has been the case for male–female differences in sentences (Nagel and Johnson 1994).

Women as Judges and Attorneys

In addition to women appearing in the courts as victims and defendants in criminal cases and as plaintiffs or defendants in civil cases, they also participate in the judicial process as judges and attorneys. For most of our nation's history, women have been substantially underrepresented in the practice of law. Lentz (2009:445) notes that the first woman admitted to the practice of law in the United States was in Iowa in 1869. Some states specifically excluded women from being licensed to practice law, and the U.S. Supreme Court, in the case of *Bradwell v. Illinois*, 83 U.S. 130 (1872),

"ruled that practicing law was not a privilege under the U.S. Constitution, and states could restrict licensure to males" (Lentz 2009:445). This meant that most women were systematically—and legally—excluded from university-level legal studies and from the practice of law in their communities.

As a result of not being allowed to practice law, women also were foreclosed from public service as judges. For example, "in 1969 there were just over 8,000 women attorneys and only about 200 female judges" in the United States (Lentz 2009:446). While there has been progress in this area, the numbers for women continue to lag behind those of men. "By the 1980s it was estimated that there were over 500 women sitting as judges on state courts and by the early 1990s that number had more than doubled," but the percentage of women judges nationwide still remains small (Lentz 2009:447).

In 2012 there were 116 women judges on state courts of last resort (32 percent of the 361 judges total), there were also 316 female intermediate appellate judges (32 percent of the 977 total), and 2,768 female judges serving in general jurisdiction state courts (25 percent of the 11,049 total) (National Association of Women Judges 2013). In terms of the federal bench, just over 30 percent of the federal district court and federal appellate judges are female, and three of the current associate justices of the U.S. Supreme Court are women. Most of the increases in the numbers of female judges have come as a result of the significant increases in the percentage of female law school students and the number of women entering the practice of law. In fact, the American Bar Association (2014) reports that the percentage of licensed female attorneys in the United States grew from 8 percent in 1980 to 20 percent in 1991 and 30 percent in 2005. In addition, in the 2013–2014 academic year, women comprised nearly 48 percent of the roughly 128,000 law students in the country. That number has been hovering at just under one-half of the total law school enrollment for nearly 20 years (American Bar Association 2014).

The exclusion of women from participation in the judicial process has gone beyond their participation as judges and attorneys, however. For instance, even after women gained the right to vote in 1920, some states still systematically excluded them from jury service based upon their supposed emotional frailty (Lentz 2009:446). Today no state routinely excludes women from jury service, and the Supreme Court, in the case of *J.E.B. v. Alabama Ex Rel. T.B.*, 511 U.S. 127 (1994), has said, "the Equal Protection Clause [of the Constitution] forbids intentional discrimination on the basis of gender, just as it prohibits discrimination on the basis of race." Thus, in the process of jury selection, peremptory challenges cannot be used to exclude all females (or all males, for that matter), and "gender, like race, is an unconstitutional proxy for juror competence and impartiality" (511 U.S. 127).

RACE AND JUSTICE

Just as concern over gender remains a consideration in the justice apparatus of the United States, the issue of race (and ethnicity) must also be addressed. Again, as with gender, race or ethnicity is a two-dimensional concern dealing with the way minorities are treated within the justice system and with the numbers of minorities serving as attorneys and judges within the court system.

Minorities as Defendants

Race has particularly been raised as an issue in regard to the disproportionate number of minorities who are arrested and prosecuted in our nation's courts. As an example, in 2006, 38 percent of the people convicted of all felonies in state courts were black. Even more startling is the fact that 44 percent of the state felons convicted of drug charges and 55 percent convicted of weapons charges were black. The Bureau of Justice Statistics notes that "whites comprised 82% of adults in the U.S. population, compared to 60% of persons convicted of a felony. Blacks comprised 12% of the adult population, but 38% of convicted felons" (Rosenmerkel et al. 2009:15). The reasons behind such discrepancies are varied and complex. For example, for any number of reasons, it is possible that minorities simply commit more crimes and thus are more likely to be targeted and apprehended by the police as well as prosecuted.

