To: The Minority and Justice Commission
From: Dontay Proctor Mills; Mynor Lopez; Sam Sueoka; Carsen Nies
Date: July 28, 2020
RE: Reparations Memo

Executive Summary

Introduction

The 2020 Calhoun Family Fellows propose that the Washington State Supreme Court Minority and Justice Commission ("MJC") engage in a research study of reparations for Black and Indigenous people and communities of color in Washington State and develop and present an education program about Washington's racial history and the results of the study on how Washington may develop reparations measures. This proposal falls within the MJC's mission of taking affirmative steps to address and eliminate racial, ethnic, and national origin bias.[1]

Education Proposal

For its 2022 Supreme Court Symposium, we recommend that the Commission present an educational program that addresses the following: (1) the history of racial oppression and exclusion in Washington State; (2) different examples of reparations that have been made in the United States; and (3) suggested reparations measures that Washington may take. A symposium on these issues would align with the MJC's Education Committee's goal to improve the administration of justice by eliminating racism and its effects by offering and supporting high quality education programs designed to improve the cultural competency of legal professionals.[2]

The Commission should also consider supporting the Mandatory Continuing Legal Education Board's suggested amendment to Admission to Practice Rules (APR) 11 that would require each licensed legal professional to complete an hour of equity, inclusion and the mitigation of bias as part of the minimum requirement of six ethics and professional responsibility credits.[3]

Research Proposal

With the guidance of our preliminary research, we recommend that the MJC conduct a more extensive research study to determine how best to implement reparations measures in Washington. Further, we recommend that the Commission work with community organizations, such as King County Equity Now[4] and Africatown Community Land Trust,[5] in its research on

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[1] *Minority and Justice Commission,* Mission Statement (Last visited Jul. 15, 2020, http://www.courts.wa.gov/?fa=home.sub&org=mjc).
[2] *Minority and Justice Commission,* Education Committee (Last visited Jul. 23, 2020, https://www.courts.wa.gov/?fa=home.sub&org=mjc&page=education&layout=2&parent=work).
[3] MCLE Board, *Special Meeting Agenda: Suggested Amendments to APR 11* (2020), (Last visited Jul. 23, 2020, https://www.wsba.org/docs/default-source/legal-community/committees/mcle-board/mcle-board-report-and-recommendation.pdf?sfvrsn=52e008f1_4).
[4] King County Equity Now is a coalition of accountable, Black-led, community-based organizations fighting to achieve equity in King County. (Last visited Jul. 24, 2020, https://www.kingcountyequitynow.com/).
[5] Africatown Community Land Trust was formed to acquire, steward and develop land assets necessary for the Black/African diaspora community to grow in the Central District. (Last visited Jul. 24, 2020, https://www.africatownlandtrust.org/).

how best to implement reparations measures in Washington. The three areas of reparations we have explored are the following: (1) monetary, (2) land, and (3) cultural. We have also explored a couple of international reparation examples.

Examples of monetary reparations that we have researched include the following:

- Japanese American reparations, for which 82,219 eligible Japanese American claimants were given $20,000 each;[6]
- Reparations for victims of the Tuskegee Experiment, for which living survivors of the experiment were given lifetime medical benefits and burial services;[7] and
- Reparations measures other jurisdictions have taken or will soon implement, including Chicago, which will research how to pay reparations to its citizens[8] and Evanston, which has established a $10 million reparations fund;[9] Asheville, whose City Council recently voted to provide reparations to the city's Black residents and descendants;[10] Tulsa, where a scholarship fund has been established for the descendants of those affected by the Greenwood Race Massacre;[11] and Florida, which paid $500,000 to African American families who were affected by the Rosewood Massacre of 1923[12] and passed a bill to include instruction on the 1920 Ocoee Election Day Riots in schools.[13]

Examples of land reparations that we have researched include reparations for Native Hawaiians, for whom the United States committed that land that was ceded to the U.S. Government must be used for the betterment of the Hawaiian people under the Admissions Act of 1959.[14]

