GENDER AND JUSTICE COMMISSION

FRIDAY, MAY 29, 2020 (9:30 AM – NOON)
JUSTICE SHERYL GORDON MCCLOUD, CHAIR
JUDGE MARILYN PAJA, VICE CHAIR
ACCESS LINK: HTTPS://WACOURTS.ZOOM.US/J/92648468016
DIAL-IN: 253-215-8782 US (TACOMA)
MEETING ID: 926 4846 8016

Agenda		Page
9:30 AM – 9:45 AM **WELCOME AND INITIAL BUSINESS**		
➢ Welcome	Justice Sheryl Gordon McCloud, Commission Chair	
➢ Approval of January 31st Meeting Minutes		**1**
➢ Vote: Proposed Amendment to Commission Bylaws › Change officer position of Commission Vice Chair to Commission Co-Chair		**9**
9:45 – 10:15 AM **COMMITTEE DISCUSSION**		
➢ **COVID-19 Impacts and Priorities** › How has COVID-19 impacted the work of your committee? › What would you like to see the Commission or your committee prioritize over the next few months?	Committee Chairs and Members	**10**
10:15 – 11:15 AM **GENDER JUSTICE STUDY**		
➢ **Research Updates and Discussion**		**13**
› Mass Incarceration Section	Ms. Marla Zink, Lead	**15**
› Family Law Section	Mr. David Ward, Lead, and Mr. Rob Mead, State Law Librarian	**SUP**
➢ **Request for Feedback via Email** › Consequences of Violence Section	Judge Jackie Shea-Brown	**66**
11:15 AM – 11:45 AM **E2SHB 1517 DV Workgroups**		**98**
➢ **Discussion: Mandatory Arrest** › Work Group Task:	Judge Eric Lucas, Judge Marilyn Paja, Ms. Laura Jones	**100**

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Research, review, and make recommendations on whether laws mandating arrest in cases of domestic violence should be amended and whether alternative arrest statutes should incorporate domestic violence risk assessment in domestic violence response to improve the response to domestic violence, and what training for law enforcement would be needed to implement an alternative to mandatory arrest. E2SHB 1517 Sec. 803 (4)(a)(1)	
11:45 AM – 12:00 PM **NEXT STEPS AND ADJOURMENT**	
➢ **Next Steps for Commission – COVID-19**	Justice Sheryl Gordon McCloud, Judge Marilyn Paja
➢ **Adjournment**	
APPENDIX	
➢ 2020 Gender & Justice Meeting Dates	**105**

NEXT MEETING – September 25th – Location TBD

WASHINGTON COURTS	**Gender and Justice Commission** **Friday, January 31, 2020** **8:45 AM – 12 PM** **AOC SeaTac Office** **18000 International Blvd., Suite 1106, SeaTac, WA** **Teleconference: 1-877-820-7831** **Passcode: 904811#**	

MEETING NOTES

Members & Liaisons Present

Justice Sheryl Gordon McCloud (Chair)
Judge Marilyn Paja (Vice Chair)
Ms. Josie Delvin
Ms. Laura Edmonston
Judge Rebecca Glasgow
Justice Steven González (phone)
Ms. Gail Hammer (phone)
Ms. Lillian Hawkins
Ms. Elizabeth Hendren
Judge Eric Lucas (phone)
Ms. Eleanor Lyon
Ms. Heather McKimmie
Ms. Erin Moody
Judge Rich Melnick
Ms. Riddhi Mukhopadhyay
Mr. Sal Mungia
Ms. Renée Pilch
Dr. Dana Raigrodski
Ms. Sonia Rodriguez-True
Judge Jackie Shea-Brown
Judge Cindy K. Smith
Ms. Vicky Vreeland

Staff

Ms. Kelley Amburgey-Richardson
Ms. Michelle Bellmer (phone)
Ms. Moriah Freed
Ms. Sierra Rotakhina (phone)

Members & Liaisons Absent

Judge Anita Crawford-Willis
Ms. Grace Huang
Ms. Elaine Kissel
Ms. Michelle Gonzalez
Ms. Jennifer Ritchie
Ms. Stephanie Verdoia

WELCOME AND ANNOUNCEMENTS

Welcome and Call to Order

The meeting was called to order at 8:54 AM

- Justice Gordon McCloud and members introduced themselves.
- The Commission welcomed several attendees to their first meeting:

- Renée Pilch, Gonzaga University School of Law – Ms. Pilch is one of the Co-Presidents of Gonzaga's Women's Law Caucus and was instrumental in planning the successful Judicial Officer & Law Student Reception last year.
- Eleanor Lyon, University of Washington School of Law – Ms. Lyon and Stephanie Verdoia share liaison duties on behalf of the UW Women's Law Caucus.
- Lillian Hawkins, DMCMA representative, King County District Court - Shoreline. Ms. Hawkins is taking over for Annalisa Mai, who is no longer a DMCMA member.

November 1, 2019 Meeting Minutes
The meeting minutes were approved as presented.

COMMITTEE AND PROJECT UPDATES

Immigration Enforcement at Courthouses Ad Hoc Committee – Judge Shea-Brown, Judge Paja, & Ms. Riddhi Mukhopadhyay

Proposed Rule Change – GR 38

- Judge Paja provided background information about the development of GR 38. The work of the ad hoc committee has been a combined effort by the Gender & Justice Commission, Minority & Justice Commission, Interpreter Commission, and the Access to Justice Board.
- The Gender & Justice Commission submitted a letter comment to the Supreme Court in support of proposed GR 38. The letter may be found in the packet on page 10.
    - Advocacy organizations that proposed the rule are recommending amendments to the text of the rule as published for comment. They will include these recommendations in their letters of support, which have not yet been submitted.
    - The ad hoc committee discussed these potential amendments, but they were not included in the GJC letter of support.
- Rebuttal is anticipated. Advocates of the proposed rule plan to monitor comments and respond to concerns in their own comments on the rule.
- You may view all comments filed on the WA Courts website.
- The comment period for GR 38 has been extended by 30 days and will now close on March 3.

MOTION: Justice Gordon McCloud moved to ratify the position expressed in the GR 38 letter/comment. Unanimously passed.

ACTION: Given the extended comment period, the ad hoc committee will monitor and consider submitting an additional comment. If Commission members have input to share, please email committee members or staff.

Proposed Legislation – HB 2567

- HB 2567 (Concerning open courts) addresses similar issues. Some judicial branch groups support the bill, while others oppose.
    - The Board for Judicial Administration (BJA) originally took an "oppose" stance on the bill due to separation of powers issues. The chairs of the Commissions (GJC, MC, IC) requested they reconsider this position. The BJA then took a position of "support with concerns." Having previously expressed those specific concerns to legislators, the BJA will sign in as "other" at the legislature (support, oppose, or other are the only options).
    - The Superior Court Judges Association (SCJA) is still leaning toward "oppose."
    - The Interpreter Commission and Minority & Justice Commission are also discussing whether to take a position on this legislation.
- Commission members engaged in discussion over HB 2567.
    - Some members expressed concern about separation of powers. Others expressed that the legislation deals with these issues adequately.
    - Discussed a potential "support with concerns" position. Members expressed that a strong showing of "support" without reservation is critical on a bill impacting access to justice and safety. It is crucial to show our vulnerable communities support given the current culture.
    - It is important to speak as a unified judicial branch voice, unless that voice is on the wrong side of justice.

MOTION: Justice Gordon McCloud moved to vote on position of "support with concerns" for HB 2567.

MOTION: Justice González moved to table the vote on "support with concerns." Motion passed 13 yes, 6 no.

MOTION: Justice González moved to vote on position of "support" for HB 2567. Motion passed 13 yes, 4 no, 2 abstained.

ACTION: Immigration ad hoc committee will continue to monitor this legislation along with GR 38.

MJC – GJC Symposium – Justice Gordon McCloud

June 3, 2020 Symposium

- MJC selected the following topic: The Increase in Incarceration Rates of Women and Girls of Color
    - GJC proposed several topics, and the others should be incorporated into future education sessions.
    - MJC indicated they are likely to explore the community impact of incarceration, policing, and intersectionality so that it touches on trans women as well.
- Members noted the importance of not overlooking local jail populations. The Prison Policy Initiative report includes jail statistics.

- Planning committee members are still needed. Ms. Elizabeth Hendren and Judge Maureen McKee agreed to join the committee. Ms. Laura Edmonston agreed to assist with research.

<u>Tribal State Court Consortium</u> – Chief Judge Cindy K. Smith

Workgroup Updates

- Branding & Messaging
    - This group has reviewed the 2020 Communication Plan, Annual Report and the new National Tribal State Court Forum Directory listing. Other 2020 projects to increase awareness and support for the TSCC include updating website resources, rolling out a factsheet and webinar about rule 82.5 changes, and supporting the messaging for the DV PO Enforcement project.
    - Next up, look for the February TSCC Update, an email to include updates as well as a Tribal Court Spotlight. To improve relationships and foster respect, the group hopes to feature a new Tribal Court in each update.
- Spring Regional Meeting Planning
    - Save the Date: Friday, May 15, 2020 at the Temple of Justice and Nisqually Tribal Court.
    - New Justice Raquel Montoya-Lewis will be invited to attend.
    - This group is exploring a Tribal/State Court Relationship Questionnaire ahead of the meeting and sharing results of the survey at the meeting.
- DV PO Enforcement
    - This workgroup will start on Thursday, February 6, 2020. The first project will be to oversee a protection order process survey. Additionally this group will work on distributing the 2018 AGO Opinion on full faith and credit for tribal protection orders.
- ICWA Bench Card
    - Cindy Bricker is hiring a short term contractor to cover this project in 2020. Interested parties will be notified soon.
- Joint Jurisdiction Pilot
    - This project needs Tulalip Tribe's Council approval to move forward.

Future Training

- Ms. Cynthia Jones is beginning to coordinate funding efforts with the TSCC for programs. Judge Pennell, Court of Appeals, Div. III, is interested in having some of the training in Eastern WA.

<u>Superior Court Judges' Association's Self-represented Litigant Ad-Hoc Workgroup</u> – Professor Gail Hammer

Overview

- The first workgroup meeting will be on Monday 2/3. Topics of discussion include current resources available, and the development of online resources and bench guides to assist self-represented litigants and court staff.
- The workgroup is chaired by Judge Jennifer Ford, and includes a mix of justice system stakeholders.
- Judge Paja suggested that the group should include court clerks from Superior and CLJ courts, if it does not already.
- Justice Gordon McCloud wondered if there are any technology experts on the work group. Professor Hammer will look into this.

<u>Education Committee</u> – Judge Rich Melnick, Judge Rebecca Glasgow & Committee

Judicial College

- Judicial College took place this week. The Gender & Justice Commission's session was on Wednesday.
- Ms. Amburgey-Richardson was present to assist presenters and observe the session.
- Judge Anne Hirsch will be retiring. The Education Committee is seeking a judicial officer to take her place.

New Session Proposals Submitted - Annual Fall Judicial Conference

- Law, Justice, and the Holocaust: How the Courts Failed Germany
- Sex Harassment in the Courthouse: How to Be Part of the Solution, Instead of the Problem
- Law, Language, and Power: An Exploration of Discrimination and Tribal Jurisdiction in the Pacific Northwest

Planning in Progress

- Appellate Program
    - Myths and Misperceptions about Native Americans: What Every Judge Should Know (with MJC)
- SCJA Spring Program
    - Tribal Court Jurisdiction
    - New SCJA liaison – Commissioner Indu Thomas has agreed to be a liaison to the SCJA Education Committee. She is one of the committee's Co-Chairs.
- DMCJA Spring Program
    - Implementing Changes in Weapons Surrender Laws in Your Jurisdiction
    - Poverty Simulation (with MJC)

<u>ACTION</u>: Email Ms. Amburgey-Richardson and/or the Education Committee Chairs if you or someone you know is interested in replacing Judge Hirsch as Judicial College faculty.

<u>GR 34 Update</u> – Judge Rich Melnick

Name Change Petitions and Fee Waivers

- Judge Melnick confirmed that Clark County is allowing a GR 34 fee waiver for name change petitions. There is still a question of whether someone may obtain a fee waiver when they file a petition for name change via mail.
- The facilitator fee is not waived unless Judge makes it mandatory in court order.
- Clark County Auditor does not charge a fee to record the name change.

<u>Communications Committee</u> – Judge Marilyn Paja & Committee

3rd Annual Women's History Month CLE

- Registration is now open for the March 3rd event, co-sponsored by the Gender & Justice Commission.
- Some spots are reserved for pre-law students UW Tacoma to attend.

<u>ACTION</u>: Email Ms. Amburgey-Richardson if you would like support from the Gender and Justice Commission to attend.

2017-2019 Commission Report

- Judge Paja is working with staff on the report. The first draft of content is now complete.
- There will be two versions of the report – one will be colorful, shorter, and include links to the website for more detail. The second will be online and more detailed.

<u>Incarceration, Gender & Justice Committee</u> – Ms. Elizabeth Hendren & Committee

Update on Mission Creek Legal Resource Computer

- Judge Paja provided background and an overview of current issues.
- Judge Paja and Judge Michael Evans visited Mission Creek for the Success Inside & Out Conference and attempted to use the computer. It froze upon use, and is in an area labeled "out of bounds."
- Ms. Hendren plans to work with the IGJ Committee at today's meeting to draft a letter to Mission Creek about the issues. Once the letter is complete, it will be submitted to the Commission Chairs for approval.

New Women's Prison – Maple Lane

- DOC has confirmed plans to convert Maple Lane into a third women's prison.
- The first zoning hearings were held earlier this month. DOC is petitioning Thurston County for a special use permit, and are calling for proposals for a facility to house up to 700 women.

Black Prisoners' Caucus Legislative Summit

- The Black Prisoners' Caucus had its first legislative summit at Purdy. This is the first time women have been able to participate, because previous legislative summits have been held at men's facilities.

- Specific legislative recommendations were proposed, and discussion topics included the rise in mass incarceration, overcrowding, gender specific oppression, and families. Senator Jeannie Darneille was present.

<u>Liaison & Representative Reports</u>

Access to Justice Board – Mr. Sal Mungia

- Immigration Issues – The ATJ Board has taken a position of support on GR 38 and proposed amendments to Rule of Professional Conduct 4.4.
- Delivery Systems Committee – Research is being completed on what civil legal aid resources are available for immigrants.
- The ATJ Board previously distributed surveys about priorities. Please fill those out if you have not.
- The Goldmark Luncheon will be held on February 14th in downtown Seattle. Mr. Mungia encouraged people to register and attend.

Law Library – Ms. Laura Edmonston

- Mr. Rob Mead and Ms. Laura Edmonston have been working on research for the Gender Justice Study.
- The January news roundup is complete. Topics include implicit bias, incarcerated women and pregnancy, domestic violence, missing and murdered indigenous women, and campus sexual assault.

<u>Domestic & Sexual Violence Committee</u> – Judge Jackie Shea-Brown, Ms. Erin Moody, & Committee

Update on Committee Projects

- The Committee's ex parte weapons surrender bench card was included in the Judicial College session materials.
- Work continues on several weapons surrender projects, including a survey.

<u>E2SHB 1517 DV Workgroups</u> – Judge Marilyn Paja & Judge Eric Lucas

Report on Recent Meeting and Progress

- Staff coordinator, Laura Jones, provided a written report on page 26 of the packet.
- The work groups will be presenting at a working session of the House Public Safety Committee on February 13th.

<u>Gender & Justice Study Task Force</u> – Justice Sheryl Gordon McCloud, Dr. Dana Raigrodski, & Ms. Sierra Rotakhina

- Staff project manager, Sierra Rotakhina, provided a written report on page 27 of the packet.

ACTION: Send any materials that may be helpful to the study to Dr. Dana Raigrodski, Co-Chair.

Legislative Session – All

- The BJA will discussing the Clean State Act on its Monday call. The IGJ Committee should discuss at its meeting and provide any input. If others have thoughts, email them to Ms. Amburgey-Richardson.
- Ms. Amburgey-Richardson circulated and will be maintaining a bill tracking list for bills of interest to the Gender & Justice Commission.
- Members identified HB 2602, concerning hair discrimination, as a new bill to add.

ACTION: Send Ms. Amburgey-Richardson any bills of interest to include in the report.

CHAIR AND STAFF REPORTS

Chair Report – Justice Sheryl Gordon McCloud

Announcements

- Anti-Harassment Model Policy – GJC will be presenting to the BJA on 2/21
- Commission Order of Renewal – the Court voted to approve an order renewing the Commission for five years at a recent en banc meeting.
- Meeting Location – Is the SeaTac meeting location still working for the Commission? Is it practical to meet in a different location and/or to do outreach at that location?
    - Commissions staff are working on getting Zoom up and running to make future meetings more accessible for remote participants.

Message on Inclusivity & Substantive Discussion

- Justice Gordon McCloud thanked the Commission for engaging in an honest, substantive discussion of HB 2567, and encouraged members to continue sharing their opinions. One goal of the Commission meetings is open, substantive discussion.

Vice Chair Report – Judge Paja

- Judge Paja attended the Women's Commission and LGBTQ Commission Outreach Event on January 30th at the Temple of Justice. She has reached out to the LGBTQ Commission about future collaboration.

Staff Report – Ms. Amburgey-Richardson

- The next Commission meeting is on March 27, 2020.

The meeting was adjourned at approximately 11:50 AM

Proposed Amendment to Gender and Justice Bylaws – Justice Sheryl Gordon McCloud, Chair

Article 4.4

You may access the full bylaws on the Gender and Justice Commission website.

- Current Article 4.4: The Commission Chair shall appoint one of the remaining commissioners as vice-chair, who shall serve as the pleasure of the Commission Chair.

- Proposed Article 4.4: The Commission Chair shall appoint one of the remaining commissioners as Co-Chair, who shall serve as the pleasure of the Commission Chair.

- Purpose of proposed amendment, per Justice Gordon McCloud: I propose the Amendment so that the Commission's leadership structure more accurately reflects the actual leadership role that Judge Marilyn Paja has been exercising. She not only leads the Communications Committee and participates in the IGJ Committee, she also plays a leading role in our Commission's leadership of the DV Work Groups that the legislature asked us to chair; took a leading role in our advocacy in favor of the Open Courts bill (and led us to victory); always takes a leading role in the law school events we plan; keeps up our important ties with NAWJ; and consistently brings new and innovative ideas and programs in front of the Commission. I trust her with full leadership duties for the Commission, and I want to recognize the contributions that she has made and will continue to make.

- Technical Correction: The office of vice-chair is referenced in Article 3.3 regarding membership. Should the proposed amendment pass, that reference would be updated to Co-Chair.

May 12, 2020 12-2 PST – Zoom Listening Session - Summary
ABA Women in Criminal Justice Task Force
From: Marilyn Paja

Justice Gordon McCloud suggested that I might be interested in attending this listening session of the ABA Women in Criminal Justice Task Force. It was fascinating. About 25 lawyers, judges, law students, law professors attended the meeting plus many of the members of the Task Force.

I've requested contact information for the co-chairs, and a list of the participants (particularly two who identified from Washington state) and will share that when it becomes available.

This event was held after eleven pre COVID-19 sessions were held in-person across the country. One of the listening sessions was in Spokane last year. Three more are planned with a respective focus for experienced attorneys, military lawyers and those from a religious minority.

The Task Force is Co-Chaired by Gloria Ochoa-Bruck and Rachel Pickering and has 15 named members.

The mission of this Committee explores issues of concern to women attorneys (defense, prosecution, etc.), judges, other allied to the criminal justice field, and the needs of women as victims, witnesses and defendants. It also promotes networking and career opportunities for women.

The Task Force publishes a quarterly newsletter for members and has prepared a law review article scheduled for publication in the Berkley Law Review this fall.

There are several subcommittees including a **data analysis committee**.

According to the ABA website, initial Task Force Goals include:

1. Explore the expanding role of women in criminal justice.

2. A renewed perspective of women in the criminal justice field and the intersection with other legal areas such a civil rights and immigration.

3. Submit an article on A Fresh Look at The Expanding Role of Women in Criminal Justice.

4. Organize and present a panel at the Spring Conference regarding this topic.

After introductions, the call participants were asked to speak about the challenges and opportunities discovered as a result of COVID-19.

Information was shared about the isolation that prosecutors and public defenders feel throughout the country, with a belief that women practitioners are even more isolated. With COVID-19 isolation and work from home, the blurred lines between work and home have been expanded making home less of a refuge. Women have more family responsibility including to extended family and children needed home-schooling. The tolerance of courts and employers for brief interruptions due to these responsibilities varies widely. At the same time, practitioners see benefits in the future to occasional work from home – something that previously seemed impossible in the criminal justice arena.

As a result of the listening sessions, several communities of lawyers (San Francisco area speakers) have bonded over Zoom in a way that was not as easy when they were all in court all the time. They are meeting to establish a common set of goals to present to their employers about the workplace culture, as well as opportunities for advancement. No details were shared on this call.

Several participants from tribal lands in New Mexico and Arizona spoke about the compounding effects of rural isolation, high numbers of COVID-19 cases and deaths, lack of any or non-reliable internet service, lack of the hardware necessary to access lawyers, services and the courts. These lawyers particularly sounded exhausted.

The NY public defenders spoke about their professional worry about the postponement of even preliminary hearings in NY (recently prelims have been started but slowly), such that many felony defendants have not had bail hearings for several weeks while being held in custody. There are clearly big differences in orders from Governors across the country in this regard. Participants from some other states expressed concern about a lack of leadership from local government officials – some minimizing the COVID-19 concerns particularly as it related to jail conditions.

Equally clearly, and not unexpectedly, some states and jurisdictions are considering release of jailed offenders and others are not at all. The pressure on prosecutors to balance risk factors for just release and the impact of COVID-19 is high. Several persons commented that although initial releases occurred, some jurisdiction jails are going back up again.

One participant from Washington state spoke about the wear and tear of constant tweaking of the court processes – almost daily, and from multiple sources (Governor, Chief Justice, local and multiple courts) – as well meaning, but causing lots of stress to the practitioners. Constant, nearly daily, change is not helpful. She was also concerned about local proposals to conduct jury trials as early as July considering continued COVID-19 fears. (I shared the recent Pierce County discussion of some of the issues: Jury duty somewhere other than the courthouse? Pierce County is considering it during pandemic)

Several law professors spoke about a new asynchronous approach to learning (webinars and in person) that they expect will continue into the post-pandemic future. The loss of summer jobs and clinical experiences (some are required for law school graduation). The good news is that there are law schools that are seeing a big decrease in applicants – so there are opportunities.

Clearly the internet/Zoom are part of the future and may most benefit some of the rural and otherwise isolated communities – eventually. Zoom might enable more preventative measures by those in the justice field, more community outreach. But the lack of access to the internet and necessary equipment is far behind in these same locales.

There are opportunities to consider less restrictive alternatives to jail and particularly pretrial detention. Public security balanced with appropriate detention standards is needed.

There is an opportunity for a *new type of feminism* (one could almost hear the nods of support when this was mentioned by several of the law professors as something their students are actively discussing) to consider women's caretaking responsibility, bonding opportunities with other women, and how to maintain home as a 'safe' and 'distanced' mental space from the inevitable pressures of criminal justice work when one is working from home.

The Task Force leadership actively seeks new members of the ABA, and of the Women in Criminal Justice Task Force. More information about the Task Force and its work is on the ABA website:

https://www.americanbar.org/groups/criminal_justice/committees/equal_justice/

Considerably more information is available to ABA members including the quarterly newsletter and announcements.