It is equally likely that the policies of the criminal justice system disproportionately affect minorities, particularly those policies that are aimed at controlling drugs. An illustration of this is the so-called 100-to-1 conversion factor for crack cocaine versus powder cocaine built into the federal laws. What this means is that 1 gram of crack cocaine can result in the same sentence as 100 grams of powder cocaine, even though the drugs are chemically indistinguishable. Until 2007 the result of this policy was that blacks, who were more likely to possess and sell crack cocaine rather than powder cocaine, were often punished more severely than their white counterparts in the drug trade. In 2007, the U.S. Supreme Court ruled that such a legal inconsistency is not constitutionally justifiable (see Box 12.3).

Not only are blacks convicted of all crimes at disproportionate rates relative to whites but also this disproportionality shows up in our prison populations. On December 31, 2013, there were 1,516,879 people held in state and federal prisons in the United States. Of this number, 549,100 were black (526,000 males and 23,100 females) along with 332,200 who were Hispanic (314,600 males and 17,600). These two groups taken together represent over half (58 percent) of the nation's prison population, and jail populations have similar racial proportions (Carson 2014:8). Clearly minorities are disproportionately represented in the population of persons processed by the courts and those sentenced to serve time at the local, state, and federal levels.

Minorities as Judges and Attorneys

Just as is the case with women, minorities are substantially underrepresented in the practice of law and on the benches of the nation's courts. For instance, the American Bar Association (2014) notes that in 1990 blacks comprised 3.3 percent of the licensed attorneys in the United States, by 2000 this had grown to 4.2 percent, and in 2010 they still were only 4.8 percent. Hispanics represented the next largest minority group; they constituted 2.5 percent of U.S. attorneys in 1990, in 2000 they were 3.4 percent, and in 2010 they were 3.7 percent of the attorney population. For the 2013–2014 academic year, all minority groups accounted for just over one in five (28.5 percent) of the nation's law school enrollment.

BOX 12.3 Crack Cocaine Versus Powder Cocaine: *Kimbrough v. United States*, 552 U.S. 85 (2007)

For some time, critics of the 1986 federal drug law have argued that the legal distinction between the penalty for crack (or rock) cocaine violations and the penalty for powder cocaine violations were unjustified. In essence, the law imposed the same penalty for 1 gram of crack cocaine as it did for 100 grams of powder cocaine (the so-called 100-to-1 disparity). While the two forms of the drug cannot be chemically distinguished, Congress decided in the early 1980s to tack a more severe punishment on those accused of involvement with crack cocaine in comparison with those who were arrested for the powder version of the drug. The result was that the application of the law had a racially disparate effect: minorities were much more likely to be involved with crack than with powder cocaine and, thus, much more likely to receive severe criminal penalties.

In 2007, the U.S. Supreme Court, in a 7–2 decision, supported the view of the trial court judge that the existing distinction created a "disproportionate and unjust effect" (*Kimbrough v. United States*, 552 U.S. 85). The Court affirmed the sentencing decision of the federal trial court judge that had departed downward from the sentence prescribed by the U.S. sentencing guidelines. Therefore, after more than two decades of maintaining this legal distinction, the federal drug laws must now treat all forms of cocaine the same.

Sources: Legal Information Institute (2010); Mikkelson (2007).

When the numbers of minorities practicing law are small, this is also reflected in the presence of minorities on the benches of courts in the United States. For instance, the American Bar Association (2015) has found that nationwide there are approximately 1,144 minority judges sitting in state courts. Of this group, 769 (53.6 percent) are African American, 408 (28.4 percent) are Hispanic, 157 (10.9 percent) are Asian American or Pacific Islanders, 13 (1.1 percent) are Native American, and 89 (6.2 percent) represent other racial/ethnic groups. These numbers can be broken down as follows: 47 state supreme court judges are minorities, 131 of the judges serving on intermediate appellate courts are minorities, and 1,258 of general trial court judges are minorities. The numbers for federal courts are not any better: out of nearly 1,300 federal judges only 8 percent are African American, 11 judges are Asian American, and only 1 is Native American (Federal Judicial Center 2015). As a nation we have a long way to go in order to have the actors within the justice system reflect the nation's racial and ethnic population.