Examples of cultural reparations that we have reviewed include the following:

- The Native American Graves Protection and Repatriation Act, which requires federal agencies and institutions that receive Federal funds to transfer Native American human remains and other cultural items to the appropriate tribes;[15]

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[6] David Takami, *World War II Japanese American Internment- Seattle/Ling County,* HistoryLink, (November 06, 1998), https://www.historylink.org/File/240.
[7] Centers for Disease Control and Prevention, *The Tuskegee Timeline,* U.S Public Health Service Syphilis Study at Tuskegee, viewed July 15, 2020, https://www.cdc.gov/tuskegee/timeline.htm.
[8] Heather Cherone, *Chicago Will Not Create Reparations Commission After Lightfoot Objects*, WTTW (2020), https://news.wttw.com/2020/06/12/chicago-will-not-create-reparations-commission-after-lightfoot-objects.
[9] *See* Eric Lutz, *One city's reparations program that could offer a blueprint for the nation*, The Guardian (2020), https://www.theguardian.com/us-news/2020/jan/19/reparations-program-evanston-illinois-african-americans-slavery.
[10] Joel Burgess, *In historic move, North Carolina city approves reparations for Black residents,* USA Today (2020), https://www.usatoday.com/story/news/nation/2020/07/15/asheville-passes-reparations-black-residents-historic/5441792002/?fbclid=IwAR1HqSdYx8zaT1zPjFJ7YA3HXGA4J_CBB9EiwpN2WZ3XD5voOdrTX3SSmNs.
[11] Okla. Stat. Ann. tit. 70, § 2621 (West).
[12] Fla. HB 591 (1994).
[13] Fla HB 1213 (2020).
[14] Admission Act of March 18, 1959, Pub. L. No. 86-3, § 5(f), 73 Stat 4. https://dhhl.hawaii.gov/wp-content/uploads/2020/02/Hawaiian-Homes-Commission-Act-1921-As-Ammended-Searchable.pdf.
[15] 25 U.S. Code, Chapter 32, Section 3005, (Last visited Jul. 22, 2020, https://www.law.cornell.edu/uscode/text/25/chapter-32).

- The Equal Justice Initiative Memorial, which built the National Memorial for Peace and Justice in Montgomery, Alabama, to remember the legacy of enslaved black people,[16] and which developed the Community Remembrance Project to memorialize documented victims of racial violence throughout history across the nation;[17] and
- The transfer of Portland, Oregon-based Yale Union's land and building to the Native Arts and Cultures Foundation, which is a Native-led national organization that works with artists, communities, and leaders to advance Indigenous arts and artists.[18]

Finally, examples of international reparations measures we have researched include New Zealand, where the Crown created the Waitangi Tribunal to consider claims of the Māori people and provide recommendations to parliament[19] and which has also paid over 2.2 billion New Zealand dollars, or nearly 1.5 billion U.S. dollars, in settlements to the Māori people,[20] as well as Germany, which has paid over $80 billion to Jews who suffered under the Nazi regime[21] and has criminalized the public use of symbols of unconstitutional organizations.[22]

Recommendations:

Along with our proposals that the Commission provide an education program and conduct a study on reparations in Washington, we recommend the MJC support the following changes:

- A renaming of eight counties in the state that were originally named after slaveholders, including Pierce, Douglas, Stevens, Grant, Thurston, Jefferson, Clark, and Lewis counties;[23]
- Eliminating the bar examination, which has a racially disparate impact;[24]
- Retroactivity for legislation such as SB 5288, which has removed robbery in the second degree from the list of offenses that qualify an individual as a persistent offender, and similar legislation for resentencing purposes;[25]
- An inclusion of Washington's racial history in K-12 curricula; and