Gender Justice Study Task Force Update

March 2020

Since the March written update to the Commission, the Gender Justice Study Task Force has continued to advance the writing on the 27 priority areas and taken strides in completing the four pilot projects. More specific updates on the pilot projects are included below. The Commission recently received a six-month time extension on the Study grant in order to allow time to collect sufficient data for the pilot projects. The new deadline for the final report is June 2021. Since our last update we have:

1. Contracted with Katrina Goering (MPH), Claire Mocha (MPHc), and Julie Tergliafera (MPHc) to support the social science analysis;
2. Contracted with Dr. Tatiana Masters to complete the data analysis for the mass incarceration of women in Washington State pilot project;
3. Partnered with graduate students in Seattle University's Criminal Justice Department to complete some of the remaining social science research; and
4. Identified evaluation experts to conduct the DV-MRT evaluation.

Pilot Projects:

Evaluation of Domestic Violence Moral Reconation Therapy (DV-MRT)
We have identified the evaluators we will be working with and are in the process of writing the scope of work for the contract. The draft scope of work involves collection of qualitative data through focus groups with current program participants. The draft plan also includes analysis of existing Court Contact and Recidivism Database data to evaluate impacts of the program on recidivism and to identify a comparison group. Once the scope of work and contract is finalized the evaluation will run through May of 2021.

Evaluation of courthouse childcare centers in Washington State
Since the last written Study update, the graduate students from the University of Washington School of Public Health Community Oriented Public Health Practice (COPHP) program who completed the evaluation presented their findings to the Gender Justice Study Advisory Committee. We received feedback from the Advisory Committee on potential future work related to: 1) measuring the impacts of courthouse childcare programs; 2) gathering information on the childcare needs of those who are not currently accessing the courts; and 3) identifying mechanisms to ensure individuals who need to access the courts are aware of this resource before they enter the courthouse.

Study of existing data to better understand mass incarceration of women in Washington State
Elizabeth Hendren is leading this work in partnership with the University of Washington. The team, with technical assistance from Dr. Carl McCurley, Washington State Center for Court

Research, has developed the research questions, scope of work, and timeline. We have contracted with Dr. Tatiana Masters who will be completing the analysis of existing data. The preliminary report will be delivered in July of 2020.

Washington State courts workplace harassment survey

Dr. Arina Gertseva with the Washington State Center for Court Research is leading the development and administration of this survey. Dr. Gertseva has developed a draft survey tool and we have drafted a list of experts to review the draft survey tool. Dr. Gertseva is developing a matrix to establish how we can effectively get the electronic survey out to the target populations (e.g. which listservs to use, etc.). We are currently discussing how COVID-19 impacts the timeline for sending out the survey. It will be important to send out the survey during a time that we are most likely to get a strong response rate and to collect data reflective of the experiences of employees when people are interacting with the courts in more regular patterns.

We appreciate this opportunity to share our draft sections on mass incarceration and gender with you. Please keep in mind that this is a work in progress. We have provided bracketed, highlighted notes at times to give you a sense of areas in which we are actively working. Although it is not noted in the text and we have not figured out precisely where/how, we anticipate adding information and/or reflection on the impact of Covid-19 on these topics. Also, bear with us as we have not yet had time to focus on consistent formatting and final proofreading. Finally, we are also awaiting a larger discussion on the broader report about some language-choice issues, such as the use of female v. women, the use of girls v. youth, etc. While we're interested in any input you have on such language issues, this meeting is not the best format to express those thoughts. Instead, please direct any such comments to Sierra Rotakhina via email (CNTR-Sierra.Rotakhina@courts.wa.gov) so we can include those when we have this larger discussion.

Thank you for taking the time to review our work and provide us with feedback! There are a few areas that we are particularly interested in:

- How is the balance of content overall? Are there areas you think we are missing? Are there topics you would like to see expanded or reduced?
- Are there any changes in tone you think we should consider?
- Where we indicate (with highlighting) questions/research we are still looking into, please let us know if you have any resources you can point us to or persons we can speak with that cover these areas.

I would like to also recognize the hard work of the following people as part of this team: Judge Joseph Campagna, Judge Maureen McKee, Sierra Rotakhina, Justice Sheryl Gordon McCloud, Dana Raigrodski, Katarina Goering. And special thanks to those who conducted the preliminary social science and legal research that formed the early foundation for these sections: Mary Miller, Sam Tjaden, Brenda Coufal (under the supervision of Judge Rebecca Glasgow), Shelby Peasley (under the supervision of Justice Gordon McCloud).

Sincerely,

Marla Zink
Lead Attorney
Sections 2.5, 2.6 & 2.7

[In an introduction to this section or to the full report, we anticipate a discussion of the problem of data being collected and presented as binary, i.e. distinguishing based on gender, and noting there is more data available at the federal than state or local level]

Chapter 2.5: Washington State's Increase in Female Criminalization and Incarceration.

Generally, research shows an increase in female criminalization and incarceration in Washington State as compared to males in the 2010s. This chapter examines the data, the policies and the laws that have been shown to be driving the data, and the effect of this trend on women and subpopulations of women.

2.5.1 In the 2010s, Washington's female criminalization and incarceration rates have increased as compared to males.

Generally, research shows an increase in female criminalization and incarceration in Washington State as compared to males in the 2010s. This section examines available data that shows recent trends. Both nationwide and Washington State data are analyzed. Moreover, within each category, various subgroups are addressed: state and federal jurisdictions, local city and county jails, and American Indian and Alaskan Native populations. The next section analyses the social and legal environments behind the data. Although females are still incarcerated at a lower rate than males, the rate of female incarceration has continued to increase in recent years, even as the rate of male incarceration has decreased or plateaued. The reasons for the disparity are somewhat unclear. However, recent studies suggest that an increase in pretrial detention, an increase in incarceration for probation violations, an increase in mandatory sentences for drug offenses, and the impact of trauma on involvement in the justice system have all contributed to female incarceration rates.

Washington confinement facilities

Research regarding incarceration rates in Washington includes information on inmates in different confinement facilities. Confinement facilities in Washington include jails and prisons which are distinct from one another with regard to the individual's length of stay, the nature of their conviction, and the available services and treatment for inmates.[1] Moreover, jails and prisons are managed by different governmental entities.[1] Washington prison facilities are managed federally by the State Department of Corrections whereas jails in Washington are operated by municipalities, county and tribal governments.[1] Increasing numbers of people, and disproportionate numbers of women compared to men, are held in jail correctional facilities compared to prisons. Research suggests that this increase in the jail population negatively affects women and their families (see content following Community Supervision: Parole).[2] See below for a map of jail and prisons dispersed across the state of Washington.

Jails[1]: Jail facilities are intended to hold individuals for less a year on a temporary or short-term basis.[1,4,5] Jail populations include adults[2], pretrial inmates who are unable to pay bail/were not granted bail or are waiting a trial date, convicted inmates waiting for sentencing,

[1] "Facilities include jails, detention centers, city and county correctional centers, special jail facilities (such as medical or treatment centers and pre-release centers) and temporary holding or lockup facilities that are part of the jail's combined function."[3]

[2] "…may hold juveniles before of after they are adjudicated."[3]

and inmates serving misdemeanor sentences of less than a year.[1,5] Individuals incarcerated in jails may also be held temporarily as they wait to be transferred to a prison.[1]

Prisons[3]: Prisons are long-term facilities intended for inmates with sentences that are longer than one year.[4] They are operated by the state or federal government.[4]

Exhibit 1: Location of State Prisons, County Jails and Juvenile Detention, and Tribal and City Jails with 100 or More Beds

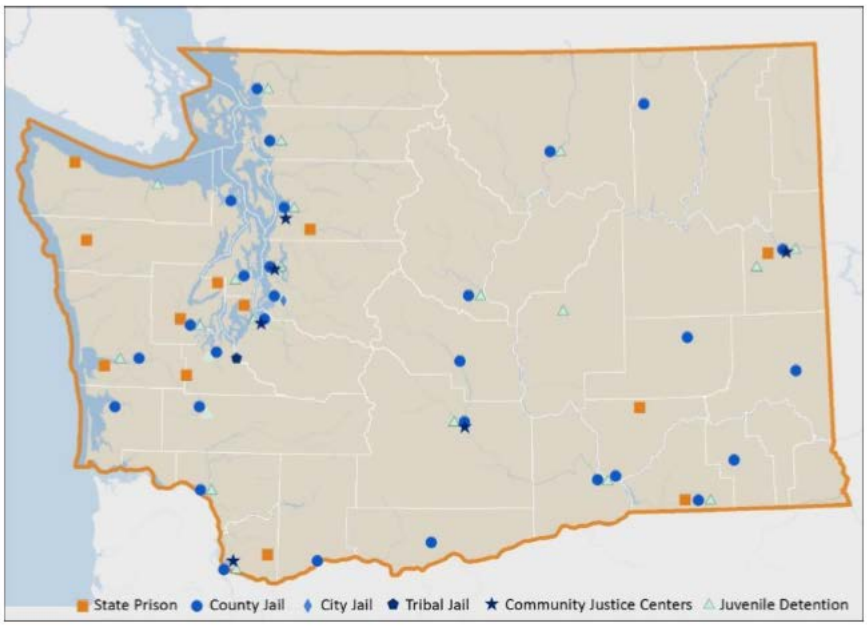

Figure X shows how correctional facilities are dispersed throughout Washington. The figure shows more facilities in Eastern regions of the state compared to the Western, and more urban, regions of the state (*Analysis of Statewide Adult Correctional Needs and Costs*, 2014). Recent national research on incarceration conducted by the Vera Institute of Justice, reveals a geographical shift in the incarceration population in Washington from urban facilities to rural facilities "despite rural counties' substantially lower crime rates in comparison to urban areas" (Kang-Brown & Subramanian, 2017; Swavola et al., 2016). Moreover, increasing rates of incarcerated women in the last decade has been the primary contributor to these increasing rural incarceration rates "…with the number of women in small county jails increasing 31-fold from 1970 to 2014."(Swavola et al., 2016).

Community Supervision

The community supervision population includes individuals on probation and parole.[6]

Probation: Individuals are often given probation as an alternative to being incarcerated and have a "court-ordered period of supervision in the community while under the control,

[3] Prison facilities include: "public or private prisons, penitentiaries, correctional facilities, halfway houses, boot camps, farms training or treatment centers and hospitals."[3]

supervision, or care of a correctional agency."[3,7] Probation may or may not require reporting to a correctional agency.[3]

Parole: Individuals are released on parole often either by a parole board "...or according to provisions of a statute..."[7] Individuals on parole are released early and serve the remaining part of their sentence in the community following a prison term and are still under the supervision of a correctional agency.[3,6,7]

A report published in 2019 by the Prison Policy Initiative shows that sixty percent of incarcerated women in jail facilities "have not been convicted of a crime and are awaiting trial."[2] Women are often detained for long periods of time as they await their trail because of the financial strain of bail and other fines required by the correctional system.[2] Kajstura's report published by the Prison Policy Initiative highlights that other barriers exist for inmates incarcerated in jail facilities as well including more expensive phone calls and sometimes more restricted mail entry requirements.[2] These constraints make it difficult to maintain contact with family members.[2]

Services for inmates include but are not limited to: behavioral, faith-based, vocational and educational, medical and mental health services.[1] Jail facilities have more limitations given their shorter-term capacity and their services often depend on volunteers.[1] Incarcerated women in jail facilities reported high rates of mental health illness and trauma with "86 percent report having experienced sexual violence in their lifetime…and one in five has experienced SMI, PTSD, and substance use disorder in her lifetime…"[8] These complex medical conditions call for critical mental health treatment that jail facilities have difficulty providing.[8] Moreover, research shows that medical and mental health symptoms worsen when inmates cannot access treatment and remain in jail for longer periods of time.[8]

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NATIONWIDE DATA

Combined: State Prisons, Federal Prisons and Jails Nationwide

[We are adding in a sentence or two about the levels of incarceration in the U.S. compared to the rest of the world (i.e. extraordinarily high)]

Female incarceration in state prisons, federal prisons, and jails nationwide has increased more than seven-hundred and fifty percent between the years 1980 and 2017. Rising from a total of 26,378 women incarcerated in 1980 to 225,060 in 2017 (The Sentencing Project, 2019). Below, more detailed data is set forth by sub-jurisdiction.

State and Federal Prisons Nationwide

Summary

While women make up a smaller proportion of those involved in the criminal justice system than men, increases in female incarceration rates and arrest rates began exceeding those of men in 1981. For example, between 1994 and 2004 arrest rates for males declined 6.7% while arrest rates for females increased 12.3% (Moe & Ferraro, 2006). Nationwide data shows a steady increase between 1990 and 2008 in the number of people incarcerated in state and federal prisons. This trend exists for incarcerated males, females, and the combined prison population. Beginning in 2009 we began to see an overall downward trend in male state and federal prison populations, female populations, and the combined male and female population. However, while the male prison population continued to decline through 2017, the female prison population started to increase again in 2013 and then largely plateaued (Bronson & Carson, 2019; Covington & Bloom, 2003; West & Sabol, 2008). Lastly, national level research widely highlights racial disparities for individuals and communities of color involved in the justice system. These disparities are reflected in higher incarceration rates for communities of color than white populations (see section 2.5.3 for more on the intersection of incarceration rates, gender and race).

Data

The national trend in the United States finds that the number of females in both state and federal prisons increased nearly eight times between 1980 and 2001 (Covington & Bloom, 2003; Bureau of Justice Statistics, 2001; National Institute of Justice, 1998). Between 2000 and 2007 this number increased 22.7% (from 93,234 to 114,420). The male prison population also increased (14.3%) between 2000 and 2007, though not as drastically as did the female prison population. Washington State saw a higher percent increase than the national averages for both males and

females (see number below under “Washington State Specific data”) (West & Sabol, 2008). Between 2007 and 2017 the number of females serving a prison sentence of more than one year (regardless of facility where held) decreased from 114,311 to 111,360 nationwide (a 2.6% decrease). The male combined state and federal prison population nationwide declined 7.1% in this same time period. Twenty-five states and the Federal Bureau of Prisons showed decreases in their female prison populations from year-end 2016 to year-end 2017, with the largest decreases occurring in Texas and Illinois. While the nationwide aggregated data shows a decline in the number of female prisoners, the number actually increased from 2016 to 2017 in 25 states, including Washington State (see Washington State data below under “Washington State Specific data”)(Bronson & Carson, 2019). See Table 1. These data suggest that the root causes of increasing female incarceration rates still needs to be addressed.

Table 1. Population in State and Federal Prisons Nationwide[a,b,c]

	Female Population	Male Population	Total Population
1990	44,065	729,840	773,905
1997	79,268	1,162,885	1,242,153
1999	90,530	1,273,171	1,363,701
2000	93,234	1,298,027	1,391,261
2006	112,459	1,457,486	1,569,945
2007	114,311	1,482,524	1,596,835
2008	114,612	1,493,670	1,608,282
2009	113,485	1,502,002	1,615,487
2010	112,867	1,500,936	1,613,803
2011	111,407	1,487,561	1,598,968
2012	108,772	1,461,625	1,570,397
2013	111,358	1,465,592	1,576,950
2014	113,028	1,449,291	1,562,319
2015	111,491	1,415,112	1,526,603
2016	111,833	1,396,296	1,508,129
2017	111,360	1,378,003	1,489,363
% change 1990-2000	111.6%	77.9%	79.8%
% change 2000-2010	21.1%	15.6%	16.0%
% change 2010-2017	-2.6%	-7.1%	-6.7%

[We are working on getting the original data to be able to tabulate consistently across years and, hopefully, to be able to look at the intersection of race/ethnicity and gender]

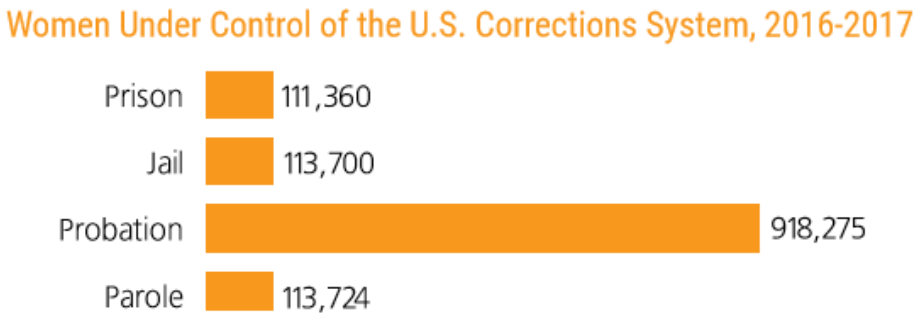
[a] Cells shaded orange indicate an increase in the population compared to the previous year listed.
[b] Cells shaded green indicate a decrease in the population compared to the previous year listed.
[c] The data in this table are pulled from multiple published reports rather than from analysis of one dataset. The data collection and analysis methods between years may not be comparable and these tables should be interpreted with caution.

Source: This table is adapted from information available from:
Beck, A., & Harrison, P. (2001). Prisoners in 2000. Bureau of Justice Statistics Bulletin, NCJ 188207. https://www.bjs.gov/content/pub/pdf/p00.pdf
Beck, A., & Mumola, C. (1999). Prisoners in 1998. Bureau of Justice Statistics Bulletin, NCJ 175687. https://www.bjs.gov/content/pub/pdf/p98.pdf
Bronson, J., & Carson, A. (2019). Prisoners in 2017. U.S. Department of Justice; Office of Justice Programs; Bureau of Justice Statistics, NCJ 252156. https://www.bjs.gov/content/pub/pdf/p17.pdf
West, H., & Sabol, W. (2008). Prisoners in 2007. U.S. Department of Justice; Office of Justice Programs; Bureau of Justice Statistics, NCJ 224280. https://www.bjs.gov/content/pub/pdf/p07.pdf

City and County Jails Nationwide

Summary

In 2017, the largest population of incarcerated women was being held in city and county jails across the United States with numbers reaching 113,700 (The Sentencing Project, 2019). Furthermore, the vast majority of the female population interacting with the criminal justice system is doing so through probation (see Figure 1 below). Between the years 2016-2017, 918,275 women were on probation in the United States (Bronson & Carson, 2019; Zeng, 2019; Kaeble, 2018).



Source: Bronson, J., and Carson E.A. (2019). *Prisoners in 2017*. Washington, DC: Bureau of Justice Statistics; Zeng, Z. (2019). *Jail Inmates in 2017*. Washington, DC: Bureau of Justice Statistics; Kaeble, D. (2018). *Probation and Parole in the United States, 2016*. Washington, DC: Bureau of Justice Statistics.

Figure 1 above demonstrates that only a small portion (19%) of the female population involved in the correctional system are actually in correctional facilities. The remaining 81% of the population are either on probation or parole with the majority on probation. Many barriers exist for women who are on probation that create significant hardship. A report by the Prison Policy Initiative highlights that, "probation often comes with steep fees, which like bail, women are in the worst position to afford. Failing to pay these probation fees is often a violation of probation." Additional barriers include finding and affording childcare and transportation to and from required meetings with a probation officer (Kajstura, 2019). [Likely cross-reference to collateral consequences section of Report]

On average the adult female jail population grew 6.6% annually between 1990 and 2000, while the adult male inmate population grew 4% annually in that time period (Beck & Karberg, 2001).

Between 1999 and year-end 2013, the female jail inmate population increased by 48%. In this same time period the male jail inmate population increased by 17% (Minton et al., 2015).

Nationwide data shows a steady increase between 1990 and 2007 in the number of people incarcerated in jails. This trend exists for incarcerated males, females, and the combined prison population. Beginning in 2008 for females (and in 2009 for males and the combined male and female population) an overall downward trend in the number of people incarcerated in jails began. However, while the male population continued this general downward trend through 2017 (with some oscillation from year to year but with a general downward trend), the female jail population began climbing again in 2011 reaching the highest historical population in 2017. In contrast the male jail population in 2017 was lower than it had been in 2005 (Beck & Karberg, 2001; Minton, 2010; Zeng, 2019). See Table 2.

Data

Table 2. Population City and County Jails Nationwide[a,b,c]

	Female Population	Male Population	Total Population
1990[d]	37,198[e]	365,821[e]	405,320
1995	51,300[e]	448,000[e]	507,044
1999	67,487[e]	528,998[e]	605,943
2000	70,987	550,162	621,149
2005	94,571	652,958	747,529
2006	99,000	666,819	765,819
2007	100,520	679,654	780,174
2008	99,673	685,882	785,556
2009	93,729	673,891	767,620
2010	92,400	656,400	748,700
2011	93,300	642,300	735,600
2012	98,600	645,900	744,500
2013	102,400	628,900	731,200
2014	109,100	635,500	744,600
2015	103,800	623,600	727,400
2016	107,600	633,100	740,700
2017	113,700	631,500	745,200
% change 1990-2000	90.8%	50.4%	53.2%
% change 2000-2010	30.2%	19.3%	20.5%
% change 2010-2017	23.1%	-3.8%	-0.5%

[a] Cells shaded orange indicate an increase in the population compared to the previous year listed.
[b] Cells shaded green indicate a decrease in the population compared to the previous year listed.
[c] The data in this table are pulled from multiple published reports rather than from analysis of one dataset. The data collection and analysis methods between years may not be comparable and these tables should be interpreted with caution.
[d] Figures from 1990-2009 data are mid-year counts while figures from 2010-2017 are year-end counts. Year-end counts tend to be slightly lower than mid-year counts.
[e] The Female and Male populations for 1990, 1995, and 1999 are adult only. All other figures in this table are adult and juvenile numbers combined.

Source: This table is adapted from information available from:
Beck, A., & Karberg, J. (2001). Prison and Jail Inmates at Midyear 2000. Us. Department of Justice; Bureau of Justice Statistics; Office of Justice Programs. https://www.bjs.gov/content/pub/pdf/pjim00.pdf
Minton, T. (2010). Jail Inmates at Midyear 2009—Statistical Tables. Bureau of Justice Statistics Statistical Tables, NCJ 230122. https://www.bjs.gov/content/pub/pdf/jim09st.pdf
Zeng, Z. (2019). BJS Releases Jail Inmates in 2017. Politics & Government Business, 230.

Research suggests that the increase in the jail population negatively affects women and their families.[2]

American Indian and Alaska Natives in Local Jails across the United States and in Washington

At midyear 2014, an estimated 10,400 American Indian and Alaska Native (AIAN) inmates were held in local jails across the United States, up from an estimated 5,500 at midyear 1999. At midyear 2014, AIAN inmates accounted for 1.4% of all local jail inmates across the United States. From 1999 to 2014, the number of AIAN jail inmates increased by an average of 4.3% per year, compared to an increase of 1.4% per year for all other races combined. Within this 15 year timeframe, the percentage of AIAN inmates held in local jails remained stable from 2006 to 2014. Between 1999 and 2013, the AIAN jail incarceration rate increased from 288 to 398 AIAN inmates per 100,000 AIAN U.S. residents.

At year end 2013 jails in Washington State held 620 male and female AIAN inmates, a 17% increase since 1999. In 2011 (the most recent year with detailed survey data) females accounted for 20% of adult AIAN inmates. [We are working on comparing this 17% increase to what was happening nationwide.]

The proportions of both AIAN males and females in local jails across the United States were significantly different than the distribution of male (87%) and female (13%) inmates for all other races and Hispanic origin. (Minton et al., 2017). [We are mindful that we need to add the timeframe here]

Juvenile Detention Nationwide

Of 48,043 youth in residential placement, 15% (7,293) are female. Youth of all genders are confined considerably less often than 20 years ago. In 2001, 15,104 young females were confined in residential placement settings with that number being halved by 2015. Female youth of color are much more likely to be incarcerated than white female youth. National placement rates are as follows: [we are working through formatting how to present the below data]

- All females between 12 and 17 years of age: 47 per 100,000
- White females between 12 and 17: 32 per 100,000.
- Native American females between 12 and 17: 134 per 100,000
- African American females between 12 and 17: 110 per 100,000

- Latina females between 12 and 17: 44 per 100,000

(The Sentencing Project, 2019).

Table 3: Nationwide incarceration rates by race/ethnicity per 100,000 for female youth between ages of 12-17 years	
	Rate per 100,000
All Females	47 per 100,000
White	32 per 100,000
Native American	134 per 100,000
African American	110 per 100,000
Latina	44 per 100,000
Source: (The Sentencing Project, 2019)	

Though 85% of incarcerated youth are males, female youth make up a much higher proportion of those incarcerated for the lowest level offenses such as truancy, curfew violations, and running away. While female teens still have lower arrest rates than their male counterparts, between 1980 and 2017 females did comprise a growing proportion of all teen arrests (The Sentencing Project, 2019).

Jails in Indian Country across the United States and in Washington

While males continued to account for the largest proportion of _____ in the population in Indian country jails in 2016, the proportion of female inmates increased from 20% (n=354 across the United States) of all inmates in 2000 to 27% (618 across the United States) in 2016. In midyear 2016, 381 individuals were being held in Indian Country jails in Washington State (77% male and 23% female) (Minton & Cowhig, 2017). Similarly, the proportion of female inmates in Indian country jails in Washington State increased from 11% (n=4) in 2000 to 23% (n=89) in 2016 (Minton, 2001; Minton & Cowhig, 2017). [Looking into whether we can compare Washington numbers to nationwide number]

WASHINGTON STATE SPECIFIC DATA

State and Federal Prisons in Washington State

Summary

In 2017, Bronson and Carson (2019) examined the state and federal prison incarceration rates of women in all fifty states and found that Washington falls below the average for all states incarcerating women. The average among the states is 57 per 100,000 women being incarcerated; while, Washington lands below that average at 46 per 100,000 . To provide context, Oklahoma has the highest female incarceration rates with 157 per 100,000 and Massachusetts has the lowest rate with 9 per 100,000 (Bronson & Carson, 2019). However, while the aggregated data shows a 2.6% decrease in the number of female prisoners between 2016 and 2017 nationwide, the number actually increased from 2016 to 2017 in 25

states, including Washington State, which saw a 5.1% increase. In 2017 in Washington State, 71% of admissions to state prisons were for violations of conditions of probation or parole (Bronson & Carson, 2019).

Data

Table 3. Population in State and Federal Prisons in Washington State

	Female Population	Male Population	Total Population
1990	435	--	--
1998	1,018	13,143	14,161
2000	1,065	13,850	14,915
2006	1,496	16,065	17,561
2007	1,514	16,258	17,772
2016	1,658	17,446	19,104
2017	1,742	17,914	19,656
% change 1990-2000	144.8%	--	--
% change 2000-2007	42.2%	17.4%	19.2%
% change 2007-2017	15.1%	10.2%	10.6%
% change 2016-2017	5.1%	2.7%	2.9%

[a] Cells shaded orange indicate an increase in the population compared to the previous year listed.

[b] The data in this table are pulled from multiple published reports rather than from analysis of one dataset. This is why data is missing in some cells. The data collection and analysis methods between years may not be comparable and these tables should be interpreted with caution.

Sources: This table adapted from information available at:
Beck, A., & Harrison, P. (2001). Prisoners in 2000. Bureau of Justice Statistics Bulletin, NCJ 188207. https://www.bjs.gov/content/pub/pdf/p00.pdf
Beck, A., & Mumola, C. (1999). Prisoners in 1998. Bureau of Justice Statistics Bulletin, NCJ 175687. https://www.bjs.gov/content/pub/pdf/p98.pdf
Bronson, J., & Carson, A. (2019). Prisoners in 2017. U.S. Department of Justice; Office of Justice Programs; Bureau of Justice Statistics, NCJ 252156. https://www.bjs.gov/content/pub/pdf/p17.pdf
West, H., & Sabol, W. (2008). Prisoners in 2007. U.S. Department of Justice; Office of Justice Programs; Bureau of Justice Statistics, NCJ 224280. https://www.bjs.gov/content/pub/pdf/p07.pdf

City and County Jails in Washington State

[Work in progress: We have not been able to identify any publications disaggregating Washington jail data by sex other than one publication which identified data for December 31, 2013]

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Zeng, Z. (2019). BJS Releases Jail Inmates in 2017. *Politics & Government Business*, 230.

Potential Pilot: WSIPP study, Dually Involved Females in Washington State (Nov. 2019): Identifies the lack of programs for dually involved youth (in Washington and throughout the nation). A potential pilot could also include preventing out-of-home placements in the first instance.

2.5.2The environments causing increased female criminalization and incarceration..

As the previous section demonstrated there has been a historical increase in the criminalization and incarceration of women, a trend that seems to be continuing in Washington State. Research points to several factors contributing to these gender disparities. The Office of the Corrections Ombuds published a 2019 report describing seven areas of recommended changes based on complaints they have received from incarcerated individuals in the last year. The report highlights a recommendation specifically focusing on applying a "trauma-informed and gender-responsive lens to programs...particularly for women and LGBTQI individuals across facilities" (Carns, 2019). Further, the report asserts the following regarding the root causes of gender disparities in correctional facilities:

> "As with many other correctional systems in the nation, prison facilities, practices, procedures, and protocols in Washington are created for the cisgender male population. When applied to the female, transgender, and non-binary populations, however, these same policies and practices may no longer serve any penological interest and can become traumatizing"(Carns, 2019).

Trauma is well established as a driver of female incarceration. A 2018 study found that female inmates arrive at prison with higher rates of PTSD than male inmates, and that when females had experienced adult psychological trauma, they tended to commit more severe offenses and receive longer prison sentences. Thanos Karatzias et al., *Multiple traumatic experiences, post-traumatic stress disorder and offending behaviour in female prisoners*, Criminal Behavior and Mental Health 28: 72–84 (2018). *See also* Christy K. Scott et al., *Trauma and Morbidities Among Female Detainees in a Large Urban Jail*, 96 The Prison Journal 102 (2016) (reviewing research showing that "the experience of trauma is a likely determinant in women's involvement in criminal activities," and noting that female offenders are more likely than males to experience trauma-related addictions and psychological disorders); Bonnie J. Green et al., *Trauma Experiences and Mental Health Among Incarcerated Women*, 8 Psychological Trauma: Theory, Research, Practice, and Policy 455 (2016) (finding high rates of trauma exposure and psychiatric disorders among female inmates, reinforcing the conclusion that trauma is a significant pathway to criminal activity for females).

In addition to practices, procedures, and protocols in Washington correctional systems, national level research widely cites the war on drugs as a root cause for the increase in criminalization and incarceration of women. Other legislation has furthered the increased criminalization and incarceration of women such as three-strikes, pretrial detention, welfare benefits, housing, education and the custody of children (Bloom, Owen, & Covington, 2004; Covington & Bloom, 2003). Ferraro and Moe (2003) argue that it was the combined responsibility of child-care with economic marginality and domestic violence that have encouraged women towards crime or drug dealing to support themselves and avoid homelessness. Furthermore, minor probation violations were found through the qualitative study conducted by Ferraro and Moe (2003), that determined conflicts between work, child-care, and probation requirements would inevitably lead to their incarceration. This paper will discuss first the legal environment, bail, and the war on drugs. Followed by the examination of gender and social environment, specifically, welfare benefits,

housing, education, and custody of children that have increased the incarceration of women in America.

[We are still researching and determining whether there might be anything to add about pre-prosecution information – changes in policing, selective enforcement, prosecutorial discretion . . .]

The number of women held for pretrial detention prior to conviction has increased nationally. [More will either be said here or in other sections about the rise in pretrial detention] Covington and Bloom (2003) found that most female offenders were poor, undereducated, unskilled workers with a lack of consistent employment. In 1996 Collins and Collins (1996) found that nearly two-thirds of women were jobless when arrested compared to the one-third of males. Furthermore, Covington and Bloom (2003) argue that fewer women have partners that would post bail for them. Finally, Teplin, Abram, and McClelland (1996) found that most female pretrial jail detainees were nonviolent offenders who were jailed due to their inability to pay bail for misdemeanors. These facts create a picture of women who are of an overall lower socioeconomic status compared to men. Moreover, an increasing number of women found themselves incarcerated, even though today probation is still the most common punishment applied to women. [We are working on bringing in more recent research]

The war on drugs has been the most frequently studied reason for the increase in criminalization and incarceration of women in the last forty years (Bloom et al.,2004; Covington & Bloom, 2003; Phillips & Harm, 1998). Covington and Bloom (2003) report that the largest increase (36%) in arrests of women and the number of prisoners in 1998 came from drug-related crimes. Furthermore, when examining the entire female population incarcerated in state prisons nationwide, in 1996 approximately ` 37% of women had been charged with a drug-related offense. Among the female state prison population, from 1990 to 1996 the number of drug trafficking convictions increased 34% and the number of convictions for drug possession increased 41%. (Bureau of Justice Statistics, 1999). When state and federal systems are examined separately, eighty percent of the federal female prison population in 2000 was serving time for a drug-related crime. [we are double checking the accuracy/source of this last sentence]

More current data suggest that a high proportion of the female prison population continues to be incarcerated due to drug-related crimes. In 2016/2017, approximately 25% of sentenced female prisoners under the jurisdiction of **state** correctional authorities, and approximately 57% of sentenced female prisoners under the jurisdiction of **federal** correction authorities had a drug-related crime listed as their most serious offense. These rates were approximately 14% and 47% for sentenced male prisoners in state and federal facilities respectively (Bronson & Carson, 2019). In short, it appears drug crimes result in the incarceration of a greater percentage of females than males, particularly in state systems.

The war on drugs has been exacerbated by mandatory minimum sentences for drug offenses, specifically Anti-Drug Abuse Acts 1986 and the Omnibus Anti-Drug Abuse Act 1988 (Bush-Baskette, 2000).

Prior to 1984, federal courts had wide discretion when imposing sentences. In 1984, Congress passed the Comprehensive Crime Control Act, which included the Sentencing Reform Act with the goal, among other things, to reduce disparities in sentencing. ("SRA").

98-473 (codified as amended in scattered sections of 18 and 21 U.S.C. Under the SRA, the United States Sentencing Commission developed guidelines creating sentencing ranges with a minimum sentence and a maximum sentence for federal offenses. 18 U.S.C. Section 3553.

As part of this movement, Congress passed the Anti-Drug Abuse Act of 1986 which created mandatory minimum sentences triggered by certain amounts of controlled substances including cocaine. H.R. 5485 – 99th Congress: Anti-Drug Abuse Act of 1986, Pub.L. 99–570. The Anti-Drug Abuse Act of 1986 included a provision that imposed a sentence for simple possession of crack cocaine that was 100 times harsher than simple possession of powder cocaine. 21 U.S.C. section 841(b)(1)(A)(ii)(II), 21 U.S.C. section 841(b)(1)(A)(iii). In other words, an individual possessing 5 grams of crack cocaine would receive the same sentence as an individual possessing 500 grams of powder cocaine. This sentence structure was extended to conspiring to deliver crack cocaine. Omnibus Anti-Drug Abuse Act of 1988.

The Anti-Drug Abuse Act of 1986 created harsher penalties for the average drug users, by criminalizing small amounts of drugs. The Omnibus Anti-Drug Abuse Act of 1988 further singled out crack from other forms of cocaine and for the first time required a five-year mandatory sentence even for first-time offenders and for anticipatory offenses like attempt and conspiracy. These laws, according to Bush-Baskette (2000), removed the consideration of minor children dependent on the defendant and ignores the role the offender played in the crime. Both bills authorized substantial increases in spending on criminal drug enforcement efforts, which led to an increasing amount of female drug arrests, jumping by 95 percent between 1995 and 1996 (Covington & Bloom, 2003).

Mauer, Potler, and Wolf (1999) argue that the war on drugs and these policy changes impact women disproportionately because they are more likely to commit drug offenses than men. They found that between the years of 1986 and 1995 women incarcerated for drug offenses rose 888 percent. The Bureau of Justice Statistics (1999) found that 40 percent of women compared to 32 percent of men reported drug use during the commission of a crime, however alcohol use was higher with males. Furthermore, women in prisons used more drugs and more frequently than similarly situated men (National Institute of Justice, 1998). Finally, Covington and Bloom (2003) found that women were more likely than men to commit crimes to obtain finances to purchase drugs. Several other studies have confirmed these findings of increased female rates of drug abuse and higher levels of drug dependency (Loucks & Zamble, 1994; Mullany, 2002; Snell, 1992). The increase in female incarceration and criminalization have also been impacted by the social environment, particularly, welfare, housing, education, employment, and child-rearing/care.

Bloom, Owen, and Covington (2004) argue that the 1996 Welfare Reform Act, which posits a lifetime ban for those convicted of using or selling drugs on cash assistance and food stamps, impacts women more severely since they are more often convicted of drug-related offenses. Further, women of color will be marginalized due to the disproportionate enforcement of drug laws, and the fact that they are more likely to be susceptible to poverty (Allard, 2002). Housing has also become at risk due to the “One Strike Initiative” of 1996 that allows Public Housing Authorities to obtain criminal records of all adult applicants and tenants (Bloom et al., 2004). Bloom and colleagues (2004) argue that lack of education, increased by the fact that only 52 percent of correctional facilities for women provide postsecondary education, continues the

cycle of underemployment and interaction with the criminal justice system. Finally, the Adoption and Safe Families Act of 1997 terminates parental rights after a child has been in foster care for fifteen or more of the last twenty-two months. This becomes increasingly problematic for women with substance abuse issues who typically serve an average sentence of eighteen months (Jacobs, 2001). Furthermore, family members are less likely to care for a child during their parents' incarceration due to the fact that they are provided with less financial support than nonrelative foster caregivers. [Probable cross-reference to collateral consequences section of Report and/or amending this information in line with ongoing research]

Criminal justice research has been focused more on men than women, in large part because there are far more men incarcerated in the United States than women. In 2017 in Washington State, there were 17,811 men incarcerated compared to the 1,729 women, and this is a trend we see nationally (The Sentencing Project, 2017). Furthermore, gendered role stereotypes create the belief that men should be more violent and susceptible to violating laws compared to women. There has been a recent influx in the different pathways to a crime that impact men and women, however, further research must be conducted. While the impact of the war on drugs on women has been studied rather robustly, further research needs to be conducted on the social-environmental impacts, and the role of gender on pretrial release. Some of the analysis provided can only be collaborated by one or two citations or rely on research conducted 15 to 20 years ago, therefore these are the areas that need further examination, the social environment, and possibly other legal doctrines (besides the war on drugs) that are impacting the increased criminalization and incarceration of women. [We are looking at whether any changes in Washington crimes (legislation) might account for the differences]

[We may have more to add re the impact on different races, socioeconomic groups, and/or whether women were accused of more minor roles and what impact that has had.]

Potential pilot projects:

1. The "One Strike Initiative" of 1996 allows Public Housing Authorities to obtain criminal records of all adult applicants and tenants (Bloom et al., 2004); is there anything Washington State can do to amend this practice?
2. Bloom and colleagues (2004) argue that lack of education, increased by the fact that only 52 percent of correctional facilities for women provide postsecondary education, continues the cycle of underemployment and interaction with the criminal justice system. Can we increase the number of incarcerated females receiving higher education?
3. Family members are less likely to care for a child during their parents' incarceration due to the fact that they are provided with less financial support than nonrelative foster caregivers. Can we alter this discrepancy?
4. A project aimed at decreasing the effect of minor probation violations.

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2.5.3 The disproportionate racial, ethnic, and sexual orientation impacts of increased female criminalization and incarceration.

Research shows that the rate of increased criminalization and incarceration is not borne evenly across females of different racial, ethnic, and socio-economic groups and by persons of any sexual orientation. Minority and marginalized communities tend to be increasingly impacted by the increase in criminalization and incarceration.

Similarly to male incarceration, race does impact the rate at which women are incarcerated. In 2017, according to the Bureau of Justice Statistics, the imprisonment rate in federal and state prisons for Black women was (92 per 100,000), nearly twice the rate of imprisonment for White women (49 per 100,000). Furthermore, Hispanic women (67 per 100,00) were also incarcerated at a higher rate than White women (49 per 100,000). It is important to discuss the racial shifts in incarceration between 2000 and 2017 for White, Black, and Hispanic women. The rate of imprisonment for White women in state and federal prisons increased 44 percent (34 vs. 49 per 100,000) in this time period. During this same time period Black women have experienced a 55 percent decrease (205 vs. 92 per 100,000), and Hispanic women have experienced a ten percent increase (60 vs. 66 per 100,000) (Bureau of Justice Statistics, 2017). (The Sentencing Project, 2019).

In 2004, Demuth and Steffensmeier found that Black females were assigned higher bond amounts than their female White counterparts. However, Black and White women still maintained the same probability of obtaining pretrial release (Goulette, Wooldredge, Frank, & Travis, 2015). Bloom, Owen, and Covington (2004) found that Black women comprise nearly fifty percent of women in prison while only comprising thirteen percent of the total population of women in the United States. Furthermore, Black women are nearly eight times more likely to be incarcerated than their White counterparts. Finally, nearly two-thirds of the women incarcerated in jails and prisons are Black, while two-thirds of women on probation are White (Bloom et al., 2004).

There is robust research to support the racial inequality facing women (and men) in incarceration rates and increased criminalization. Often low-socioeconomic status is lumped in with racial/ethnic minorities, so further research could be conducted to tease out some of the differences found with socioeconomic differences. Furthermore, the research is vague on the measurement of Black, Hispanic, and White. It is crucial to know how these terms were defined and how that information was collected, (e.g. self-report vs census data). One of the issues that could occur is that minorities are being added to any one of these three heavily studied populations creating false numbers and picture of what the data is telling researchers. Specifically, if there is no "other" category than an individual might select the option closest to their classification but not how they identify. Furthermore, data for many subpopulations such as Native Americans and Asians are either combined with other subpopulations and not identified or completely ignored by this research.

[We are working on incorporating LGBTQ+ data/conclusions from this study and others: https://williamsinstitute.law.ucla.edu/wp-content/uploads/Meyer_Final_Proofs.LGB_.In_.pdf]

According to a 2017 article on incarceration rates in LGBTQI communities, Meyer et al. analyzed data (n=80,601) from interviews conducted in the 2011-2012 National Inmate Survey (Meyer et al., 2017). The survey asked questions regarding sexual orientation, race/ethnicity, incarceration-related factors, health outcomes, and sexual victimization and consensual sex. The weighted results showed a disproportionate number of women self-identifying as lesbian, gay, or bisexual or who report having same-sex sexual experiences as compared to men (42.1% of women in prison compared to 9.3% of men in prison and 35.7% of women in jail compared to 6.2% of men in jail). Moreover, LGB populations for both men and women "is approximately 3 times higher than is the already high general US incarceration rate" at 1,882 per 100,000 for US residents over the age of 18 (Meyer et al., 2017). These results highlight the need to address the root causes contributing to the disproportionate incarceration rates of LGB communities and women in particular.

Potential pilot projects: collecting more accurate race and ethnicity data in judgment and sentences/case files.

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2.5.4 The environments that contribute to the disparate impacts on minority and marginalized communities.

According to Bloom, Owen, and Covington (2004), female offenders are "low-income, undereducated, and unskilled with sporadic employment histories, and they are disproportionately women of color." Bloom (1996) found that female offenders are marginalized by race, class, and gender. The same things impacting the increased criminalization of women in 2.5.2 are also present here, if not exacerbated further for minority women. According to Mauer and Huling (1995), between the years of 1986 and 1991, the state female prison populations for drug offenses increased by 828 percent for Black women, 328 percent for Latina women, and 241 percent for White women. Therefore, the war on drugs that is specifically cracking down on drug users would have a disproportionate impact on women of color compared to white women. Mauer, Potler, and Wolf (1999) argue that compared to White women, women of color are far more likely to be arrested, convicted, and incarcerated at rates that exceed their representation in the free world.

Several studies have examined the impact of race and drug use, among both male and female offenders, and found that minorities have increased risk of felony drug conviction, which in turn limits their resources, and when returning from prison without resources (education, jobs, insurance, healthcare, housing) they face an increased risk of recidivism (Huebner, Dejong, & Cobbina, 2010; Iguchi, London, Forge, Hickman, Fain, & Riehman, 2002). The policing of drug activity was the by far the most common reason cited for why disproportionate numbers of people of color are convicted of felony drug charges. Within policing, researchers highlighted implicit bias a contributing factor as well as police efforts that:

- Target certain geographical areas (resulting in class/race-based targeting)
- Outdoor drug exchanges which are more visible compared to indoor exchanges
- Arrests that focus on crack-related exchanges.

(Beckett, 2004; BECKETT et al., 2005; Beckett et al., 2006; *Every 25 Seconds The Human Toll of Criminalizing Drug use in the United States*, 2016; *Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance Regarding Racial Disparities in the United States Criminal Justice System*, 2018; Fellner, 2009; Ferrer & Connolly, 2018; Gross et al., 2017; Mitchell & Caudy, 2015).

Research shows that in 2017, women had higher proportionate rates of drug convictions than men (25% vs. 12%) (The Sentencing Project, 2019). Women's rates of 25% in 2017 increased from 12% in 1986 (The Sentencing Project, 2019). A report by the Prison Policy Initiative posits that the increase in drug offenses for women since the 1980s is due to a change in policy and related policing rather than actual offending (Sawyer, 2018). Further, the report notes that women are more likely to engage in lower-level offenses such as drug exchanges as compared to violent, property or public order offenses (Sawyer, 2018; The Sentencing Project, 2019). The push for proactive policing and the War on Drugs in the 1980s resulted in apprehending and longer sentencing for low-level offenders therefore contributing to the increase in incarcerated women (Sawyer, 2018). Given that women of color are disproportionately incarcerated as compared to white women (see section 2.5.3), it can be concluded that women of color are disproportionately affected by drug convictions and have been since the 1980s.

When examining pretrial release, Demuth and Steffensmeier (2004) found that white women were the most likely to receive the pretrial release. While Black and Hispanic defendants were less likely than similarly situated white defendants to receive pretrial release, this encompasses both men and women. Brennan (2006) attempts to fill the void of missing data, due to the large focus on male discrepancies and examines predictors of sentencing for typical female offenders. She finds that "Black and Hispanic females were more likely to receive jail sentences than their White counterparts due to the differences in socioeconomic status, community ties, prior record, earlier case processing, and charge severity."