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[16] Equal Justice Initiative, *The National Memorial for Peace and Justice*, (Last visited Jul. 18, 2020, https://museumandmemorial.eji.org/memorial).
[17] *Community Remembrance Project*, https://eji.org/projects/community-remembrance-project/.
[18] Naomi Ishisaka, *Arts organization Yale Union transfers its land and building to Native ownership*, The Seattle Times (2020), (Last visited Jul. 23, 2020, https://www.seattletimes.com/entertainment/arts-organization-yale-union-transfers-its-land-and-building-to-native-ownership/).
[19] Te Ahukaramū Charles Royal, *Story: Treaty of Waitangi*, Te Ara - the Encyclopedia of New Zealand (Last accessed Jul. 14, 2020 https://teara.govt.nz/en /treaty-of- waitangi/page-7.
[20] New Zealand Office of Treaty Settlements, *Healing the Past, Building a Future*, 22 (Jun. 2018) https://www.govt.nz/assets/Documents/OTS /The-Red-Book/The-Red-Book.pdf.
[21] Rebecca Staudenmaier, *Germany extends Holocaust compensation to include survivor spouses,* Deutsche Welle (2019), (Last visited Jul. 22, 2020, https://www.dw.com/en/germany-extends-holocaust-compensation-to-include-survivor-spouses/a-49438399).
[22] Andreas Stegbauer, *The Ban of Right-Wing Extremist Symbols According to Section 86a of the German Criminal Code*, German Law Journal Vol. 08 No. 02, 178, 184 (2007), https://www.time.com/wp-content/uploads/2018/08/3e228-glj_vol_08_no_02_stegbauer.pdf.
[23] Knute Berger, Opinion, *8 Washington Counties Carry a Racist Legacy in Their Names*. Crosscut. (June 30, 2020, https://crosscut.com/2020/06/8-washington-counties-carry-racist-legacy-their-names).
[24] Society of American Law Teachers, "Statement on the Bar Exam" (2002). *Statements*. 2. https://scholars.law.unlv.edu/saltarchive_statements/2.
[25] Final Bill Report, S.B. 5288, 66th Leg (2019).

- The establishment of memorials or markers to remember leaders of color and victims of racial violence in Washington.

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I. Introduction

The Calhoun Family Fellows propose that the Washington State Supreme Court Minority and Justice Commission ("MJC") engage in a research study of reparations for Black and Indigenous people and communities of color in Washington State and develop and present an education program about the results of the study on how Washington may develop reparations measures. This proposal falls within the MJC's mission of taking affirmative steps to address and eliminate racial, ethnic, and national origin bias, as stated below:

> The Minority and Justice Commission seeks to foster and support a fair and bias-free system of justice in the Washington State courts and judicial systems by: (1) identifying bias of racial, ethnic, national origin and similar nature that affects the quality of justice in Washington State courts and judicial systems; (2) **taking affirmative steps to address and eliminate such bias, and taking appropriate steps to prevent any recurrence of such bias**; and (3) working collaboratively with the other Supreme Court Commissions and other justice system partners.

Minority and Justice Commission, Mission Statement (Last visited Jul. 15, 2020, http://www.courts.wa.gov/?fa=home.sub&org=mjc) (emphasis added).

The MJC also is an appropriate entity to address the issue of reparations because of the Washington Supreme Court's acknowledgement of racism in court cases such as *State v. Gregory* and *State v. Monday*, and most recently in its June 4th, 2020, letter to the judiciary and legal community following the deaths of Mr. George Floyd, Ms. Breonna Taylor, and Mr. Ahmaud Arbery. In this letter, the Supreme Court of Washington acknowledged the Court's role in systemic racism in Washington. "This very court once held that a cemetery could lawfully deny grieving black parents the right to bury their infant. We cannot undo this wrong—but we can recognize our ability to do better in the future." *Dear Members of the Judiciary and the Legal Community,* June 4, 2020, (Last visited Jul. 23, 2020, https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf). The wrongs of courts do not go away when a new judge steps through the door or when new Justices of the Washington Supreme Court step in the halls of the Temple of Justice. The MJC understands its responsibility and its role to identify and eradicate the effects of racial, ethnic, and cultural bias in Washington state's court system. See *Minority and Justice Commission,* History (Last visited Jul. 23, 2020,

https://www.courts.wa.gov/?fa=home.sub&org=mjc&page=history&layout=2&parent=about). Conducting research on reparations with an eye toward Washington's history and developing and presenting an education program on reparations would help meet the Commission's goals.