The research does not focus on racial/ethnic and socio-economic differences in the increased criminalization and incarceration of women as much as the comparison between men and women. Further, the majority of the research focuses on children of incarcerated parents, the impact that takes on them, whether it increases the likelihood of their own incarceration. This is an area where further exploration is needed. Section 2.5.2 was able to examine the impact of the war on drugs for females versus males and the racial and socioeconomic differences are briefly addressed there and here; however, there is a lack of data. Quite similarly to section 2.5.3 the research is very robust to support racial inequality facing both men and women in incarceration rates and increased criminalization. Typically, however, the low-socioeconomic status is assumed to go along with minority races or not studied as frequently as racial disparities. Furthermore, the measurement of Black, Hispanic, and White is vague and inconsistent (self-report vs. census) and does not account well for individuals of mixed race or minorities other than Black and Hispanic. One of the issues that could occur is that minorities are being added to any one of these three heavily studied populations creating false numbers and picture of what the data is telling researchers. Specifically, if there is no "other" category, an individual might select the option closest to their classification but not how they identify. Furthermore, many minorities such as Native Americans and Asians are either intermixed and not identified or completely ignored by this research. It would be safe to draw an inference that similar legal and social environments that impact increased criminalization and incarceration of women generally (as discussed in Section 2.5.2) would also impact minority women. Also, the evidence suggests that minority women are punished more harshly and at increasing rates compared to their white counterparts. However, there is a real lack of research examining these areas. In part because, as previously mentioned, females have been studied less than males in regard to criminal justice system interactions. The few articles that do examine the impact of legal and social environments focus typically on the War on Drugs.

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2.6 The mass incarceration of males produces stark impacts across genders.

Females, and indeed society as a whole, are also affected by the increasing mass incarceration of males. This section studies those impacts. We begin with a review of the environments leading to increased criminalization and incarceration of males. We then move to a discussion of the adverse impacts this male mass incarceration has on females. In studying this area, we do not mean to exacerbate heteronormative stereotypes. The study of families in this section applies equally to all families regardless of their gender composition.

2.6.1 The environments leading to an increase in criminalization and incarceration of males.

The past two decades have brought criminal justice policies designed to "get tough" on crime (Gordon, 1990; Turner, Sundt, Applegate, & Cullen, 1995). This new "get tough on crime" legislation resulted in an exponential growth of the prison population that could not compare to that of any other 20-year time period (1970-1990) (Skolnick, 1995). The Bureau of Justice Statistics (1994) reported that the prison population now exceeded one million inmates, which is five times the prisoners reported in 1970. As a result of the "get tough on crime movement," the incarceration rates for males specifically pre- and post- conviction have been directly impacted by the legal environment through the passing of punitive legislation like pre-trial detention, monetary bail, the war on drugs, and mandatory sentencing (including, but not limited to, three strikes, life without parole sentences) which have all resulted in increasing incarceration rates. These laws have disproportionately impacted low-income, African American men. This analysis will examine first the impacts of increased incarceration pre-conviction through the examination of pretrial detention and the utilization of bail, then the war on drugs and three-strike laws that increased the disparity of those punished.

Stevenson and Mayson (2017) discuss how pretrial detainees account for two-thirds of the current jail population and the overall 95 percent growth in jail populations in the last 20 years. The authors found that monetary bail/pretrial detention disproportionately affects Black defendants who make up 43 percent of pretrial detainees despite only constituting 13 percent of the total population (Stevenson & Mayson, 2017). Furthermore, pretrial detention accounts for approximately 17 percent of corrections spending. Detainees lose not only their freedom but also potentially bear the cost of the loss of a job, housing, and custody of their children.

Pretrial detention also increases the likelihood of conviction, plea bargaining, and increased recidivism. Heaton, Mayson, and Stevenson (2017) examine the impact of pretrial detention in misdemeanor cases in Texas. The researchers studied 380,689 misdemeanor cases that occurred between 2008 and 2013 and found that detained individuals were 25 percent more likely than those similarly situated releasees to plead guilty. Further, they found that those who were detained pre-trial were 43 percent more likely to be sentenced to jail and receive sentences that were twice as long as their counterparts. Overall, Heaton and colleagues (2017) argue that pretrial detention is associated with an increase in recidivism at the rate of30 percent for felonies and 20 percent for misdemeanors (Heaton, Mayson, & Stevenson, 2017). This is likely because those who are detained pre-trial lose their jobs, homes, and support systems and once convicted have increased challenges finding both employment and housing. Digard (2019) discusses the impact of pretrial detention, which has been utilized due, in part, to monetary bail. They find that pretrial detention increased the odds that the individual will be convicted and receive a harsher

sentence, because case dismissal, diversion, and plea-bargaining opportunities wain while held in pretrial detention (Digard, 2019).

The get tough on crime movement emerged with the war on drugs legislation, which was first introduced in 1968 by President Nixon. The war on drugs effort outwardly claimed to focus criminal justice efforts toward reducing the sale, distribution, and consumption of illegal drugs (Moore & Elkavich, 2008). Disparities in implementation raise serious questions about the actual purpose of the legislation. There are vast discrepancies in those who are actively using illicit drugs. According to Moore and Elkavich (2008), in 1998 Whites made up 72 percent of drug users compared with the 15 percent of Blacks. However, when you examine who is incarcerated, lack men are admitted to prison for drug charges at a rate 13 times more frequent than that of White men. Pettit and Western (2004) found that 20 percent of Black men and only three percent of white men were imprisoned by their early thirties (examining men born between 1965 and1969). Similarly, other research has found that African Americans makeup 14 percent of drug users but comprise 37 percent of those arrested for drug offenses (Tucker, 2017). States have not been immune to these disproportionalities: 62.6 percent of drug offenders in state prisons were Black in 1996. For a discussion of changes in sentencing laws in Washington state that contributed to this trend, see Section 2.7.__. For further discussion of the war on drugs legislation, see Section 2.5.__. Further, the study calculated the cumulative risk of incarceration rates of Black men compared to White men and found that by 1999 59% of Black men who did not finish high school were incarcerated as compared to 11% of White men. The study notes that for Black men with lower levels of education, this high cumulative risk indicates that incarceration is becoming an incorporated life stage among men in Black communities. This resulting mass incarceration has been suggested to create the new “racial caste system”, which Alexander (2010) argues is driven by politics and not crime. According to Tucker (2017), between the ages of 25 and 39 African American males were imprisoned 2.5 times more than Hispanic males and 6 times more than White males. Furthermore, it has been argued that the “War on Drugs” should be called the “War on People of Color” (Tucker, 2017). For a discussion of the effects of the sentencing changes resulting from this legislation, see Section 2.7.

Pretrial detention/ financial bail is also impacted by race. According to Sacks, Sainato, and Ackerman (2015), Black and Hispanic defendants are more likely than White defendants to have to pay monetary bail. Specifically, Black defendants were 73 percent less likely to post bail compared to White defendants, while Hispanics were ten percent less likely than White defendants. When examining the differences between the minority races the researchers found that Hispanics had a 16 percent greater probability than Blacks to post bail (Sacks, Sainato, Ackerman, 2015). Wooldredge, Frank, Goulette, and Travis (2015) found no statistically significant difference between Black and White bond amounts, however, they did find significantly higher odds of pretrial detention for Blacks compared to their White counterparts. It is important to note that some research has not found a relationship between racial and ethnic disparity. For example, Wang, Mears, Spohn, and Dario (2013) examined 20,516 felony cases and found no evidence of racial or ethnic disparity in any stage of the sentencing system.

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2.6.2 Beyond the obvious impact on males, increased criminalization and incarceration of males also adversely impacts our female population.

Mass incarceration has devastating collateral effects for all genders. Some specific collateral consequences from female criminalization and incarceration are discussed in Chapter ____. This section evaluates the effect of the mass incarceration of males on female partners, family members, relatives, friends, and children. We do so not to perpetuate heteronormativity, but to acknowledge the broad impact. As previously mentioned, the effect on partners, family

members, relatives, friends, and children apply regardless of the family structure or its gender makeup.

The incarceration of men has impacted women, their children, parents, and family members through income deprivation, housing and food insecurity, and health concerns (Baker & Mutchler, 2010). It is important to note that certain groups have been impacted more than others. Specifically, women of color (typically the focus has been on African American and Hispanic populations with more research being needed for Native populations in particular) and low-income women have experienced disproportionate hardship due to the impacts of war on drugs, three strikes, tough on crime (mandatory sentencing), and sentencing disparity that has targeted low-income, African American men. Wakefield and Uggen (2010) report that incarceration is unequally distributed, therefore disproportionately impacting lesser-educated minority men. According to Harris and Miller (2006), African American men make up 46 percent of the prison population while only making up 12 percent of the national population. Similarly, they found that Hispanic men make up 16 percent of the prison population while only comprising 13 percent of the population in the United States (Harris & Miller, 2006). Schlosser (1998) reported that African American men are incarcerated in the United States at a rate of one in every 14 and it is expected that one in four will be incarcerated at some point during their life. Another impact of male incarceration has been the impact on the family unit. Darity and Myers (1995) found that the Black family structure is balanced more towards female-headed households due to the number of African American males being incarcerated and therefore, unable to marry. There is a lack of research to answer the question fully because the focus has remained on other impacts of male incarceration.

The majority of the research has focused on the impact on children of incarcerated parents, both maternal and paternal. Baker and Mutchler (2010) found that children living in single-parent homes, due to incarceration, were disproportionately uninsured and members of racial and ethnic minorities. The authors found that single-parent households were most likely to be living in poverty, with approximately 60 percent living near or in poverty. Furthermore, Baker and Mutchler (2010) found that children in single-parent households were at increased risk of housing and food insecurity compared to those who lived with two-parent households. The vast majority of the research examines how parental incarceration impacts future criminality of those children (Myers & Wilkins, 2000; Snell, 1993). Wildeman (2014) utilizing data from the Fragile Families and Child Wellbeing Study paternal incarceration substantially increased the risk of child homelessness. Furthermore, this effect of homelessness was centered around African American children. Finally, increased economic hardship and lack of access to institutional support explain some of the relationships found (Wildeman, 2014).

Looking at just one area of impact, Grinstead, Faigeles, Bancroft, and Zach (2001) examine the financial burden of visiting, calling, and supporting an incarcerated partner. The researchers observed visitors at a prison and then asked each woman leaving the visiting area to participate in a survey. 153 of the 981 leaving the prison completed the quick 10-minute verbal survey. Most of the participants were there to see a romantic partner and reported on average spending almost three hundred dollars monthly to maintain their relationship. The sample was largely African American women (76%) followed by European-American (17%) than Hispanic (4%) and finally Asian (1%). This sample represented the larger 981 population observed by the researchers during their five-day data collection (Grinstead et al., 2001).

Charles and Luoh (2010) found that rising incarceration of men has affected women's marriage market, especially within race, location, and age that incarceration dramatically varies within these variables. Specifically, men ranging from ages 20 to 35 are more likely to be incarcerated than older individuals, and the mean incarceration rate for African American men was 18 percent and for Hispanics, it was 10 percent in 2000. High rates of male incarceration has created a context within the marriage market where women are less likely to get married and have fewer choices for a partner or spouse (Charles & Luoh, 2010). This evidence suggests that women in marriage markets affected by incarceration have increased their schooling or labor force participation in response to these changes (Charles & Luoh, 2010).

Another lesser studied impact of paternal incarceration is the increased likelihood of maternal neglect and harsh parenting once their partner has been incarcerated. Turney (2014) found some evidence to support that incarceration increases physical aggression and maternal neglect towards their children as well as economic insecurity and mental health conditions. She examined longitudinal data from both fragile families and child wellbeing study and in-home longitudinal study of preschool-aged children resulting in a sample size of 1,509 mothers who were living with their partners prior to incarceration. Ultimately, she found through propensity matching that incarceration was unharmful for psychological aggression but very harmful for physical aggression (Turney, 2014).

Unfortunately, there is a lack of robust findings that examine the full impact of men's increased incarceration. The research takes for granted that the majority of this disadvantage is centered around minorities with a lesser education and low incomes. The research was more focused on the impact of children, with just a few of the examples provided here. Finally, some of the research compared grandparents raising children due to incarceration with single-parent households (however those were not exclusively female lead households). The consequences of men's increased incarceration include a reduction of marriage in that population, lesser income, financial struggle to support an incarcerated partner, home and food insecurity, and some evidence to suggest increased maternal neglect. Finally, the rates of minority incarceration outweigh those of White individuals and therefore impact minority families at a greater rate.

Potential pilot projects:

1. Since most Washington families report spending almost three hundred dollars monthly to maintain their relationship with their incarcerated relatives, consider providing funding to assist or determining ways to reduce these costs.
2. Offering or connecting insurance for single-parent homes due to incarceration?

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2.7 Sentencing Changes and Their Direct and Indirect Impact on Women.

Developments in sentencing laws are one of the most-studied drivers of the increase in mass incarceration of females. This chapter discusses changes in Washington State sentencing laws throughout the past few decades as a framework for evaluating how those laws impact females. In Section 2.7.2, disparate impacts upon subpopulations of females are discussed.

[The impact of mandatory minimums, particularly in the federal system, is likely being analyzed elsewhere and may be cross-referenced here]

2.7.1 Sentencing Laws and Practices in Washington State

I. Developments in Washington State sentencing laws since the 1980s

In 1981, the Washington State Legislature enacted the Sentencing Reform Act ("SRA") the stated purpose of which was to ensure proportionate sentencing, meting just punishment, punishing commensurately with others, protecting the public, offering rehabilitative measures, reducing the use of governmental resources, and reducing recidivism. RCW 9.94A.010. The legislature developed sentencing ranges for the vast majority of felony offenses based upon two factors: 1) the severity of an offender's current offense; and 2) the offender's prior criminal history (which informs the "offender score"). RCW 9.94A.505; RCW 9.94A.510; Engen, Gainey, Crutchfield, & Weis, 2003. Washington allows judges to issue "exceptional sentences", sentences outside the presumptive sentencing range in cases where aggravating or mitigating circumstances should be considered. (Engen et al., 2003). Washington also allows structured sentencing alternatives such as intermediate punishment, community-based sanctions and rehabilitative programs. Examples of these alternative sentences include Alternative Sentence Conversion (Conversion), the First-Time Offender Waiver (FTOW), Drug Offender Sentencing Alternative (DOSA), Family & Sentencing Offender Alternative (FOSA), and the Special Sex Offender Sentencing Alternative (SSOSA) (Engen et al., 2003).

Under the SRA, the offender score is a significant driver of the applicable sentencing range. A person's "offender score" is calculated by the number of points a person has. As a general rule, a felony conviction or a juvenile adjudication for a violent felony offense counts as one point in a person's "offender score." RCW 9.94A.525(7). There are, however, a multitude of exceptions to this general rule which were present in the SRA in its original form as well as which have arisen in amendments to the SRA since its inception. *See generally* RCW 9.94A.525(8) – (21). For certain offenses, past convictions may count as two or three points instead of just one. *See generally* RCW 9.94A.525(8) – (21). Categories of offenses for which certain past convictions will count as two or three points (thereby increasing the sentence range for the current offense) include but are not limited to: 1) manufacturing methamphetamine; 2) burglary or residential burglary; 3) sex offenses; 4) failure to register as a sex offender; 5)

offense related to theft of motor vehicles; and 6) domestic violence offenses. RCW 9.95A.525(13)–(21). The effect of this doubling or tripling of points for purposes of an individual's offender score is an increase in the individual's standard range (in other words, the minimum and maximum sentence).

[We are still looking into the following questions: Has there been an increase in sentences for specific offenses affected by this doubling or tripling of points for past convictions since 1981? What, if any, is the impact upon racial disproportionality, given the disproportionate number of young men of color with prior convictions? Even if this has had less of an effect on women in the past as compared to men, in light of the increase in criminalization of women, will this exponentially affect women going forward?]

A. Increase in sentences for drug offenses in Washington State since 1981

The SRA introduced sentencing ranges with mandatory minimum and maximum sentences for drug offenses as well. Whereas a pre-SRA court could sentence an individual to any amount of time for a drug offense so long as it was under the statutory maximum time allowed for the offense in general, post-SRA courts were limited to imposing a sentence within a statutorily-prescribed range. RCW 9.95.010; RCW 9.94a.505. (The exceptions permitting sentences above or below that range are discussed at Section ____.)

Sentencing ranges for certain drug offenses including possession of cocaine and heroin have remained relatively static since 1984. RCW 69.50.401(d). For other offenses including manufacturing, delivering, or possessing with intent to deliver a narcotic drug from schedule I or II including heroin and cocaine, the sentencing ranges increased from 1988 to 1989. RCW 69.50.401(a)(1)(i). In addition to the increase in standard ranges, a past drug offense conviction weighs more heavily when calculating the offender score beginning in 1989. RCW 69.50.401(a)(1)(i). For example, an individual, who has two (2) past felony convictions (and no other criminal history) and who is convicted in 1988 of the crime of manufacturing, delivering or possessing with intent to deliver cocaine would have received a sentence of 31 to41 months. An individual in that same scenario convicted in 1989 would have received a sentence of 67 to 89 months.

[We are still looking into the following questions: Is there a disparate impact on blacks or other people of color? How about on women – are they typically charged as assistants rather than major players, does their lack of supervisory status deprive them of bargaining power?]

B. Two and Three Strikes . . . "And you're out"

In 1993, Washington State voters approved an initiative that created the persistent offender law, popularly known as the "three strikes and you're out" law. Initiative 593. RCW 9.94A.570. Three strike legislation was originally intended to remove repeat offenders of serious crimes from society for long periods or life. Washington State along with California was one of the first states to implement three-strike laws (Clark, Austin, & Henry, 1997; Vitiello, 2002).

Under the persistent offender law, an individual must be incarcerated for life without the possibility of parole after receiving three consecutive convictions – or "strikes" - for certain serious felonies including all Class A felonies, any attempt, solicitation, or conspiracy to commit a Class A felony, and others such as assault in the second degree, extortion in the first degree, and kidnapping in the second degree. RCW 9.94A.570; RCW 9.94A.030(33).

While California and Washington implemented their three-strike laws within months of each other they are notably different. While California includes a similar portion to Washington State, a 25-yearto-life sentence for third-strike felons, California's law also includes a portion that would double second-strike offenders (Vitiello, 2002). California has become the center of focus for "three strikes" laws and results about whether this legislation successfully deters crime has mixed results. According to Chen (2008), three-strike laws appear to be associated with significantly faster rates of decline for robbery, burglary, larceny, and motor vehicle theft. However, Chen (2008) finds it perplexing that murder rates examined do not decline based on the three strikes law in California and ultimately argues that the harshest sentencing punishment might not be the most effective. While others find no evidence that three strikes have any intended deterrent effect on crime rates in California (Males & Macallair, 1999). It is also important to consider gender and race biases that might impact the increased criminalization and incarceration of men pre- and post-conviction.

If convicted of two separate convictions of certain sex offenses, an individual will also receive the mandatory sentence of life without parole. RCW 9.95A.570. In 1997, the legislature expanded the list of sex offenses that would constitute "strikes". RCW 9.94A.030(38). Sentencing for sex offenses has changed more dramatically since the passage of indeterminate sentences discussed next.

[We are still looking into the following questions:: What is the racial or ethnic background of those who received a sentence of life without parole as a result of receiving a 2nd (in the 2 strikes sex offense law) or 3rd strike (in the 3 strikes serious felony law)? Is there a racial or ethnic disproportionality for individuals facing a 2nd (in the 2 strikes sex offense law) or 3rd strike (in the 3 strikes serious felony law) who received a plea offer to a non-strike offense and those who did not? Have any women been sentenced under either law?]

C. Indeterminate Sentencing for Sex Offenses

Even though Washington State courts were generally confined to sentencing ranges (as mentioned above,, determined by the seriousness of the crime and the criminal history of the defendant), in 2001, the Washington State Legislative dramatically changed the way individuals with certain sex offense convictions were sentenced for crimes committed on or after September 1, 2001. 3ESSB 6151, enacted as the Sex Offender Management Act, 2001 Wash. Laws, ch. 12, § 9.

Individuals who are not persistent offenders are sentenced under the Sex Offender Management Act if convicted of the following offenses: 1) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; 2) murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree,

kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree – so long as there is a finding of sexual motivation; or 3) an attempt of any offense falling in the above two sections. RCW 9.94A.507(1).

When a judge determines that an individual's conviction falls within this section, the judge is required to sentence the individual to a maximum term and a minimum term. RCW 9.94A.507(3)(a). The minimum term is set by the court and must either be within the standard range set by statute or an exceptional sentence pursuant to RCW 9.94A.535; the maximum term is set by statute. Before the expiration of the minimum term, the indeterminate sentence review board will conduct a hearing to decide whether to release the individual before the maximum term has expired. RCW 9.95.420(3). If the board does not release as a result of the hearing, it can set another minimum term of confinement not to exceed five years before the next review by the board for release. RCW 9.95.011(2).

II. Incarceration through civil commitment

[NOTE: We will likely be drastically shortening this subsection or deleting it for two reasons: 1) it is arguable whether it fits under a section about sentencing; and 2) my understanding talking with public defenders practicing in this area is that only one cisgender woman has been civilly committed under the SVP statute.]

In 1990, the Washington State legislature passed the Sexually Violent Predator Act. RCW 71.09. The definition of a "sexually violent predator" is someone who: 1) has been convicted of or charged with a crime of sexual violence; 2) who suffers from a mental abnormality or personality disorder; and 3) the mental abnormality or personality disorder makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(18). If a person is deemed to be a sexually violent predator, the person is committed to the custody of the Department of Social Health Services for placement in a secure facility. RCW 71.09.060. The Department must provide each individual committed under this statute with an annual review assessing the status of the individual's personality disorder or mental abnormality. RCW 71.09.070.

An individually civilly committed under this statute may seek a trial to review the applicability of the past determination of sexually violent status. RCW 71.09.090. If the court grants the individual a trial, a jury or judge will assess whether the individual still meets the criteria of sexually violent predator and if so, whether the individual must remain committed in a secure facility. RCW 71.09.090(3).

A person remains civilly committed only until it is established that he has changed so that he no longer fits the definition of a "sexually violent predator" or he is granted – either by the Court or through the agreement of the State – a less restrictive alternative to commitment. RCW 71.09.060(1).

D. Concurrent versus consecutive sentences

When an individual is sentenced for more than one conviction, the sentences generally run concurrently. RCW 9.94A.589. Two exceptions have arisen, however, in the 1990s. In 1990, the legislature adopted a change so that sentences for two or more serious violent convictions must generally be served consecutively as opposed to three or more serious violent convictions. RCW 9.94A.589(b).

E. Sentencing enhancements

Since the adoption of Washington State's Sentencing Reform Act in 1981, the legislature has passed laws increasing sentences in certain circumstances. These laws include the "hard time for armed crime" law, "three strikes and you're out" law, and the "drug free zone" law, among others. In addition to the presumptive or base sentence, courts are mandated in certain circumstances to tack on additional time that must be served consecutive to the presumptive or base sentence. Below is a list of the different sentencing enhancements.

1. Firearm and deadly weapon enhancement

In 1995, Washington State citizens passed the "hard time for armed crime" initiative which increased the sentence an individual would receive for committing a felony offense when armed with a firearm. RCW 9.94A.533(3). Once an individual is found to have committed a felony with a firearm, the added time is 18 months to five (5) years depending upon the class of felony conviction. RCW 9.94A.533(3). This period of time must be consecutive to all other sentencing provisions including any time added for other firearms or deadly weapons. RCW 9.94A.533(3). A sentencing judge is required to order additional time for each firearm or deadly weapon. *State v. Santiago*, 149 Wash.2d 402, 417, 68 P.3d 1065 (2003). The time received for the enhancement doubles if a person has received a firearm enhancement or a deadly weapon enhancement for a previous sentence. RCW 9.94A.533(3). The enhancement is added to the presumptive sentence and must be served in prison. RCW 9.94A.533(3).

For individuals convicted of a felony armed with a deadly weapon other than a firearm, the added time is six (6) months to 24 months depending upon the class of felony conviction. RCW 9.94A.533(4). Similarly, this added time for a deadly weapon other than a firearm must be served in prison and must be served consecutive to all other sentencing provisions including any time added for *other* firearms or other deadly weapons. RCW 9.94A.533(4). The time received for the enhancement doubles if a person has received a deadly weapon enhancement for a previous conviction. RCW 9.94A.533(4).

If an individual has previously been sentenced for any deadly weapon enhancement, all firearm or deadly weapon enhancements double. RCW 9.94A.533(1)(d) and (4)(d). For example, if there is a finding that an individual committed a robbery in the first degree while using a firearm and has previously received a firearm or deadly weapon enhancement, the court must impose a ten (10) year sentence *in addition* to the sentence received for the robbery in the first degree conviction.

2. "Drug free zone" enhancements

In 1989, the legislature enacted a law that increased the sentence for an individual convicted of delivering, manufacturing or possessing certain drugs with intent to deliver if the act occurred in or near certain locations. RCW 69.50.435. These locations included school, school bus, public park, public transit vehicle, public housing project, public transit stop shelter, at a civic center or 1,000 feet from a school, school bus route stop, and civic center. RCW 69.50.435(1)(a-j). When there is a finding that a drug offense occurred at one of these locations, the 24 months must be served consecutive to the presumptive sentence and must be served in prison. RCW 9.94A.533(6). The maximum imprisonment and fine one can receive are also doubled. RCW 69.50.435. An accomplice, a person who knowingly assists another to commit an offense, will also receive the enhancement if both the accomplice and person committing the offense are within these locations. *State v. Silva Baltazar,* 125 Wn.2d 472, 483, 886 P.2d 138 (1994).

3. DUI enhancements

In the 2000s, the legislature also adopted an enhancement for those convicted of vehicular homicide. RCW 9.94A.533(7). Specifically, the court must sentence the individual for an additional two years of total confinement consecutive to all other sentencing provisions for each prior DUI or physical control conviction. RCW 9.94A.533(7). This mandatory enhancement also applies to people who have a prior conviction such as negligent driving if the prior conviction derived from a DUI charge. *City of Walla Walla v. Greene*, 154 Wash.2d 722, 728, 116 P.3d 1008 (2005).

4. Sexual motivation enhancements

In 2006, the legislature adopted an enhancement for those convicted of crimes with sexual motivation. RCW 9.94A.533(8). If a person is sentenced to a crime of sexual motivation or sentenced for an anticipatory offense with sexual motivation (such as taking steps in order to commit a crime), the court is mandated to sentence an additional two years for any past class A felony convictions, 18 months for class B felony convictions and one year for past class C felony convictions. RCW 9.94A.533(8). If a person has received a prior sexual motivation enhancement after July 1, 2006, the subsequent sexual motivation enhancement is doubled. RCW 9.94A.533(8). This added time must be served consecutively to any presumptive sentence and must be served in prison.

5. Criminal street gang sentencing enhancement

In the 2000s, the legislature adopted a sentencing enhancement for adults convicted of "any criminal street gang-related" felony for which the adult involved a minor in committing the offense. RCW 9.94A.533(10)(a). Once the court makes this finding, the sentence range in this scenario is 125% of the sentencing range for the same crime in which there is no such finding. RCW 9.94A.533(10)(a). For example, a person with a certain criminal history committing the crime of theft in the first degree and without gang-related finding and without involving a minor in committing the crime could be sentenced between the range of 22 – 29 months. In contrast, a person with the same criminal history committing the crime of theft in the first degree and with a

gang-related finding and with a finding that this defendant involved a minor in the committing of the offense would receive a sentence between the range of 27.5 – 36.25 months in prison.

6. Other types of sentencing enhancements

Other sentencing enhancements – all of which have been adopted post-1981 - include: 1) committing vehicular homicide while under the influence; 2) injuring someone while attempting to elude police; 3) having a minor in the car when committing certain felony driving offenses; 4) manufacturing methamphetamine or possessing certain ingredients with the intent to manufacture methamphetamine in the presence of a minor; 5) committing certain drug offenses in a jail or prison; 6) engaging in certain sex offenses involving minor in exchange for a fee; 7) assaulting a law enforcement officer who is performing their duties; and 8) committing robbery of a pharmacy. RCW 9.94A.533. Each of these enhancements add 12 to 24 months to the presumptive sentence. RCW 9.94A.533. Once a finding is made of any of these enhancements, the enhancement period is mandatorily added to the presumptive sentence and must run consecutive to it. RCW 9.94A.533.

[We are still looking into the following questions: What is the racial or ethnic breakdown of defendants who received enhancements? What is the racial or ethnic breakdown of individuals who received specific enhancements such as the firearm/deadly weapon enhancement, "drug-free zone" enhancement, and criminal street gang enhancement? What are the different policies and practices exercised by county prosecutors throughout Washington State in charging enhancements? Is there any gender disparity in the "in the presence of a minor" or other sentencing enhancements?]

III. Exceptional Sentences Above or Below the Guidelines Range

As discussed, Washington's sentencing statutes provide a standard range for sentencing most crimes. A standard range is a range of years set by statute based on the seriousness of the crime and offender's history. RCW 9.94A.505, RCW 9.94A.510, RCW 9.94A.525. A defendant may not appeal a standard range sentence. RCW 9.94A.585(1).

While the SRA provides structure to sentencing, it does not eliminate a court's discretion altogether when sentencing. RCW 9.94A.010. A judge may depart from a standard range sentence and impose an exceptional sentence above or below the standard range. RCW 9.94A.535. A court must not only consider the policy goals of the SRA set forth in RCW 9.94A.010 when deciding whether to impose an exceptional sentence but must also find that there are "substantial and compelling reasons" justifying an exceptional sentence. *State v. Graham*, 181 Wash.2d 878, 337 P.3d 319 (2014); RCW 9.94A.535. The court must explain in writing the reasons for imposing an exceptional sentence. RCW 9.94A.535. RCW 9.94A.535(1) lists eleven non-exclusive mitigating factors that are reasons for reducing a sentence. RCW 9.94A.535(2) has a non-exclusive list of over thirty aggravating factors that could lengthen a sentence.

The illustrative list of mitigating factors provided in RCW 9.94A.535(1) include the following: 1) to a significant degree, the victim was an initiator, willing participant, aggressor or

provoker; 2) the defendant was under duress, coercion, threat, or compulsion on some level; 3) the defendant was induced by others without apparent predisposition to do so; 4) defendant's capacity was impaired (but not by voluntary use of alcohol or drugs); 5) the defendant was not the principal in the offense and manifested concern for the victim; 6) the defendant or defendant's children suffered from a pattern of abuse by victim and committed offense in response to abuse; and 7) defendant committed act of domestic violence after and in response to suffering from pattern of coercion, control or abuse by victim. Although this list is non-exclusive, a basis for an exceptional sentence downward must distinguish the case from other cases in the same category of crime. *State v. Fowler*, 145 Wash. 2d 400, 405, 38 P.3d 335 (2002). Once a court identifies a basis for an exceptional sentence downward, it must consider the purposes of the Sentencing Reform Act as set forth in RCW 9.94A.010 when crafting an appropriate sentence. *State v. Alexander*, 125 Wash.2d 717, 730, 888 P.2d 1169 (1995).

As noted above, an example of a mitigating factor is that the defendant's capacity was impaired. RCW 9.94(A).535(5). Impairment of the defendant's capacity by voluntary use of alcohol or drugs, however, does not constitute a mitigating circumstance. *Id*. Furthermore, the Washington Supreme Court clarified that impairment by alcohol as a result of alcoholism is not, in and of itself, a mitigating factor. *State v. Allert*, 117 Wash.2d 156, 164, 815 P.2d 752 (1991). The Court even further clarified in *State v. Hutsell* held that "the unforced, and not fraudulently induced, use of drugs or alcohol" regardless of dependence is not a mitigating factor. 120 Wash.2d 913, 921, 845 P.2d 1325 (1993). While declining to create a broader interpretation of "voluntary", the *Allert* Court explained, "We decline to conclude that the Legislature intended such an anomalous result. If the Legislature intends that intoxication by an **alcoholic** be treated differently for **sentencing** purposes than intoxication by one not an **alcoholic**, then that decision is better suited to the legislative process wherein the psychological characteristics of compulsive diseases can be studied. We find no such intent in the present statutory scheme." 117 Wash.2d at 168. Thus far, neither the Washington State legislature nor the Washington Supreme Court has broadened the interpretation of "voluntary" in this context.

Upon identifying a mitigating circumstance and after considering the purpose of the Sentencing Reform Act, a court may impose a sentence outside the standard range if it finds substantial and compelling reasons justifying the sentence. RCW 9.94A.353. Examples of such sentences are not simply confined to deviating below the standard range. In *In re Pers. Restraint of Mulholland*, the Washington State Supreme Court explained that a court has discretion upon finding one or more mitigating factors justifying an exceptional sentence downward to order concurrent sentences for separate serious violence offenses. 161 Wash.2d 322, 331, 166 P.3d 677 (2007). A sentencing court also has discretion upon finding one or more mitigating circumstances supporting an exceptional sentence downward to run sentences for firearm-related offenses concurrently. *State v. McFarland*, 189 Wash.2d 47, 50, 399 P.3d 1106 (2017)

All sentencing guidelines must be imposed equally "without discrimination as to any element that does not relate to the crime or the previous record of the defendant." RCW 9.94A.340; *State v. Law*, 154 Wn.2d 85, 97, 110 P.3d 717 (2005). The reasons for an exceptional sentence must relate to the crime, the defendant's culpability, or the defendant's criminal record. *State v. Law*, 154 Wn.2d 85, 89, 110 P.3d 717 (2005). The defendant's personal and unique factors unrelated to the crime, are not relevant. *State v. Law*, 154 Wn.2d 85, 89, 110 P.3d 717 (2005). The defendant's race and gender "should play no part in determining the appropriate sentence for a crime. . . . A determinate system, by its nature, should virtually

eliminate such sentencing disparities." Larry Michael Fehr, *Racial and Ethnic Disparities in Prosecution and Sentencing: Empirical Research of the Washington State Minority and Justice Commission*, 32 GONZ. L. REV. 577, 580 (1997) (quoting Sentencing Guidelines Commission, Sentencing Policy in Washington: An Assessment 8 (1996).) However, the *victim's* personal and unique characteristics may be relevant. *State v. Nguyen*, 68 Wn. App. 906, 919, 847 P.2d 936, 943 (1993) (reasoning an exceptional sentence was justified because the victims were particularly vulnerable based on their age and gender "under the circumstances").

A Two-Part Test

A two-part test determines whether a factor actually supports an exceptional sentence. *State v. Law*, 154 Wn.2d 85, 95, 110 P.3d 717 (2005).

First, a judge "'may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range.'" *State v. Law*, 154 Wn.2d 85, 95, 110 P.3d 717 (2005) (quoting *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)). For example, a lack of criminal history is generally not a sufficient reason to depart from a standard range because that was something the legislature considered when setting the standard range. *State v. Freitag*, 127 Wn.2d 141, 143-44, 896 P.2d 1254, (1995). However, a lack of criminal history may be considered in combination with a finding that the defendant was 'induced' to commit the crime or lacked a predisposition to commit the crime. *State v. Fowler*, 145 Wn. 2d 400, 406-07, 38 P.3d 335 (2002).

Second, the "'factor must be sufficiently substantial and compelling to distinguish the crime.'" *State v. Law*, 154 Wn.2d 85, 95, 110 P.3d 717 (2005) (quoting *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)). "[A] any such reasons must relate to the crime and make it more, or less, egregious." *State v. Fowler*, 145 Wn.2d 400, 404, 38 P.3d 335 (2002). For example, family support or being low or moderate risk to reoffend are not considered relevant to the crime. *State v. Fowler*, 145 Wn.2d 400, 404, 409, 411, 38 P.3d 335 (2002). However, the court will accept a stipulation to an exceptional sentence in a valid plea deal as a substantial and compelling reason. *In re Breedlove*, 138 Wn.2d 298, 300, 979 P.2d 417, 420 (1999).

Additionally, aggravating factors relied upon by the sentencing court must be proved to a jury. *State v. Ose*, 156 Wn.2d 140, 148-49, 124 P.3d 635, 639 (2005). There are limited exceptions including where the defendant and state stipulate that an exceptional sentence serves the interest of justice and the court agrees or, essentially, where the standard offender score calculation allows for too lenient a sentence. RCW 9.94A.535(2). Likewise, an exceptional sentence cannot be imposed below a mandatory minimum sentence if the legislature has provided one. RCW 9.94A.540.

Juvenile Offender

A sentencing court must consider the circumstances of the youth of the offender when assessing culpability and determining whether to impose an exceptional sentence. *Miller v. Alabama*, 567 U.S. 460, 475-76, 132 S. Ct. 2455 (2012). Age in this sense is not considered a personal factor but instead is to be considered on how it bears on the offender's culpability. *State v. Ramos*, 187 Wn.2d 420, 448, 387 P.3d 650 (2017). The sentencing court must consider the juvenile's immaturity, impetuosity, and failure to appreciate risks and consequences, the nature

of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, the way familial and peer pressures may have affected them, how youth impacted any legal defense, and any factors suggesting that the juvenile might be successfully rehabilitated. *State v. Gilbert,* 193 Wn.2d 169, 176, 438 P.3d 133 (2019).

Sentencing Alternatives

Washington also allows for sentencing alternatives for specific types of offenders including parents, drug offenders, and sex offenders. RCW 9.94A.655, RCW 9.94A.660, RCW 9.94A.670. These sentencing alternatives are not considered exceptional sentences. *See State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005) (noting the similarities and differences of procedural requirements between sentencing alternatives and exceptional sentences); *State v. Murray*, 128 Wn. App. 718, 726, 116 P.3d, 1072, 1076 (2005) (noting the trial court cannot create a hybrid sentence of a sentencing alternative and an exceptional sentence).

[Despite research, we have not been able to determine whether changes to community custody (like DOC's swift and certain policy) had an effect on the incarceration for women.]

Sentencing Disparities based on Race

Overall, the "war on drugs" legislative changes and the get "tough on crime" movement have led to a large body of robust findings showing disparity within the sentencing of minorities compared to whites. Steffensmeier, Ulmer, and Kramer (1998) utilized statewide data for Pennsylvania from 1989-1992 to examine sentencing outcomes. They found that young Black men are the most likely group to be sentenced more harshly than any other group. Second, race played a larger role in sentencing disparity for younger men when compared to older men. Steffensmeier and colleagues (1998) also found that Black men were receiving moderately harsher sentences than White offenders, and Black men were 1.5 times more likely to receive a sentence of incarceration than White men. Hauser and Peck (2017) found that Black offenders were over two percent more likely to go to prison than their White counterparts and Hispanics were over one percent more likely. The researchers also found that Black individuals received sentences that were almost five months longer than Whites, Hispanics received sentences almost two months longer (Hauser & Peck, 2017). Mustard (2001) examined 77,236 federal offenders under the Sentencing Reform Act of 1984 and found that Black, males, and offenders with lesser education and income receive substantially longer sentences. Furthermore, he found that there is about a 55 percent difference between Black and White offenders when it comes to sentencing. Finally, he found that Blacks are less likely to receive no prison time when the option is available and receive smaller reductions than Whites (Mustard, 2001). While examining the impacts of race on sentencing Steen, Engen, and Gainey (2005), found that in Washington State White offenders and Black offenders who more closely resemble dangerous drug offenders were more likely to receive harsher penalties than their counterparts.

When analyzing for race discrepancies in sentencing, there is a large body of robust findings highlighting the disparity between men and women. This research is dispersed in the discussion below, which is divided by nationwide and Washington-specific research.

Sentencing Disparities based on Gender

Nationwide Research on Gender Discrepancies in Sentencing

Steffensmeier and colleagues (1998) found that men's age influenced sentencing disparity more than females age. When considering gender specifically, the researchers found that females' odds of incarceration were half that of males, and their sentences were six and a half months less than males on average (Steffensmeier et al., 1998). Hauser and Peck (2017) found that men were five percent more likely to be incarcerated than females. While examining the overall disadvantage, White women received the most favorable treatment while Black males received the most disadvantaged treatment. Finally, large gender differences were found with men being sentenced to almost seven months longer than women (Hauser & Peck, 2017), findings very consistent with Steffensmeier and colleagues almost twenty-years apart. Mustard (2001) found that there was a 70 percent difference between men and women in sentencing. Furthermore, he found that males are less likely to receive no prison time when the option is available and receive smaller reductions than females (Mustard, 2001). Steffensmeier and Demuth (2006) found that female defendants, consistent with prior research receive more lenient sentences, and that gender strongly influences sentencing across all race and ethnic groups. Therefore, Black and Hispanic women benefit from their "female" status more than are hindered by being a racial minority (Steffensmeier & Demuth, 2006). While Farnworth and Teske (1995) found that women without records were more likely to receive charge reductions and chances for probation than similarly situated men. Doerner and Demuth (2014) examined data from the United States Sentencing Commission and found similarly to Farnworth and Teske (1995) that women were more likely to receive a lenient sentence than their male counterparts.

It is important to note that the effects of gender on sentencing varies by crime type, but not in any consistent or predictable pattern (Rodriguez, Curry, & Lee, 2006). Rodriguez and colleagues (2006) found that for property and drug offenses women were less likely to be sentenced to prison, however, for violent offending they were no less likely than males to be sentenced prison time. But, those women who are sentenced to prison time for violent offending typically receive substantially shorter sentences than men (Rodriguez, Curry, & Lee, 2006).

Studies analyzing the relationship between gender and race/ethnicity have found that females were more likely than males to receive a downward sentencing departure with those who have a lower socio-economic status less likely to receive a downward sentencing departure (Mustard, 2001; Johnson, 2005; Doerner & Demuth, 2010). White defendants were more likely to receive a downward departure compared to minority defendants (Mustard, 2001; Johnson, 2005; Johnson & Betsinger, 2009; Doerner & Demuth, 2010; Brennan & Spohn, 2009). One of the only studies to include Asian offenders, found that while Asians were slightly less likely than white offenders to receive a downward sentencing departure, they were more comparable to white offenders than African American and Hispanic offenders who were significantly less likely to receive a downward sentence departure Johnson & Betsinger (2009). For upward (harsher) sentencing departures, there were mixed results. Similar to the findings of the Washington study conducted by Engen and colleagues (2003), Johnson (2005) and Doerner and Demuth (2010) found that Hispanic defendants were the most likely to receive an upward sentencing departure compared to both White and African American defendants when not controlling for age. Age also had a positive relationship with upward sentencing departures in that the older defendants were more likely to receive a harsher sentence. Johnson & Betsinger (2009) also found that Hispanic and African American defendants were punished more harshly, while Asians and

Whites were treated similarly. In the study conducted by Mustard (2001), he did not find that gender and race/ethnicity had an impact on upward sentencing departures.

The following studies included the intersection of gender and race/ethnicity and compared the groups. In a study of violent offenders in Pennsylvania, Kramer and Ulmer (2002) also found that female defendants were more likely to receive a downward departure than males. African American females were most likely to receive a downward sentencing departure, with the younger African American females having the highest odds. Doerner and Demuth (2010) also found that for females, African American women received a downward sentencing departure more when compared to white and Hispanic females; however, these findings were not statistically significant. Hispanics (young male Hispanics had the worst odds) were also less likely to receive a downward sentencing departure than white and African American defendants, while white and African Americans had similar odds (Kramer & Ulmer, 2002). In a study of court cases involving drug offenses over three years, Brennan and Spohn (2009) also found that African American and Hispanic females receive downward departures more than their male counterparts, however, white males and females received similar sentences. Contrary to Johnson (2005), Johnson & Betsinger (2009) and Doerner and Demuth (2010) found that age and race/ethnicity had a negative relationship with upward sentencing departures for males in that younger minority males were more likely to receive harsher sentences, with young African American males receiving the longest sentences.

One final critique of the research examined and conducted is the lack of minority representation. Most research focused solely on Black, White, and Hispanic persons and left out Native Americans, Asians and other minorities seen in the United States. Furthermore, there is no consistent measurement of those racial/ethnic groups (self-report vs. census data). There is also no guarantee that other minority groups are not being mixed in with either Black, White, or Hispanic which would cause an inaccurate representation about the increase in incarceration for those racial categories.

Washington State Research on Gender Discrepancies in Sentencing

Based on the findings of a Washington study conducted by Engen and colleagues (2003) combined with the empirical support of studies conducted in other states, it can be determined that, historically, in the case of downward departures below the standard range, female defendants, (and in some studies, specifically African American women), were more likely to receive a downward departure compared to male defendants, with Hispanic males having the worst chance of a downward departure. For upward departures, the findings were mixed. The findings for the existing studies all empirically support that females were historically less likely to have an upward departure on their sentencing, however, could not determine if Hispanic or African American males had the highest chance of an upward departure. While it can be shown empirically that Hispanic and African American males are were most likely to receive an upward departure compared to white and Asian males, it is unclear which race was the most impacted. Because the existing research relies primarily on data collected nearly twenty years ago, when incarceration trends were different than current trends, it is unclear if these trends around exceptional sentencing are relevant today (Doerner & Demuth, 2010; Engen et al., 2003; Johnson, 2005; Johnson & Betsinger, 2009a, 2009b; Kramer & Ulmer, 2002; Mustard, 2001; Spohn & Brennan, 2011).

In a study conducted by Engen and colleagues (2003) of felony convictions from 1989-1992 (N=46,552) in the state of Washington, the researchers found that there was a statistically significant relationship between race/ethnicity, gender, age, type of plea and downward (lesser) sentencing. The authors reviewed two legal mechanisms in Washington State courts that can lead to departures from the standard sentencing provision: "discretionary departure provisions" (which refer to departures from standard guidelines and can lead to upward or downward departures) and "structured sentencing alternatives" (which can only be used to lesson a sentence). The authors found that 92% of the sentences in the study period that departed from the standard range were produced via one of the legal sentencing options. This indicates that judges very rarely disregarded the sentencing laws (Engen et al., 2003).

During the study period in Washington State, 20% of eligible cases received a downward departure. This figure includes both discretionary departure provisions and structured sentencing alternatives. Of those cases receiving a downward departure, approximately 13% were discretionary departures, 35% Conversion, 29% FTOW (First-Time Offender Waiver), and 16% SSOSA (Special Sex Offender Sentencing Alternative). Males were 46 percent less likely to receive a lesser sentence than the presumed range compared to females who were more likely to receive a downward departure when their situations were similar. For defendants who were African American or Hispanic, the odds of receiving a lesser sentence were about 32% less and 55% less respectively than a non-Hispanic White defendant. The researchers also found that older defendants and those who pleaded guilty were more likely to receive a lesser sentence than the presumed guideline (Engen et al., 2003).