II. Defining Reparations

The Latin origin of the word reparation is "to restore". This simple definition is sometimes lost in the discourse of what reparations means in a modern context. The idea of restoration or repair is central to the idea of reparations for Black and Indigenous people and communities of color. Reparations means reconciling with America's past atrocities through recognition of our racist history, meaningful investment in our disenfranchised communities, and restructuring our racist institutions.

Professor Charles Ogletree has written:

> …almost every minority has been singled out, wronged or discriminated against. The fundamental difference in the case of African Americans is that it was written and enforced law, not just a matter of custom. Equally important is that slavery in America, which existed for nearly 250 years, was followed by an era of legalized discrimination and continuing practices that perpetuate black subordination. The legacy of slavery is seen today in well-documented racial disparities in access to education, health care, housing, employment and insurance, and in the form of racial profiling, the high rate of single-parent homes and the disproportionate number of black inmates….
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> My own view is compensation shouldn't be in the form of individual checks. It's not designed to benefit the Tiger Woodses and Oprah Winfreys or so many other who have overcome the barriers of institutional discrimination. Instead, a trust fund should administer money received through claims, and an independent commission should distribute those funds to the poorest members of the black community, where damage has been most severe.[26]

III. Past and Present Atrocities in Washington Call for Reparations

Washington State has a long history of racism against its peoples, including Native Americans, Black Washingtonians, Washingtonians of Japanese Descent, Latinx Washingtonians, and Washingtonians of Chinese descent.

A. Against Native American Individuals

[26] "The Case for Reparations", Charles Ogletree, Jr., *USA WEEKEND*, Aug 16-18, 2002, pp. 6-7, http://instruct.westvalley.edu/kelly/History17a_on_campus/Readings/reparations.htm.

Washington committed atrocities against the Native American peoples of the state. In 1841, the Distribution-Preemption Act was passed by Congress and signed into law to encourage the settlement in the Oregon Territory, which included all or portions of five present-day states, including Washington, until the Washington Territory was established in 1853. David Bernstein and Chris J. Magoc, *Imperialism and Expansionism in American History: A Social, Political, and Cultural Encyclopedia and Document Collection*, 24–25, (2005); The Oregon Encyclopedia, *Creation of Washington Territory, 1853* (2018) (Last visited Jul. 22, 2020, https://oregonencyclopedia.org/articles/washington_territory_1853/). The law allowed adult men to claim 160 acres for themselves. *Id.* Shortly thereafter, on August 18, 1848, Congress officially established the Oregon Territory. *Id.* After the establishment of the territory, provisional Governor and first delegate to Congress, Samuel R. Thurston, advocated for the passage of the Donation Land Act. *Id.* This act granted "white settler[s] or occupant[s] of the public lands, American half-breed Indians included," the right to 320 acres for themselves and an additional 320 acres for their wives. Oregon Donation Land Act, Sec. 4 (1850). These claims applied without regard to Native American claims to the land. *Id.* While advocating for this bill, Thurston advocated against allowing Black people to settle in Oregon, as well as Hawaiians, stating that they were "a race of men as black as your negroes of the South, and a race, too, that we do not desire to settle in Oregon." Jean Barman and Bruce McIntyre Watson, *Hawaiians in the Oregon Country*, Oregon Encyclopedia (Last visited Jul. 19, 2020 https://oregonencyclopedia.org/articles/hawaiians_in_the_oregon_country/).