Upward sentencing in Washington state during the study period was very rare, occurring in only 2% of eligible cases. For upward sentencing departures (harsher), gender did not have a statistically significant relationship. The odds of aHispanic defendant receiving an upward sentencing departure were 45 percent higher than a White defendant while African American defendants were 35 percent less likely than White defendants to receive a harsher sentence. The older defendants had a higher chance of receiving an upward sentencing departure while those who plead guilty are less likely to receive a harsher sentence. The authors describe potential interactions between discretionary departures and structured sentencing alternatives in Washington State's system. The most serious crimes and drug delivery offenses are ineligible for sentencing alternatives. Only incarcerated individuals eligible for these alternatives were considered in the analysis, meaning that the cases analyzed were less serious cases. This could indicate that judges choose not to use available sentencing alternatives when the defendant is already facing a very short sentence and that they are more likely to use an alternative sentence when the sentence would be great enough an alterative would make a meaningful difference. This is an important consideration when interpreting this study, because it highlights an area were the analysis did not explore—the sentence severity by subpopulation when comparing those receiving a downward departure to those who may have had a short sentence without a departure (Engen et al., 2003).

Unfortunately, this study does not break down the intersection of race/ethnicity and gender, so it is impossible to determine if the race/ethnicity of a specific gender, like female, has a different impact. It is important to note that this study was completely quantitative and does not detail the reasons behind the sentencing departures. It is also important to note that decisions by the court were the focus of the study but one must also consider the sentencing recommendations of the prosecution as well as the defense when reviewing disparate sentencing. There is also a

concern that this study only utilized the years of 1989-1992 and only included those who had felony convictions. This focus on felony cases allows this study to only generalize their findings to similarly situated felony cases, therefore, missing out on misdemeanor cases. Given the length of time since those years, it would be beneficial to replicate this study and, considering the potential for a small sample size of female defendants, utilize a sample over a longer period. Special attention should be paid to separating the sample's race/ethnicity by gender for analysis to allow for the identification of effects based on the intersection of race/ethnicity and gender. Another consideration would be the replication of this study examining both felony and misdemeanor crimes to determine if there is a difference in exceptional sentencing in regard to the severity of crime.

Unfortunately, there are a limited amount of studies that specifically look at exceptional sentencing departures and an even smaller amount of studies that focus on Washington. Most of the available research focuses on the effect of race/ethnicity, gender, socio-economic status, and other factors on sentencing outcomes and length of sentences but does not include upward and downward sentencing departures. In addition to the few studies that analyze exceptional sentencing, there is a lack of focus on the intersection of gender and race/ethnicity and only one study controlled for socio-economic status. More focus needs to be placed on other attributes like citizenship status in future research. In addition, there is a concern with the operationalization of race and ethnicity. Race is typically categorized into two options (White/Black) or three (White/Black/Other). Brennan and Spohn (2009) purposefully removed Asian and Native American participants from their sample due to a small participant size, a constant concern when trying to measure race. While Johnson & Betsinger (2009) provided a well-done contribution that included Asian offenders, it is the only one found to do so. Native Americans, for example, are not included in any of the studies regarding exceptional sentencing. Studies including Native Americans have focused on sentencing outcome and length only. Another concern is the Hispanic classification, which is also limited in the research. Hispanic can be of many races so there needs to be a more descriptive variable on how ethnicity is being measured to allow for replication. For example, in the study by Engen and colleagues (2003), they limit the categorization as white non-Hispanic. However, there are Hispanics who are of the white race. This mis-categorization could result in shifting the findings inappropriately, so extra care should be paid to correctly identifying Hispanic participants in order to truly measure the impact of ethnicity as suggested by Demuth and Steffensmeier (2004).

2.7.2 The disparate impact of sentencing changes upon minority and marginalized communities.

Throughout the past 50 years, developments in sentencing laws and sentencing courts' discretionary decisions effected marked disproportionate sentences for individuals belonging to minority and marginalized communities. The dramatic increase in disparity resulted from both laws and policies focused upon certain categories of crimes as well as the explicit and implicit biases of sentencing judges granted discretion, albeit limited discretion.

As discussed in Section 2.____, beginning around the 1970s, the "Get Tough on Crime" movement emerged as a result of the "War on Drugs" introduced by President Nixon (Gordon, 1990; Turner, Sundt, Applegate, & Cullen, 1995; Moore & Elkavich, 2008; Brennan & Spohn, 2008). Examples of the "get tough on crime" policies passed during this time were the three

strikes laws and crack/cocaine sentencing disparities. Research on the impact of the "tough on crime" policies provide robust empirical support that these policies resulted in the overrepresentation of minorities in the criminal justice system, with African American males composing the greatest percentage (Bronson & Carson, 2019; Zeng, 2019; Hattery & Smith, 2014; Jefferson Exum, 2004; Pasko, 2002; Rocque, 2011; Brennan & Spohn, 2008). One reason for the cause of this overrepresentation are sentencing disparities based on gender and race/ethnicity. As a result of these disparities, the state of Washington and 20 other states, including Washington D.C. and the federal system, have implemented sentencing guidelines for the purposes of limiting judicial discretion and increasing equality throughout the court process (Harris, Evans, & Beckett, 2011; Rocque, 2011). It is important to note that the guidelines allow for the exercise of judicial discretion in varying from the determined sentence range in certain cases, referred to as exceptional sentence availability (Harris et al., 2011). *See* Section 2.____ for further details. Despite the desired outcome of having determined sentencing guidelines, studies of exceptional sentencing use have found that "judicial departures" from the guidelines have continued the trend of disparities based on gender and race (Johnson, 2005; Kautt, 2009; Murakawa & Beckett, 2010). One theory behind the continued disparities associated with the use of exceptional sentencing focuses on the court players, i.e. judge and prosecutor, who make the decision to deviate from the presumed guidelines (Johnson, 2005; Harris et al., 2011).

The purpose of a court-ordered sentence is to act as a deterrent, directly and/or indirectly, and to be an appropriate punishment for the violation of a law. Exceptional sentencing is utilized when the sentencing range may be inappropriate for a case judgement for multiple reasons. Referred to as bounded rationality, judges consider three overall factors: blameworthiness or culpability, dangerousness and risk of future crime, and individual offender and organizational sentencing constraints (Johnson, 2005; Jordan & Freiburger, 2015). However, the determination of these three overall factors is based on the judge's individual subjective determination of what is dangerous, who is responsible, and by the needs of the offender, community, and court. Therefore, every judicial decision/judgment is subjected to the biases and experiences of that court judge and the needs and influences of the community that court is within, including during election time (Johnson, 2005; Harris et al., 2011; Berdejó & Yuchtman, 2012; Kramer & Ulmer, 2002; Ulmer & Johnson, 2004; Rocque, 2011; Murakawa & Beckett, 2010; Britt, 2000). To determine the influence of the community around the courts, Johnson (2005) conducted an analysis of the Pennsylvania departure decisions for both upward and downward departures. Using data from 1999 and 2000 obtained from the Pennsylvania Commission on Sentencing, Johnson (2005) found that young offenders, male offenders, minority offenders, and offenders convicted at trial are less likely to receive downward departures and more likely to receive upward departures. The researcher also found that sentencing departures by courts varied depending on the community and the court size (Ulmer & Johnson, 2004). The larger the court, the rate of both upward and downward departures for sentencing increased (Johnson, 2005). The findings also found modest support for a social trend that may be contributing to exceptional sentencing disparities: fear of the racial group threat based on stereotypes (Johnson, 2005; Ulmer & Johnson, 2004; Steen, Engen, & Gainey, 2005; Johnson, Stewart, Pickett, & Gertz, 2011).

One theory for the judicial decision-making process that has resulted in the increased likelihood of upward departures for minorities, especially African Americans, is the racial group threat theory (Ulmer & Johnson, 2004; Feldmeyer & Ulmer, 2011). Racial group threat theory argues that the racialized social systems contribute to the racial disparity to contain the "threat" of racial groups to those in position and power (Ulmer & Johnson, 2004; Alexander, 2010). The

"threat" is reinforced by stereotypes, like minority criminals, which invokes fear and will often influence the thoughts and actions of people, like judges. Consciously or subconsciously, racial stereotypes influence the decision-making. A prime example is the determination of what makes someone more dangerous compared to another when they committed similar acts. Thus, the racial disparity is reinforced through policies and practices that are explicitly colorblind (Schlesinger, 2011; Ulmer & Johnson, 2004; Feldmeyer & Ulmer, 2011; Jordan & Freiburger, 2015; Steen et al., 2005; Alexander, 2010). In a study of judicial interviews conducted with criminal justice decisionmakers from three counties within Washington state in combination with three years of felony drug offense data, Steen and colleagues (2005) tested the impact of racial stereotypes on sentencing decisions. They found that offenders being the most like the perceived stereotypes of a drug offender (i.e. prior history) received less leniency regardless of race. However, race did impact the determination of stereotype. White drug offenders were classified into categories of seriousness and dangerousness based on factors, whereas, all black offenders were treated the same regardless of those factors. As a result, black drug offenders received upward departures despite prior histories except for black female non-dealers and black first-time offenders. Downward departures occurred primarily for white drug offenders only while the guidelines were enforced for the black offenders (Steen et al., 2005). Stereotypes are theorized to contribute to the disparity of treatment for men and women. [We are working on some possible visuals to complement these paragraphs]

Compared to male offenders, many studies provide empirical support that female offenders are more likely to receive leniency from the criminal justice system, specifically within the court system regardless of offense type (Goulette, Wooldredge, Frank, & Travis III, 2015; Koons-Witt, 2002; Franklin & Fearn, 2008; Gathings & Parotta, 2013). As mentioned previously, judicial decision-making is based on three factors. According to the chivalry/paternalism theory, males, who dominate the criminal justice system, associate females with their mothers, sisters, wives, and daughters. As such, they are less likely to view the women as dangerous and blame-worthy, as women are often associated as victims, nurturing, and docile (Goulette et al., 2015; Koons-Witt, 2002; Franklin & Fearn, 2008). Women who conform to the "appropriate" gender role are most likely to be given preferential treatment whereas females who act in a manner outside of the role are most likely to be punished (Goulette et al., 2015; Koons-Witt, 2002). Racial stereotypes also persist for minority females as they did with minority males, although females regardless of race/ethnicity were handled more leniently (Brennan, 2006). In a study of judicial decision-making, Goulette and colleagues found that black females were given higher bail amounts, were more likely to be detained, and receive prison sentences compared to white females. Goulette's findings were supported by Steffensmeir and Demuth (2006), who found that the intersectionality of gender with race/ethnicity did lead to a disparity with females bring treated more leniently by the court (Goulette et al., 2015; Steffensmeir & Demuth, 2006; Brennan, 2006). [We are working on identifying Washington data or noting lack of data.]

Despite the empirical support of the above studies, there is a notable gap within the literature regarding the intersectionality of gender, race/ethnicity, and social status. Much of the research focuses on African American and white males and females. A few studies exist that investigate exceptional sentencing for Hispanics and one study exists studying the use of exceptional sentencing and the impact on Asians. There is no research that can be found that examines the exceptional sentencing for Native Americans and the underlying legal, political, or social environment that influences exceptional sentencing disparities. The theories that exist have primarily focused on determining why gender and racial disparities exist in judicial decision-

making for pre-trial release, sentencing, and sentencing length. In order to truly grasp the underlining issues, more research needs to be done that specifically examines the use of exceptional sentences.

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We appreciate this opportunity to receive feedback on the draft sections of the Gender Justice Study related to gender bias in civil proceedings as they relate to violence, domestic violence and sexual assault. Please note: this is a working draft that we are still researching and editing. At this point, we are looking for substantive feedback rather than copy editing. We have provided comments throughout the document (highlighted and in brackets) to point out areas where we are still conducting research. You can send comments on the draft to Jackie.SheaBrown@co.benton.wa.us and cntr-laura.jones@courts.wa.gov.

There are a few areas that we are particularly interested in hearing your feedback:

1. Are there any gaps?
    - Note: One gap that we have recently discussed is including more information re: education and resources for various stakeholders, as so many of the original study recommendations centered on this.
2. What is the overall tone of the study, and is our section in line with that?
3. Are there topics that should be discussed in greater depth?
4. Where we've flagged a need for additional information in the draft, do Commission members have any resources or contacts that we could consult?
5. Are there areas where legalese needs to be translated into plain English?

We would like to also like to recognize the hard work of Rob Mead in conducting the preliminary research that informed the foundation of this section as well as the valuable writing contributions of Cynthia Jones and the dedicated research efforts of Sierra Rotakhina.

Sincerely,

Laura Jones and Judge Jackie Shea-Brown
Study Leads for Sections 2.1 and 3.6

CONSEQUENCES OF VIOLENCE

In the 1989 Final Report, the Task Force's Subcommittee on the Consequences of Violence evaluated the judicial system's response to domestic violence and adult rape, two of the major categories of violence against women, to determine whether gender bias was evident in the implementation of domestic violence and sexual assault laws and in the treatment of victims. The Subcommittee gathered information from public hearings and surveys from domestic violence service providers, sexual assault service providers, judges, and lawyers.

The Task Force found that while much progress had been made in the fifteen years preceding the 1989 Final Report, gender bias continued to affect the judicial system's handling of domestic violence and rape cases and **made recommendations** to address the bias as it impacted treatment of victims and the interpretation and application of laws, **including**[1]:

- Strengthen the laws;
- More education and funding to adequately address violence for those working in the justice system;
- Uniform and simpler forms;
- Legal counsel for victims;
- Quality and accessible treatment for offenders;
- Sensitivity towards victims from court staff and judges; and
- More rigorous prosecution and punishment.

[We are developing an Appendix that lists the 1989 recommendations and the status of each of those recommendations]

[1] For a complete list of recommendations from the 1989 Final Report, please refer to Appendix **

Since the 1989 Report was published, Washington has made great strides in addressing legal remedies for domestic and sexual violence; however, there continues to be a high incidence of gender-based violence which disproportionately impacts women, people of color, people living in poverty, and LGBTQ communities. This section of the report will give an overview of changes that have been made in the law since 1989, as well issues that still deserve attention to help reduce the prevalence of gender-based violence in Washington State. [We are still conducting the following research to be included in this section: data on the disproportionate impacts of violence and research addressing gender and intersectional bias experienced by people accessing the court system]

DOMESTIC VIOLENCE

There has not been a recent study of the efficacy of domestic violence law in Washington, but one truth is clear: domestic violence in Washington has not substantially decreased in the thirty-one years since the 1989 Final Report was published, despite significant focus from both the legislative and judicial branches. Washington continues to report a high incidence of domestic violence as compared to most other states. For example, the most recent *National Intimate Partner and Sexual Violence Survey* from 2017 shows that between 2010-2012, Washington reported the fifth-highest lifetime prevalence of intimate partner physical violence (37.5 percent of women) in the nation.[2] The national prevalence is 32.4 percent and Kentucky reported the highest prevalence rate at 42.1 percent.[3]

[2] Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report* (2017) Table 5.7, available at https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf.
[3] *Id.*

As Washington's population has grown 155 percent since 1989, from 4.867 million to 7.546 million[4], so have the number of domestic violence filings. In 1988 there were over 6,000 domestic violence hearings in the Superior Courts and 3,500 hearings in the District Courts.[5] In 2017 there were XXXX domestic violence petitions with XXXX hearings in Superior Courts and XXXXX hearings in District Courts. [We are working on getting this data] Local domestic violence programs served 24,642 victims of domestic violence and their children, with 5,379 receiving emergency shelter in 2017.[6] This is an increase from 2013, when 21,314 victims and their children received domestic violence services and 5,599 received emergency shelter.[7]

While the comparatively high level of lifetime prevalence in Washington and increase in domestic violence filings may be partially attributable to strong reporting mechanisms, this data demonstrates that domestic violence remains a significant problem in Washington. [We are still conducting research to put this information into context: How does WA compare to other states? Have other states successfully reduced rates? Evidence-based interventions/programs/policies? Or, does WA have better reporting mechanisms so higher rates of reported DV?]

Major Changes to Domestic Violence Law Since 1989[8]

[4] State of Washington, Office of Financial Management, Total Population and Percent Change, available at https://www.ofm.wa.gov/washington-data-research/statewide-data/washington-trends/population-changes/total-population-and-percent-change.

[5] Washington State Task Force on Gender & Justice in the Courts, *Gender & Justice in the Courts* 8 (1989), http://www.courts.wa.gov/programs_orgs/gjc/documents/Gender%20and%20Justice%20in%20the%20Courts--Final%20Report,%201989.pdf.

[6] Email to Rob Mead from DSHS- how do we cite this?

[7] Washington State Department of Social and Health Services, *2013 Washington State Emergency Domestic Violence Shelter and Advocacy Services*, https://www.dshs.wa.gov/sites/default/files/CA/dv/documents/DVDATA-FY13.pdf.

[8] The best source for a systematic overview of domestic violence law in Washington is the *Domestic Violence Manual for Judges*, most recently updated in 2016, produced by the Administrative Office of the Courts, and available on the Washington State Supreme Court Gender and Justice Commission's website.[8] This resource tracks the ever-increasing complexity of the law and the associated appellate decisions in a comprehensive manner that is beyond the scope of this review.

Instead of creating separate crimes of domestic violence, the Washington State Legislature has added specific procedures and requirements for addressing and preventing it, finding that "the existing criminal statutes are adequate to provide protection for victims of domestic violence."[9] Domestic violence laws are codified primarily at RCW 26.50 (domestic violence prevention) and RCW 10.99 (addressing the official response to domestic violence by police). RCW 70.123 provides funding and requirements for domestic violence shelters. Taken together, the Washington State Supreme Court has found that Washington has evinced "a clear public policy to prevent domestic violence—a policy the legislature has sought to further by taking clear, concrete actions to encourage domestic violence victims to end abuse, leave their abusers, protect their children, and cooperate with law enforcement and prosecution efforts to hold the abuser accountable."[10]

Current legal reform efforts to reduce domestic violence in Washington focus on several key issues: reduction of perpetrator access to firearms; evaluation of perpetrator treatment and risk assessment; and, increased focus on reducing domestic violence against women of color, particularly indigenous women who experience domestic violence and physical assault at rates as much as 50 percent higher than other populations when living on tribal reservations.[11] Additionally, many technical reforms have also been implemented to address recidivism, such as the elevation of DV assault in the fourth degree from a gross misdemeanor to a class C felony based on repeated criminal history and required DNA collection from offenders who are convicted of assault in the fourth degree.[12]

[9] RCW 10.99.010.
[10] *Danny v. Laidlaw Transit Services*, 165 Wn.2d 200, 198 P.3d 128 (2008).
[11] Steven W Perry, *American Indians and Crime- A BJS Statistical Profile 1992-2002*, Bureau of Justice Statistics, US Department of Justice, Office of Justice Programs, December 2004.
[12] Laws of 2017, ch. 272.

Reduction of DV Perpetrator Access to Firearms

Because firearms are used in over half of domestic violence homicides committed in Washington, one of the key legislative responses to domestic violence has been the attempt to significantly reduce lethality by limiting perpetrator access to firearms.[13] In 2014, the Legislature amended RCW 9.41.040 to strengthen the requirement to surrender firearms by parties subject to various types of protection orders. This state law works in tandem with the 1994 amendment to the federal Gun Control Act, 18 U.S.C. § 922(g), prohibiting gun possession by those convicted of domestic violence crimes. These gun restriction laws are important efforts to try to reduce the lethality of domestic violence. In 1997, the Courts amended CrR 4.2 and CrRLJ 4.2 to require written advisement of the effect of a guilty plea on the right to possess a firearm.[14] The Washington State Coalition Against Domestic Violence (WSCADV) has also recommended numerous strategies for advocates, courts and law enforcement to ensure safe removal of firearms from perpetrators subject to protective orders, including the following: "[i]nclude Motion for Surrender and Order to Surrender in all Protection Order packets and with domestic violence forms on AOC website" and "[a]lways ask about guns in safety planning."[15]

To improve compliance with firearm surrender, in 2019, the Legislature amended RCW 9.41.800 (in SHB 1786) to emphasize the duty to immediately surrender all weapons.[16] This law also adds a new section to RCW chapter 9.41 explaining that:

> Because of the heightened risk of lethality to petitioners when respondents to protection orders become aware of court involvement and continue to have access

[13] Washington State Coalition Against Domestic Violence, *Domestic Violence Fatalities in Washington State* 8 (June 2016), available at https://wscadv.org/wp-content/uploads/2016/12/2016-DV-FATALITIES-IN-WA-STATE-updated-links.pdf (perpetrators used firearms in 56% of domestic violence homicides between 2006 and 2015).
[14] Washington Statutes Annotated - 1997
[15] "Strategies for Effective Protective Orders" (WSCADV, February 2018), available at https://wscadv.org/resources/strategies-effective-orders/.
[16] Laws of 2019, ch. 245.

> to firearms, and the frequency of noncompliance with court orders prohibiting possession of firearms, law enforcement and judicial processes must emphasize swift and certain compliance with court orders prohibiting access, possession, and ownership of firearms.[17]

The new section instructs law enforcement to explain that immediate surrender is required at the time of service of process and that the officer shall take possession of all firearms, dangerous weapons, and concealed carry licenses at that time. Law enforcement is directed to alert the court of any failure to comply so that the court may issue a search warrant for the weapons.

SHB 1786 was signed into law and became effective on July 28, 2019. This bill revised protection order, no-contact order, and restraining order provisions that include an order to surrender firearms, dangerous weapons, and concealed pistol licenses, including the following changes:

- Requires service by law enforcement of an order that includes a provision to surrender firearms, dangerous weapons, and any concealed pistol license;
- Establishes a procedure for surrender of firearms, dangerous weapons, and any concealed pistol license to law enforcement and authorizes courts to issue warrants to seize firearms and dangerous weapons when there is probable cause to believe the respondent has failed to comply with the order to surrender;
- Makes it Unlawful Possession of a Firearm when a respondent possesses a firearm in violation of a qualifying order that meets certain criteria and includes an order to surrender firearms and prohibition on possessing firearms; and

[17] *See* RCW 9.41.801

- Requires the Administrative Office of the Courts (AOC) to create a statewide pattern form and issue annual reports on the number of orders issued by each court, degree of compliance, and number of firearms obtained.

In 2020, the Legislature passed SHB 2622 to take effect on June 11, 2020. SHB 2622 provides additional procedures for judges to ensure compliance with court-ordered firearms surrender as related to protection orders, no-contact orders and restraining orders.[18] The procedures include issuing an order to show cause at a compliance review hearing, requiring law enforcement to accomplish service of the order on the respondent and authorizing the court to impose remedial sanctions "designed to ensure swift compliance with the order to surrender weapons."

The legal remedies for limiting access to weapons by domestic violence perpetrator is hampered by the fact that many perpetrators illegally keep weapons. For example, the Washington State Coalition Against Domestic Violence found that firearms were used in 369 of the 678 domestic violence homicides between 1997 and 2014; 54% of those perpetrators were prohibited from owning guns.[19] While there are no known studies of barriers to implementation of Washington state's forfeiture laws, one out-of-state study "found that even when a protective order banned possession of a firearm, law enforcement officials failed to take effective steps to enforce those orders by seizing or otherwise removing those firearms from abusive households."[20] The conclusion of the study, surveying 782 female victims of intimate partner

[18] Laws of 2020, ch. 126 available at http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/House/2622-S.SL.pdf?q=20200416100954.

[19] Washington State Coalition Against Domestic Violence, Issue Brief: Firearms Prohibitions & Domestic Violence Homicides (June 2015), available at https://wscadv.org/resources/issue-brief-firearms-prohibitions-domestic-violence-homicide/.