Prior to the passage of these laws, white settlers in Washington, such as Marcus and Narcissa Whitman, attempted to convert and colonize Native American tribes. Public Broadcasting Service, New Perspective on the West, Marcus Whitman, Narcissa Whitman, (Last accessed Jul. 6, 2020, https://www.pbs.org/weta/thewest/people/s_z/whitman.htm). These efforts by white settlers routinely encroached on Native American land, disrespected traditional Native American religious beliefs, and spread disease that ravaged the tribes. *Id.* The outcome of the colonization of Washington was the outbreak of a decade long series of wars between Native Americans and white settlers in Washington. The string of wars began with the Cayuse War in 1847, followed by the Yakama War and the Puget Sound War in 1855, and the Coeur d'Alene War of 1858. *Id.* During these wars, 10 treaties were signed between Washington's provisional governor Isaac Stevens and various tribes. Washington State Historical Society, *Treaty Trail:*

Background Readings (Last visited Jul. 14, 2020 https://www.washingtonhistory.org/education/curriculum/treaty-trail/treaty-trail-background-readings/).

Despite the signing of these treaties, the state continued to discriminate against the Native American Tribes of Washington. Indian Boarding Schools were created throughout the state from the 1880s to the 1920s, which were notorious for their harmful "assimilating" efforts. *See* Carolyn J. Marr, *Assimilation Through Education: Indian Boarding Schools in the Pacific Northwest*, University of Washington (Last accessed Jul. 14, 2020 https://content.lib.washington.edu/aipnw/marr.html#movement); Marsha King, *Tribes confront painful legacy of Indian boarding schools*, Seattle Times (Feb. 3, 2008) https://www.seattletimes.com/seattle-news/tribes-confront-painful-legacy-of-indian-boarding-schools/. The Washington state government attempted to limit the fishing rights of Native Americans in the state. *See e.g. State v. Tulee*, 7 Wn.2d 124, 109 P.2d 280 (1941), *rev'd sub nom. Tulee v. State of Washington*, 315 U.S. 681, 62 S. Ct. 862, 86 L. Ed. 1115 (1942); *State v. Towessnute*, 89 Wash. 478, 154 P. 805 (1916) *vacated* Order No. 13083-3. Washington leaders cried foul when Kennewick Man, the 9,000-year-old remains found in the Columbia River, were not returned to the Umatilla tribe under the Native American Graves Protection and Repatriation Act. *See* Tasneem Raja, *A Long, Complicated Battle Over 9,000-Year-Old Bones Is Finally Over*, National Public Radio (May 5, 2016) https://www.npr.org/sections/codeswitch/2016 /05/05/476631934/a-long-complicated-battle-over-9-000-year-old-bones-is-finally-over; Conrad Wilson, *Inslee Asks Army Corps To Return 'Kennewick Man' To Tribes*, OBP (Jun. 23, 2015); Sarah Schilling, *Sen. Murray introduces bill to return Kennewick Man to tribes*, Tri-City Herald (Aug. 6, 2015) https://www.tri-cityherald.com/news/ local/article32235597.html.

As of today, there are 35 federally recognized tribes[27] and seven tribes that are seeking federal recognition[28] in the state of Washington. See, Washington Governor's Office of Indian Affairs, *Federally Recognized Indian Tribes,* (Last visited Jul. 18, 2020 https://goia.wa.gov/tribal-directory/tribal-chair-contact-information); Washington Governor's Office of Indian Affairs, *Non-Federally Recognized Indian Tribes,* (Last visited Jul. 18, 2020 https://goia.wa.gov/tribal-directory/non-federally-recognized-indian-tribes).

B. Against Black Individuals

Throughout its history, Washington has had a passive relationship with anti-Black racism and white supremacy. In 1857, the Supreme Court held that even if a slave moved to a "free" state, his status was not changed, and he and his family remained property, a "right distinctly and expressly affirmed in the Constitution." *Dred Scott v. Sandford*, 60 U.S. 393, 451, 15 L. Ed. 691 (1857), *superseded* (1868).