[20] https://www.preventdvgunviolence.org/assets/documents/legal-landscape/police-seizure-of-firearms-at-scenes-of-domestic-violence.pdf, *citing* Webster, D., Frattaroli, S., Vernick, J., O'Sullivan, C., Roehl, J., & Campbell, J.

violence (IPV) in New York and Los Angeles, was that "[b]ased on the perceptions of the IPV victims in this study, laws designed to disarm domestic violence offenders were either poorly implemented or failed to inform victims when their abuser's firearms were surrendered or confiscated." Similarly, a fifty-state survey of gun forfeiture laws found that state laws vary widely, and that even those that have legislated on the issue of dispossession… [We are still looking for additional information on barriers to enforcement in Washington]

Although barriers to enforcement of forfeiture laws exist in both urban and rural communities, those barriers may be different based on the setting, and thus, local policies implemented may need to be framed differently based on the urban-rural divide. For example, a survey conducted of professionals and law enforcement officers conducted in Kentucky, the state with the highest proportion of gun-related intimate partner deaths of both men and women between 2003-2012, found that while both urban and rural communities experienced difficulties preventing the purchase of new guns and perpetrators lying about or hiding their guns, every other theme related to ability to enforce gun confiscation showed significant urban and rural differences.[21] Barriers unique to rural communities included stronger elements of perceived gun culture; deterrent to reporting by victims fearful of community backlash; and a "good ol' boy" network in the community.[22]

Evaluation of DV Perpetrator Treatment and DV Risk Assessment:

(2010). Women with protective orders report failure to remove firearms from their abusive partners: Results from an exploratory study. Journal of Women's Health, 19(1), 93-98. doi: 10.1089/jwh.2007.0530.

[21] Kellie R. Lynch, TK Logan, and Dylan B. Jackson, "People will Bury Their Guns before They Surrender Them": Implementing Domestic Violence Gun Control in Rural, Appalachian versus Urban Communities, 83 Rural Sociology 315 (2018). *See also* Kellie R. Lynch and TK Logan, "Implementing Domestic Violence Gun Confiscation Policy in Rural and Urban Communities: Assessing the Perceived Risk, Benefits, and Barriers," online prepublished in Journal of Interpersonal Violence (2017), https://doi.org/10.1177/0886260517719081.

[22] *Id.*

Another key area of legislative focus has been improving treatment and risk assessment of domestic violence offenders. In 2017, the Legislature enacted E2SHB 1163[23] which began the process of significantly reforming domestic violence law with the intent to reduce recidivism. The Senate Bill Report noted:

> DV offenders are the most dangerous offenders we deal with and have the highest recidivism rates among offenders. Fifty-four percent of mass shootings are related to DV and police are three times more likely to be murdered responding to a DV call than any other call with shots fired. Progression of violence is prevalent among offenders.

Section 7 of E2SHB 1163, effective July 23, 2017, created the Domestic Violence Perpetrator Treatment Work Group (hereafter referred to as the Section 7 Work Group) co-chaired by Judges Eric Lucas and Marilyn Paja of the Gender & Justice Commission. This Work Group submitted a reported entitled *Domestic Violence Perpetrator Treatment: A Proposal for an Integrated System Response* to the legislature in June 2018. The report called for the end of Washington's "'one size fits all' treatment regime, which is largely seen as unsatisfactory and in need of correction." To move forward on the issue of domestic violence treatment, the Section 7 Work Group called for an Integrated System Response, coalescing around the new regulations for domestic violence treatment, WAC 388-60B, promulgated by the Department of Social and Health Services, which replaces "one size fits all" treatment with a four-tiered cognitive behavioral therapy treatment approach.

The Section 7 Work Group also advocated for the creation of DV Therapeutic Courts to serve as an information repository for batterer treatment that will allow data collection, rigorous research, and support the goal of developing an evidenced-based system. These goals are absent from the status quo as treatment centers do not have access to the information housed in the

[23] Laws of 2017, ch. 272.

courts and law enforcement agencies and researchers do not have access to the information housed in treatment centers. One such therapeutic approach is the multi-disciplinary team pilot project in Seattle, the Domestic Violence Intervention Project.[24] Another possibility is for courts to create a DV treatment review calendar for all criminal and civil protective order DV cases, which would allow greater access to relevant information across types of cases, and would also promote greater compliance with orders to participate in DV treatment. Another approach would be court delivery of DV Moral Reconation Therapy (DV-MRT).[25]

Importantly, the Section 7 Work Group also advocated for a "reliable funding scheme for all court-ordered treatment" given that many batterers are unable to afford the current cost of domestic violence treatment which is not covered by most health insurance; ongoing monitoring of system performance through data collection, research, and adaptation of treatment regulations; and the provision of training and resources to professionals working in the area of DV.

The 2019 Legislature responded to the Section 7 Work Group in E2SHB 1517[26] noting the pervasiveness of domestic violence, and that "victims and offenders are owed effective treatment and courts need better tools." In additional to reconvening the work groups for additional work related to DV Perpetrator Treatment, the Legislature directed that The Harborview Center for Sexual Assault and Traumatic Stress develop a "training curriculum for domestic violence perpetrator treatment providers that incorporates evidence-based practices and treatment modalities" consistent with the new DSHS regulations by June 30, 2020.

[24] *See* https://www.seattle.gov/courts/programs-and-services/specialized-courts/domestic-violence-intervention-project.

[25] Include reference to Gender Bias Study pilot project to assess efficacy of DV-MRT in Washington. This recommendation came from the work groups. Will this pilot be discussed in-depth in another place of the report?

[26] Laws of 2019, ch. 263

Section 8 of the law created a Domestic Violence Risk Assessment Work Group (hereafter referred to as the Section 8 Work Group), also co-chaired by Judges Paja and Lucas, to "study how and when risk assessment can best be used to improve the response to domestic violence offenders and victims and find effective strategies to reduce domestic violence incidents in Washington State." The Section 8 Work Group submitted the report entitled *Domestic Violence Risk Assessment* to the Washington State Legislator and Governor Jay Inslee in June 2018, which emphasized the need for additional research before adoption of any risk assessment tool. The Section 8 Work Group made the following recommendations for legislative and justice community improvements:

- study feasibility to require all law enforcement jurisdictions to utilize the same risk/lethality assessment tool immediately at a DV scene;
- consider explicit and implicit bias when determining whether to adopt a risk assessment tool, particularly a pretrial release tool;
- consider expanded use of risk assessment by victim advocates and update forms for protection orders;
- courts should consider whether best practices require judges to review the Judicial Information System in all DV protection order proceedings to assess risk and prevent issuance of conflicting orders;
- additional funding for all Washington courts to implement a review calendar for firearm surrender;
- family law attorneys should refer clients to victim advocates trained in risk assessment and safety planning when clients who are DV victims express safety concerns;

- allocate adequate resources for social worker training in dependency cases and update the Social Worker's Practice Guide to Domestic Violence.[27]

Risk assessments are tools used at various stages of the criminal justice process, from law enforcement assessing potential lethality of a batterer to judges deciding whether to release an alleged batterer on bail pending trial. The Section 8 Work Group noted the importance of developing validated risk assessment tools with the "highest degree of predictive accuracy" and to maintain high-quality, statewide data in order to test and refine the assessment tools over time. As various projects designed to reform bail are implemented throughout Washington, the Section 8 Work Group noted the importance of protecting victims from recidivist batterers by integrating domestic violence risk assessment into bail reform projects. Finally, the Section 8 Work Group acknowledged the need to avoid creating risk assessment tools that unfairly targets racial or ethnic groups, either directly or indirectly through over-emphasis of general criminal history, recognizing that prior arrests and convictions can be affected by implicit racial bias.

In addition to reconvening the work group pursuant to E2SHB 1517, the Legislature directed the Washington State University Department of Criminal Justice to develop a risk assessment tool by July 1, 2020, to predict future domestic violence.[28]

One of the key issues identified by both the Section 7 and Section 8 Work Groups was Washington's definition of domestic violence, RCW 26.50.010, that, since 1995, has been a "narrow range of behavior applied across a wide range of relationships." Because both intimate partners, former intimate partners, and all other people who are residing together were lumped into the same category under the law, it was impossible to isolate good data for risk assessment

[27] Domestic Violence Risk Assessment (June 2018), available at http://www.courts.wa.gov/content/publicUpload/GJCOM/DV_Risk_Assessment_Sec8.pdf.
[28] Laws of 2019, ch. 263, section 401 which will be codified at RCW 9.94A.

and treatment development and implementation. Effective DV treatment for intimate partners does not correlate to others who just reside in the same household.

In 2019, the Legislature remedied this problem in Laws of 2019, chapter 263, by separating intimate partner violence and other household member violence into separate sections of RCW 26.50.010(3):

> (3) "Domestic violence" means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, ((~~between family or household members; (b)~~)) sexual assault ((~~of one family or household member by another;~~)), or ((~~(c)~~)) stalking as defined in RCW 9A.46.110 of one intimate partner by another intimate partner; or (b) physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, sexual assault, or stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

Section (a) of RCW 26.50.010(3) now applies to intimate partners and section (b) applies to family or household members, which will allow separate tracking of the two very different types of domestic violence.

Focus on Missing and Murdered Indigenous Women

The final area of recent legislative activity regarding domestic violence is the recognition of the magnitude of the problem of missing and murdered indigenous women. Over 140,000 native citizens live in Washington state alone, and 29 federally recognized tribes are located within the boundaries of our state.[29] Three tribes, the Duwamish, the Wanapum and the Chinook

[29] American Library Association, *Indigenous Tribes of Seattle and Washington*, available at http://www.ala.org/aboutala/indigenous-tribes-seattle-and-washington.

tribes, are not recognized by the U.S. government but have a long history in present day Washington.[30]

Unfortunately, violence perpetrated against indigenous women is not new. Abigail Echo-Hawk, Director of the Urban Indian Health Institute (UIHI) and Chief Research Officer for the Seattle Indian Health Board, described this history in a letter prefacing the UIHI report *MMIWG: We Demand More:*[31]

> "Missing and murdered Indigenous women and girls (MMIWG) is not a new crisis in the United States. This continuous and pervasive assault on our matriarchs has existed since colonizers set foot on this land. Decades of advocacy and activism fell on deaf ears, while more and more of our women went missing and were murdered. And while their families sought justice, they were shown at every turn by police and government agencies that Indian women and girls don't count."

This targeted victimization continues today. The U.S. Department of Justice has found that 84.3 percent of Native women have experienced violence.[32] According to Professor Sarah Deer's research, 56 percent of Native women have experienced sexual violence and 85 percent of lesbian, bi-sexual and Two Spirit Native Women have experienced sexual violence.[33] She reports that 97 percent of women victims experienced violence by an interracial perpetrator.[34]

According to the Center for Disease Control and Prevention, indigenous women are murdered at significantly higher rates than women of other races.[35] However, there is a need for better data collection number of murdered or missing indigenous women and girls (MMIWG). For example, in 2016 the National Crime Information Center reported 5,712 missing American

[30] *Id.*
[31] Available at https://www.uihi.org/resources/mmiwg-we-demand-more/.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Petrosky E, Blair JM, Betz CJ, Fowler KA, Jack SP, Lyons BH. Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014. MMWR Morb Mortal Wkly Rep 2017;66:741–746.

Indian and Alaska native women and girls, whereas NamUs, the United States Department of Justice's federal missing persons database, only reported 116 cases.[36] In a 2018 report, the UIHI[37] found that while 71% of American Indians/Alaska Natives live in urban areas, only 506 cases of MMIWG were identified in 71 cities from 1900-2018.[38] Reasons cited for the lack of quality data include "underreporting, racial misclassification, poor relationships between law enforcement and American Indian and Alaska Native communities, poor record-keeping protocols, institutional racism in the media, and a lack of substantive relationships between journalists and American Indian and Alaska Native Communities.[39]

Recognizing the lack of a comprehensive data collection system and the need for the criminal justice system to better serve Native American women, in 2018, the Washington State Legislature passed Substitute House Bill 2951. This legislation directed the Washington State Patrol to conduct a study "to determine how to increase state criminal justice protective and investigative resources for reporting and identifying missing Native American women in the state" and to submit a report to the Legislature by June 1, 2019.[40]

In its report, the Washington State Patrol reported 56 missing Native American women in Washington State based on National Crime Information Center statistics.[41] It also identified the following barriers to collaboration between tribes, urban communities and law enforcement that have led to undercounting of MMIWG: inconsistency in reporting methods; cultural

[36] *See* National Crime Information Center (2018). Federal Bureau of Investigation; Department of Justice (2018) NamUs, available at https://www.namus.gov/MissingPersons/Search.
[37] The UIHI is a division of the Seattle Indian Health Board.
[38] "Missing and Murdered Indigenous Women and Girls: A snapshot of data from 71 urban cities in the United States" (2018), available at http://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf.
[39] *Id.*
[40] Laws of 2018, ch. 101.
[41] Captain Monica Alexander, Washington State Patrol Missing & Murdered Native American Women Report (2019), available at http://www.wsp.wa.gov/wp-content/uploads/2019/06/WSP_2951-SHB-Report.pdf.

misunderstanding and distrust; lack of focused, easily accessible resources; and communication missteps.[42] The Washington State Patrol report further recommended the study and development of a centralized database.[43]

In 2019, but prior to the release of the Washington State Patrol's report, the Legislature passed Second Substituted House Bill 1713, which established two liaison positions within the Washington State Patrol for the purpose of improving law enforcement response to missing and murdered Native American women.[44] In addition to building relationships between the government and Native communities, pursuant to this legislation, the Washington State Patrol is also required to develop a best practices protocol for law enforcement response to missing persons reports for Indigenous people.[45]

In September 2019, the UIHI issued a response to the Washington State Patrol's report entitled *MMIWG: We Demand More*,[46] stating that "the report is an imprecise recounting of the 10 meetings held with tribal nations and community members across the state with no meaningful or scientifically based analysis of the knowledge shared in those meetings."[47] It also cited a lack of meaningful analysis of quantitative data related to MMIWG.[48] [We are adding in data from this report]

This continues to be an issue that is receiving much-needed attention on a statewide and national level, including in mainstream media. In 2019, Rosalie Fish, a member of the Cowlitz Tribe and a senior at Muckleshoot Tribal School made national headlines when she painted a red handprint over her mouth, the fingers extending across her cheeks to honor the lives of missing

[42] *Id.*
[43] *Id.*
[44] Laws of 2019, ch. 127.
[45] *Id.*
[46] Available at https://www.uihi.org/resources/mmiwg-we-demand-more/.
[47] *Id.*
[48] *Id.*

and murdered indigenous women.[49] At the Washington State 1B track and field championships, Fish also painted on her right leg the letters "MMIW," standing for Missing and Murdered Indigenous Women. As a member of the Cowlitz Indian Tribe, raising awareness for the issue was as natural as running. "I do like to think in native communities, the women are especially strong in the way they voice themselves," said Fish, Muckleshoot Tribal School senior. "I do see a little bit of hope … I think that the MMIW movement is getting more attention than it has in the past."[50] In her four events, Fish won three gold and one silver medal.

Additional Changes to Domestic Violence Law

Some other notable changes to domestic violence law since the 1989 Report include:

- At the national level, the most significant change in domestic violence law has been the passage of the Violence Against Women Act of 1994[51], Pub. L. 103-322. VAWA has been reauthorized several times and has provided over a billion dollars in grant funding to states and localities to address violence against women.
- Pursuant to the Washington's Crime Victim's Bill of Rights[52], passed the same year as the initial Gender Bias Study, victims are afforded the right to "[t]o have, whenever practical, a victim advocate present at prosecutorial or defense interviews and at judicial proceedings.

[49] Megan Rowe, Leaving her Mark: Native High Schooler Uses State Track Meet to Raise Awareness for Missing and Murdered Women, THE SPOKESMAN-Review, May 30, 2019, https://www.spokesman.com/stories/2019/may/30/leaving-her-mark-native-high-schooler-uses-state-t/.
[50] *Id*.
[51] Pub. L. 103-322
[52] Section 35, Article I of the Washington State Constitution.

- RCW 5.60.060 was amended in 2006 to grant privilege to communications between a victim and their domestic violence advocate."[53]
- The 2008 law requiring employers to allow "reasonable leave" for domestic violence victims to address legal and safety concerns.[54]
- The 2018 amendment to RCW 49.76 added provisions to ensure that "victims of domestic violence, sexual assault, or stalking should also be able to seek and maintain employment without fear that they will face discrimination", prohibiting employment discrimination against victims and require workplaces to accommodate safety plans.
- In addition to the reconvening of work groups regarding domestic violence treatment and risk assessment as discussed above, pursuant to E2SHB 1517[55], the 2019 Legislature:
    - Refined the definition of "domestic violence" to distinguish between intimate partner violence and other types of domestic violence in order to "facilitate discrete data analysis";
    - amended RCW 9.94A.500 to include a presentence investigation in drug offender sentencing alternative cases that include domestic violence convictions and RCW 9.94A.662 to require certification in domestic violence treatment in co-occurring drug and domestic violence cases;

[53] This privilege extends to community-based DV advocates, not system-based DV advocates. While both types of DV advocates are focused on victim safety, in addition to different confidentiality protections, they differ in the scope of services provided. System-based advocates are typically employed by a criminal justice agency, and serve as the primary contact for victims with that particular agency and facilitate the victim's participation in the justice process. Community-based advocates provide services to victims regardless of whether they choose to participate in the justice process, and the scope of services tends to be broader. Information about Washington Domestic Violence Programs in each county is available at https://wscadv.org/washington-domestic-violence-programs/.
[54] RCW 49.76.010 et seq. https://app.leg.wa.gov/RCW/default.aspx?cite=49.76.010.
[55] Laws of 2019, ch. 263

- included domestic violence in the community custody and re-entry statute RCW 9.94A.704;
- restricted deferred prosecution if a defendant has previously participated in a domestic violence deferred prosecution;
- ordered the recognition and enforcement of Canadian domestic violence protection orders.

- In 2019, the Legislature also amended RCW 10.99.030 to include traumatic brain injury as it relates to domestic violence in law enforcement curriculum.

In addition to the preceding statutory changes, the Washington Supreme Court has made a number of key decisions regarding domestic violence since the 1989 study. These cases include:

State v. Granath, 190 Wn.2d 548, 415 P.3d 1179 (2018) – The duration of a domestic violence no-contact order entered by a District Court pursuant to RCW 10.99.050 limited to the length of the underlying sentence. The 2019 Legislature amended the relevant statutes, and declared that *Granath* interpretation "inadequately protects victims of domestic violence."[56]

Rodriguez v. Zavala, 188 Wn.2d 586, 398 P.3d 1071 (2017) – The trial court's exclusion of infant son from protective order against father because he did not witness father strangling mother was reversed by a unanimous court. The court held that "exposure to

[56] Laws of 2019, ch. 263, Sec. 301.

domestic violence constitutes harm under the DVPA and qualifies as domestic violence under chapter 26.50 RCW" and reasoned that the son was a victim of domestic violence when his screaming mother was strangled at 2:00 a.m. by his father who was violating a no contact order.

Aiken v. Aiken, 187 Wn.2d 491, 387 P.3d 680 (2017) – A father's due process rights were not violated when a court commissioner denied his request to cross-examine his fourteen-year-old daughter in a domestic violence protection order proceeding where evidence was presented that he had tried to suffocate her. The child had attempted suicide, was unable to confront her father, and would be traumatized by the cross-examination. The Court noted that there was no statutory right to cross-examination and that because due process rights may warrant cross-examination in other cases, a "bright line rule prohibiting cross-examination or live testimony in protective order hearings is inappropriate."

State v. Ashley, 186 Wn.2d 32, 375 P.3d 673 (2016) – The defendant's prior acts of domestic violence were admissible to prove a pregnant mother's lack of consent as an element of unlawful imprisonment where the defendant forced her and their two-year-old to stay in a bathroom while he hid from police in the apartment. She stayed in the bathroom as directed by the defendant because of her fear of getting battered while pregnant, as he had done three times during her prior pregnancy. The prior acts of domestic violence were inadmissible to bolster the victim's credibility, but the error was harmless as they were already introduced for proper purpose.

State v. Gunderson, 181 Wn.2d 916, 337 P.3d 1090 (2014) – The probative value of evidence of a prior domestic violence incident between the defendant and one of two alleged victims was outweighed by its prejudicial effect where the alleged victim testified that the defendant did not assault her during an argument over childcare in his truck and the prosecutor attempted to evidence of prior domestic violence against her to impeach her testimony.

State v. Schultz, 170 Wn.2d 746, 248 P.3d 484 (2011) – In a case of first impression, likely domestic violence is sufficient reason for the police to search a home under the emergency aid exception to the requirement for a search warrant, but a loud verbal fight including the man saying he wanted to be left alone was insufficient evidence of domestic violence, thus the drug evidence found in the home should not have been admitted.

State v. Bunker, 169 Wn.2d 571, 238 P.3d 487 (2010) – The former version of RCW 26.50.110 regarding violations of domestic violence no-contact orders criminalizes all no-contact order violations and is not limited to only those contacts where the perpetrator was violent, threatened violence, or where the contact occurred in a specifically prohibited place, *overruling State v. Hogan*, 145 Wn. App. 210, 192 P.3d 915 and *State v. Madrid,* 145 Wn. App. 106, 192 P.3d 909.

SEXUAL VIOLENCE[57]

[57] The term "sexual violence" has been adopted in this section as it includes a wide range of victimizations. The 1989 report was more narrowly focused on rape.

There has not been a systematic study of judge or prosecutor perceptions of rape victims in Washington since the 1989 Report despite the fact that rape continues at high levels in the state. The 1989 Report analysis of rape consisted largely of comparisons between surveyed opinions of judges and the surveyed opinions of sexual assault service providers who worked directly with victims. Sexual assault remains a harrowing problem for Washington. The most recent *National Intimate Partner and Sexual Violence Survey* (2017) found that in 2010-2012 Washington reported the second highest lifetime prevalence of contact sexual violence (44.8 percent of women, second only to Oregon at 47.5 percent of women) and rape (25.3 percent of women, again second only to Oregon at 26.3 percent of women) of the fifty states. The national reported prevalence rate is that 36.3 percent of women have experience contact sexual violence and 19.1 percent have experienced rape (completed or attempted).[58]

Several major changes and additions to the laws around sexual violence have occurred in Washington since 1989, and will be discussed in the sections that follow. These changes include interpretation of the rape shield statute, civil commitment of sexually violent predators, efforts to address the back log of rape kits, the creation of the sexual assault protection order, extension of the statute of limitations for sexual assault crimes, amendment of the laws granting privilege to include sexual assault advocates, and statewide implementation of the Prison Rape Elimination Act.

***Rape Shield*:**

[58] Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report* (2017) Table 5.7, https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf.

The Washington State Legislature enacted the rape shield statute, RCW 9A.44.020, in 1975 with the intent to encourage victims to report sexual assault and to ensure that the jury is not unduly influenced by a victim's irrelevant prior sexual history.[59] Before the passage of this statute, defendants regularly proffered evidence of victims' prior sexual conduct to prove a "logical nexus between chastity and veracity."[60]

The 1989 study focused on the implementation of the rape shield law, noting that "[w]hile the 1975 "rape shield" statute has certainly reduced the incidence of victims being subjected to improper questions about prior sexual history, it has not eliminated it from the process." The study survey found that 34 percent of judges thought that victims were at least sometimes asked about their sexual history in depositions and other pre-trial interviews whereas 66 percent of sexual assault service providers thought that victims faced such questioning. The study concluded that "The very fact that a rape shield law is necessary suggests historical gender bias. Such bias is unfortunately still operating in the judicial system. The responses of the providers of services to rape victims indicate that such biases still keep victims from making reports to police and from following through with prosecutions."[61]

In 2006, the Washington State Supreme Court held in *State v. Gregory*[62] that evidence that a victim had engaged in prostitution in the past was inadmissible to prove consent in subsequent sexual assault case due to the different nature of the incident at issue and the remoteness in time of the past sexual act: "The factual similarities between the past sexual acts

[59] *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006).
[60] *State v. Peterson*, 35 Wn. App. 481, 667 P.2d 645 (1983).
[61] It is unclear from the survey results whether any of these incidences of questioning about past sexual history were lawful pursuant to the rape shield statute. Future surveys should specify whether victims unlawfully questioned about previous sexual history.
[62] 158 Wn.2d 759 (2006).

and the acts at issue in the case must be particularized, not general." Subsequently, the Legislature extended protection for evidence of past prostitution in 2013 by adding human trafficking, RCW 9A.40.100, to the list of crimes covered in the rape shield law.

In *State v. Posey*[63], the defendant sought to introduce evidence of consent through an email from the victim to another that she would "enjoy" being raped and that she wanted a boyfriend who would "choke her" and "beat her." The Court found that the trial court did not abuse its discretion when it precluded admission of the e-mail evidence because the email was not probative since it was not addressed or sent to the defendant, and because it violated the rape shield statute as it only described potential prior sexual misconduct or potential sexual mores.

In *State v. Jones*[64], the Court interpreted the rape shield law to apply only to past sexual behavior, not behavior contemporaneously connected to the assault. In a unanimous decision, the Court held that the defendant's testimony of the victim's consent during a sex party was highly probative evidence key to the defendant's defense, thus the trial court violated the Sixth Amendment when it barred his testimony under the rape shield statute.

Civil Commitment:

The second major change since 1989 in Washington sexual violence law is the enactment of the Community Protection Act in 1990, making Washington the first state to create a system for the involuntary, indefinite civil commitment of sexually violent predators. A sexually violent predator is defined as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility."[65]

[63] 161 Wn.2d 638, 167 P.3d 560 (2007).
[64] 168 Wn.2d 713, 230 P.3d 576 (2010).
[65] RCW 71.09.020(18) https://apps.leg.wa.gov/RCW/default.aspx?cite=71.09.020.

The process for such commitment can be initiated when the person's criminal sentence is about to expire or after the criminal trial if the person is found incompetent or not guilty by reason of insanity.[66] The statute allows for pleadings for conditional release to a less restrictive alternative or unconditional discharge.

There has been ample litigation in the Washington appellate courts regarding the standards of proof required for civil commitment and the procedural steps of the process. The most important foundational case is *In re Young*[67], which upheld the constitutionality of civil commitment against challenges under the double jeopardy and ex post facto clauses of the state and federal constitutions. Several years later, the U.S. District Court for the Western District of Washington found that the statute violated the due process, ex post facto, and double jeopardy clauses of the federal constitution in *Young v. Weston*[68], but that decision was remanded by the Ninth Circuit[69] in light of the U.S. Supreme Court's 5 to 4 decision in *Kansas v. Hendricks*[70], which upheld the constitutionality of the Kansas Sexually Violent Predator Act based on the Washington statute. In 2001, the United State Supreme Court upheld the sexually violent predator statute in *Seling v. Young*[71] against not just facial, but also applied arguments.

Sexual Assault Kit Backlog

Another change in Washington sexual violence law is recent scrutiny and legislative initiative to solve the unconscionable testing backlog of sexual assault kits. Addressing this backlog is critical for law enforcement to catch serial rapists. Further, it sends the message to

[66] RCW 71.09.030(1) https://apps.leg.wa.gov/RCW/default.aspx?cite=71.09.030.
[67] 122 Wn.2d 1 (1993).
[68] 898 F. Supp. 744 (W.D. Wash. 1995)
[69] 122 F.3d 38 (9th Cir. 1997)
[70] 521 U.S. 346 (1997)
[71] 531 U.S. 250 (2001).

both victims and rapists that sexual assault is taken seriously. In 2015, the Legislature enacted a law requiring the preservation and forensic analysis of sexual assault kits.[72] In 2016, the Legislature ordered the Washington State Patrol to create a statewide tracking system to address the testing backlog.[73] In 2019, the Legislature established the Sexual Assault Forensic Examination Best Practices Advisory Group (hereafter Advisory Group) to work with the Attorney General to remedy the backlog and appropriated $10.3 million to test the nearly 10,000 untested kits.[74]

In its annual report issued in December 2019, the Advisory Group made five recommendations related to remedying the backlog:

1. Provide resources for the investigation and prosecution of cold cases (unanimous);
2. Convene an advisory group to develop standard protocols for access to victim advocacy services in hospitals (unanimous);
3. Store unreported sexual assault kits and any additional items collected during a forensic examination for 20 years (unanimous);
4. Store unreported sexual assault kits and any additional items collected during a forensic examination at local law enforcement agencies with funding appropriated (near unanimous); and
5. Collect DNA samples from qualifying offenders in the courtroom at the time of sentencing (near unanimous).

[72] Laws of 2015, ch. 247.
[73] Laws of 2016, ch. 173
[74] Laws of 2019, ch. 93; *See also* "Annual Report to the Legislature and Governor: Washington Sexual Assault Forensic Examination Best Practices Advisory Group" (December 2019), available at https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/SAFE%20Report%202019.pdf.

Following the publication of the report, during the 2020 legislative session, the Legislature passed ESHB 2318, which requires unreported[75] sexual assault kits to be stored with local law enforcement and retained for twenty years.[76] The purpose of this legislation was to improvement law enforcement's response to sexual assault; it will ensure that evidence remains viable when victims feel comfortable to report an assault to law enforcement. It will also allow evidence to be more easily linked between cases with the intent of identifying serial offenders.

Sexual Assault Protection Orders

Before the Sexual Assault Protection Order (SAPO) Act was passed, civil protection orders were not available to many sexual assault victims. Based on the eligibility requirements for a Domestic Violence Protection Order or an Antiharassment Protection order, victims who were assaulted one time by a non-family or household member were precluded from applying for a protection order. This gap was significant because many sexual assaults are perpetrated by acquaintances or persons known to, but not related to, the victim.[77] In 2006, the Washington State Legislature filled this gap. As stated in the legislative intent:

> Sexual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims. According to the FBI, a woman is raped every six minutes in the United States. Rape is recognized as the most underreported crime; estimates suggest that only one in seven rapes is reported to authorities. Victims who do not report the crime still desire safety and protection from future interactions with the offender. Some cases in which the rape is reported are not prosecuted. In these situations, the victim should be able to seek a civil remedy requiring that the offender stay away from the victim. It is the intent of the legislature that the sexual assault protection order created by this chapter be a remedy for victims who do not qualify for a domestic violence order of protection.[78]

[75] Not yet tied to a police report
[76] Laws of 2020, ch. 26.
[77] Lucy Berliner, David Fine and Danna Moore, "Sexual Assault Experiences and Perceptions of Community Response to Sexual Assault: A Survey of Washington State Women" (Seattle: Harborview Medical Center 2001).
[78] RCW 7.90.005 https://app.leg.wa.gov/RCW/default.aspx?Cite=7.90.005.

SAPOs are intended to provide victims with a legal process that is independent of law enforcement or prosecutorial discretion to prevent their attacker from contacting them directly, indirectly, or through a third party or visiting their residence, school, or workplace.

A victim may seek a SAPO by filing a petition alleging that he or she has been the victim of nonconsensual sexual conduct or nonconsensual sexual penetration committed by the respondent.[79] Previously, the law stated that the petition "shall be accompanied by an affidavit… stating the specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts, for which relief is sought." [80] Washington courts interpreted the "specific statements or actions" as required to be separate from the sexual assault itself.[81] Then, in 2019, the Washington State Legislature clarified its intent regarding requirements to obtain a SAPO[82] by amending RCW 7.90.020 to require that the petition "shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought."[83]

Denial of a remedy may not be based, in whole or in part, on evidence that the respondent was voluntarily intoxicated, the petitioner was voluntarily intoxicated, or the petitioner engaged in limited consensual sexual touching.[84] Where there is evidence of intoxication, the court must determine the petitioner's capacity to consent.[85]

The court shall issue a final order if the court finds by a preponderance of the evidence that the petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual

[79] RCW 7.90.040(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.040.
[80] RCW 7.90.020(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.020.
[81] *Roake v. Delman*, 189 Wn.2d 775 (2018).
[82] That "experiencing a sexual assault is itself a reasonable basis for ongoing fear."
[83] Laws of 2019, ch. 258.
[84] RCW 7.90.090(4)(a)-(c) https://app.leg.wa.gov/rcw/default.aspx?cite=7.90.090.
[85] *Nelson v. Duvall*, 197 Wn. App. 441, 387 P.3d 1158 (2017).

penetration by the respondent.[86] Upon a full hearing, a final order may be granted for a fixed period or be permanent.[87][88] Violations of a protection order are a gross misdemeanor but can be a class C felony if the respondent has at least two prior violations.[89]

Extension of Statute of Limitations for Sexual Assault

The 2019 Legislature in SB 5649 extended the statute of limitations for Rape in the First and Second Degree[90] from ten to twenty years and removed the statute of limitations entirely for Rape of a Child in the First, Second, or Third Degree. In section 2 of the bill, the Legislature explained:

> It is generally true that the longer a victim waits to report a crime, the more difficult it will be for the case to be successfully prosecuted. However, the statute of limitations should not prohibit prosecution for these heinous offenses when there is adequate evidence. Extending or eliminating the statute of limitations in these cases is imperative to provide access to justice for victims, hold perpetrators accountable, and enhance community protection.

Enhanced opportunity to prosecute better provides for justice for victims, especially in the context of clearing the backlog of test kits.

Sexual Assault Advocate Privilege:

[86] RCW 7.90.090(1)(a) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.090.
[87] RCW 7.90.120(2) http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.120.
[88] This provision of the statute was amended by the Legislature in 2017; previously, SAPOs could be granted for a maximum period of two years.
[89] RCW 7.90.110(5) https://app.leg.wa.gov/RCW/default.aspx?cite=7.90.110; RCW 26.50.110 https://apps.leg.wa.gov/RCW/default.aspx?cite=26.50.110.
[90] Victim is over age 16.

Since the 1989 Gender Bias Study, Washington has extended protections to victim information communicated to community-based sexual assault advocacy programs.[91] In 2006, privilege was granted to communications between a victim and their sexual assault advocate."[92] In 2012, RCW 70.125.065 was amended to extend protection of records to "community sexual assault programs" from "rape crisis centers."[93] When sexual violence is perpetrated, it takes personal autonomy away from the victim; these privilege protections allow a victim the choice to waive privilege and disclose any of their private information.

Prison Rape Elimination Act (PREA) Implementation: [Include cross reference to section section 3.5 related to sexual assault in jails and state prisons]

CONCLUSION:

It is heartening to see that, since the 1989 report was published, the legislative and judicial branches have undertaken dedicated efforts to address domestic and sexual violence in Washington. The effects of those efforts may be difficult to measure given

[91] As discussed in footnote 48 (confirm as this is edited) regarding domestic violence advocates, this privilege extends to community-based sexual assault advocates, not system-based sexual assault advocates. Information about Community Sexual Assault Programs is listed by county on the Washington Coalition of Sexual Assault Programs (WCSAP) website: https://www.wcsap.org/help/csap-by-county.
[92] RCW 5.60.060(7) https://apps.leg.wa.gov/RCW/default.aspx?cite=5.60.060.
[93] Laws of 2012, ch. 29.

that domestic and sexual violence in Washington state has not substantially decreased. It is clear that more action is needed. Proposed recommendations include:

- Analyze the firearm surrender reports prepared by Administrative Office of the Courts to determine the level of compliance with orders to surrender weapons;
- Undertake a study of barriers to enforcement of forfeiture laws and develop recommendations to address said barriers;
- Establish a reliable funding scheme for all court-ordered DV perpetrator treatment and monitor the status of adoption of the recommendations by the Domestic Violence Work Groups;
- Monitor the status of adoption of the Washington State Patrol's recommendation to study and develop a centralized database related to Missing and Murdered Indigenous Women and Girls (MMIWG); and
- Continue to monitor the rape kit backlog.

Washington State Supreme Court Gender and Justice Commission

May 6, 2020

Representative Roger Goodman
Chair, Public Safety Committee
State Representative, 45th District
Leg 436B
P.O. Box 40600
Olympia, WA 98504

Sent electronically

Re: E2SHB 1517 DV Work Groups- Delayed submission of reports due to COVID-19

Dear Representative Goodman,

Due to delays to work group activities as a result of the COVID-19 pandemic, we will not be able to submit our reports by June 30, 2020. In accordance with Governor Inslee's Executive "Stay Home, Stay Healthy" Order, the Washington State Supreme Court's closure to the public, and the fact that all but a few Administrative Office of the Courts employees and many court employees and other work group members are required to telecommute, we were not able to meet in person as planned on April 7th. We also determined that it was necessary to suspend all large work group activities from March 20th through May 5th, to allow work group participants to focus on court, employee, and personal health and safety priorities, and to address the impact that COVID-19 is having in their families, courts, and communities.

We plan to resume work group activities this month, with anticipated virtual meetings via ZOOM in June and September, and **we will endeavor to deliver our report by October 30, 2020**.

Additionally, as we have preliminarily discussed, we would welcome the opportunity to give a presentation on the work group report during the Committee Assembly meetings at the end of the year. We, along with Gender and Justice Commission Vice Chair, Judge Marilyn Paja, have tentatively marked our calendars for meetings on November 30th and/or December 1st. Once available, please advise us of your committee's schedule in this regard.

It is our understanding that there may be a special legislative session this summer. If that comes to fruition, and you have the opportunity to include a statutory adjustment to our report deadline to October 30, 2020, we would appreciate it.

Finally, although our task is separate from the risk tool development by Dr. Hamilton for use by the Department of Corrections, in our role of monitoring that process, we understand that this work by DOC may also be delayed. DOC may also communicate with you.

We will continue to keep you apprised of work group activities and meetings, and please do not hesitate to contact us if you have any questions. This is important work, and we want to ensure that we are giving the issues raised in E2SHB 1517 the consideration that they deserve.

Best regards,

Judge Eric Lucas
E2SHB 1517 Co-Chair
Snohomish County Superior Court

Judge Mary Logan
E2SHB 1517 Co-Chair
Spokane County Municipal Court

Cc:

Justice Sheryl Gordon McCloud, Chair, Washington State Supreme Court Gender and Justice Commission

Judge Marilyn Paja, Vice Chair, Washington State Supreme Court Gender and Justice Commission

Dr. Zachary Hamilton, Washington State University

Mr. Mark Kucza, Department of Corrections

Ms. Dory Nicpon, Administrative Office of the Courts

Mandatory arrest laws were implemented in the early 1980s as a public policy response to the critique that domestic violence offenses were not treated as seriously as other crimes. In Minnesota, a study on the effectiveness of a mandatory arrest policy for domestic violence misdemeanants[1] found that batterers randomly assigned to mandatory arrest were less likely to reoffend than those not subject to mandatory arrest.[2] In light of the study's findings, over a period of several years, arrest laws were implemented across the nation.

Domestic violence arrest laws nationwide[3] fall into three categories:

Discretionary: Alabama, Arizona, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Missouri[4], Nebraska, New Hampshire, New Jersey[5], New Mexico, New York[6], North Carolina[7], North Dakota[8], Oklahoma, Pennsylvania, South Carolina, Texas, Vermont, West Virginia, Wyoming,

Mandatory: Alaska, California, Colorado, Connecticut, District of Columbia, Kansas, Louisiana, Maine, Mississippi, Nevada, New York[9], Ohio, Oregon, Rhode Island, South Dakota, Utah, Virginia[10], Washington, Wisconsin

Preferred: Arkansas, Massachusetts, Montana, Tennessee

Washington's mandatory arrest law, passed in 1984, requires a police officer to arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that the person:

[1] Referred to as the "Minneapolis Experiment"
[2] Sherman, Lawrence W., Berk, Richard A., 1984. The specific deterrent effects of arrest for domestic assault. American Sociological Review, 49 (1): 261–272.
[3] This summary is based on research conducted by Alex Dionne, an intern at the King County Prosecuting Attorney's Office, in 2018.
[4] Mandatory if officers respond again with same suspect within 12 hours
[5] Unless certain conditions met
[6] For misdemeanors
[7] Unless violation of no contact order, then mandatory
[8] Unless violation of no contact order, then mandatory
[9] For felonies
[10] Unless "special circumstances which would dictate action other than an arrest."

- is 18 years of age or older, AND
- has assaulted a family or household member within the past four hours, AND
    - a felonious assault has occurred, OR
    - an assault has occurred which has resulted in bodily injury to the victim (whether observable to responding officer or not), OR
    - any physical action has occurred which was intended to cause another person reasonably to fear imminent serious bodily injury or death.[11]

Washington's mandatory arrest statute also contains a primary aggressor provision: "The officer shall arrest the person whom the officer believes to be the primary physical aggressor. In making this determination, the officer shall make every reasonable effort to consider: A) The intent to protect victims of domestic violence under RCW 10.99.010; (B) the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (C) the history of domestic violence of each person involved, including whether the conduct was part of an ongoing pattern of abuse."

At the time that Washington's mandatory arrest statute was passed, it was controversial, as demonstrated by news articles from that time[12]:

Stakeholder Group	Perceived Benefits	Concerns
Law enforcement	Police better able to enforce court orders under the new law[13]	Violates federal consent decree on jail overcrowding[14]
		Delayed court dates[15]

[11] RCW 10.31.100(2)(d) https://apps.leg.wa.gov/RCW/default.aspx?cite=10.31.100.
[12] *See e.g.* Himmelspach, D.E. (1984). *Family fights. 'Nicest people' going to jail under new law.*; Mitchell, S. (1984). *Domestic violence law gets praise.;* Frost, M. (1984). *Criminal law reports*. Trial News.; Barber, M. A. (1984). *New domestic violence law packing the jails.* Seattle Post-Intelligencer.*;* Hendrick, D. (n.d.). *Will sentencing law clog courts? Strict state guidelines mean defendants have little to lose.* The Olympian.; Unknown. (1984). *Opinion: home violence law needs more funding.*
[13] Himmelspach, D. E. (1984). *Family fights. 'Nicest people' going to jail under new law.*
[14] *Id.*
[15] *Id.*

		More law enforcement resources required: since law went into effect DV calls increased 25%, deputy time on calls jumped 171%, and arrests in such cases increased 627%[16]
		Dual arrest[17]
		Removes ability to use judgment[18]
Victim Advocates	Based on research showing the traditional police response to DV of trying to settle the parties down and leaving is dangerous; in most DV homicides the police have been called a number of times before.[19]	Reduced reporting[20]
	Arrest sends the message to batterers that domestic violence is unacceptable. [21]	
	Removes the burden of initiating the legal process from victims.[22]	
	Punishes offenders and also gives them an opportunity to find treatment and stop the cycle of brutality.[23]	
Courts	Law addresses a serious problem[24]	Legal remedies less successful when criminal charges not filed.[25]
		"Preventative detention"[26]
		Eliminates bargaining from the process, resulting in more trials.[27]
		More resources required by court, prosecution, and defense to prepare cases.[28]

[16] Mitchell, S. (1984). *Domestic violence law gets praise.*
[17] Frost, M. (1984). *Criminal law reports.* Trial News.
[18] Barber, M. A. (1984). *New domestic violence law packing the jails.* Seattle Post-Intelligencer.
[19] *Id.*
[20] Himmelspach, D.E. (1984). *Family fights. 'Nicest people' going to jail under new law.*
[21] *Id.*
[22] Mitchell, S. (1984). *Domestic violence law gets praise.*
[23] *Id.*
[24] Himmelspach, D.E. (n.d.). *Family fights. 'Nicest people' going to jail under new law.*
[25] Mitchell, S. (1984). *Domestic violence law gets praise.*
[26] Himmelspach, D.E. (n.d.). *Family fights. 'Nicest people' going to jail under new law.*
[27] Hendrick, D. (n.d.). *Will sentencing law clog courts? Strict state guidelines mean defendants have little to lose.* The Olympian.
[28] *Id.*

		More lawyers needed.[29]

Disagreement regarding mandatory arrest continues to exist. Pursuant to E2SHB 1517, Part VIII, Section 4(a)(i), the Domestic Violence Risk Assessment Work Group was mandated to "[r]esearch, review, and make recommendations on whether laws mandating arrest in cases of domestic violence should be amended and whether alternative arrest statutes should incorporate domestic violence risk assessment in domestic violence response to improve the response to domestic violence, and what training for law enforcement would be needed to implement an alternative to mandatory arrest…."

The research regarding mandatory arrest is varied, with many studies outlining the downsides to mandatory arrest.[30] It is also notable that *there have been no studies that have evaluated the efficacy of Washington's mandatory arrest law*. Information that is Washington-specific is important in this context due to the different categories of arrest laws (mandatory, discretionary, preferred) referenced above. Moreover, until a Washington study on mandatory

[29] Frost, M. (1984). *Criminal law reports.* Trial News.

[30] *E.g.* **Mandatory arrest associated with less repeat offending**: Christopher Maxwell, Joel Garner and Jeffrey Fagan. "The Effects of Arrest on Intimate Partner Violence: New Evidence from the Spouse Assault Replication Program." *National Institute of Justice: Research in Brief* (2001). **Mandatory arrest results in more frequent dual arrests, with disproportionate impact on same sex couples, people of color, and women:** Durfee, A. (2012). Situational ambiguity and gendered patterns of arrest for intimate partner violence. *Violence Against Women*, 18(1):64-84; Hirschel, D. and Deveau, L. (2017). The impact of primary aggressor laws on single versus dual arrest in incidents of intimate partner violence. Violence Against Women, 23(10): 1155-1176. **Organizational policy may influence police behavior and outcomes:** Johnson, R. and Dai, M. (2016). Police enforcement of domestic violence laws: Supervisory Control or Officer Prerogatives. Justice Quarterly, 33(2):185-208; Phillips, S. and Sobol, J. (2010). Twenty years of mandatory arrest: Police decision making in the face of legal requirements. Criminal Justice Policy Review, 21(1):98-118. **Diminishes batterers' perceptions of procedural justice:** Epstein, Deborah. Procedural Justice: Tempering the States' Response to Domestic Violence. Wm. & Mary L. Rev. 1843 (2002). **Intimate partner homicides increased after mandatory arrest laws were implemented:** Iyengar, Radha. "Does the certainty of arrest reduce domestic violence? Evidence from mandatory and recommended arrest laws." Journal of Public Economics (2008). **Removes victims' autonomy.** Mordini, Nicole Miras. Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy. Drake Law Review (2004).

arrest is conducted, we will not know the scope of the problems with mandatory arrest, or that the mandatory arrest statute is working as intended.

Gender and Justice Commission
Meeting Schedule

2020

Meetings are held at:
AOC SeaTac Office
18000 International Blvd
11th Floor, Suite 1106

Meeting Day & Time:
Friday (unless noted) 8:45 AM to Noon

2020

- January 31
- March 27
- May 29
- September 25
- November 6

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