Washington welcomed free Blacks, in contrast to Oregon, which had a "lash law" to prevent free Blacks from moving to or staying in the territory. The Oregon Black Exclusion Law of June 1844 required free Blacks over 18 to leave Oregon or be subject to trial. Thomas C. McClintock, *James Saul, Peter Burnett, and the Oregon Black Exclusion Law of June 1844*, The Pacific Northwest Quarterly, Vol. 86, No. 3, 122(1995), https://www.jstor.org/stable/40491550?seq=1. If found guilty, the person was to "receive upon his or her bare back not less than twenty nor more than thirty-nine stripes, to be inflicted by the constable of the proper county." Darrell Millner, *Black in Oregon*, The Oregon Encyclopedia, (July 20, 2020, https://oregonencyclopedia.org/articles/blacks_in_oregon/#.XxXaApNKiqA). The punishment was to be repeated every six months until the person departed. *Id.*

[27] The Coeur d'Alene Tribe, Confederated Tribes and Bands of the Yakama Nation, Confederated Tribes of the Chehalis Reservation, Confederated Tribes of the Colville Reservation, Confederated Tribes of the Grand Ronde Community of Oregon, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of Warm Springs Reservation of Oregon, Cowlitz Indian Tribe, Hoh Indian Tribe, Jamestown S'Klallam Tribe, Kalispel Tribe of Indians, Kootenai Tribe of Idaho, Lower Elwha Klallam Tribe, Lummi Nation, Makah Tribe, Muckleshoot Indian Tribe, Nez Perce Tribe, Nisqually Indian Tribe, Nooksack Indian Tribe, Port Gamble S'Klallam Tribe, Puyallup Tribe, Quileute Tribe, Quinault Indian Nation, Samish Indian Nation, Sauk-Suiattle Indian Tribe, Shoalwater Bay Indian Tribe, Skokomish Indian Tribe, Snoqualmie Indian Tribe, Spokane Tribe of Indians, Squaxin Island Tribe, Stillaguamish Tribe of Indians, Suquamish Tribe, Swinomish Indian Tribal Community, Tulalip Tribes, Upper Skagit Indian Tribe

[28] Steilacoom Tribe, Snoqualmoo Tribe, Snohomish Tribe, Marietta Band of Nooksack Tribe, Kikiallus Indian Nation, Duwamish Tribe, Chinook Indian Tribe

George Bush, a free mixed-race Black man, traveled west in 1844 along the Oregon Trail. Knute Berger & Stephen Hegg, Culture, *Mossback's Northwest: The Black Pioneer Who Launched the Puget Sound Settlement*. Crosscut. (May 8, 2020, https://crosscut.com/2020/05/mossbacks-northwest-black-pioneer-who-launched-puget-sound-settlement). He initially arrived in Oregon but was forced north by the lash law. *Id*. He and his family settled and established the Bush Prairie in modern day Tumwater, near Olympia. *Id*. George Bush has a memorial Butternut Tree at the State Capitol in Olympia, the seed for which came from the one of the oldest Butternut Trees in the world on the Bush Prairie. Jennifer Crooks, *Honoring a True Pioneer: The George Bush Butternut Tree on the Washington State Capitol Campus*, Thurston Talk, Feb. 11, 2018, (Last viewed July 22, 2020, https://www.thurstontalk.com/2018/02/11/george-bush-butternut-tree-washington-state/).

Recently, it came to light that white settlers from Missouri brought slaves to Oregon Territory, some of whom lived where what is now Washington. Knute Berger, Opinion, *Yes, There Were Black Slaves in the Pacific Northwest*, Sep. 30, 2019, (Last visited Jul. 20, 2020, https://crosscut.com/ 2019/09/ yes-there-were-black-slaves-pacific-northwest -historians-are-making-our-region -confront-it). Charles Mitchell was an enslaved young Black man brought to the Washington Territory by the Tilton family. Lorraine McConaghy, *Charles Mitchell, Slavery, and Washington Territory in 1860*. Black Past, Jul. 14, 2012, (Last visited Jul11, 2020, https://www.blackpast.org/african-american-history/charles-mitchell-slavery-and-washington-territory-1860/). In 1860, young Charles caught the attention of representatives of the Black community in the Crown Colony of Victoria, Canada. *Id.* He was informed the community was 25% Black and that he would be free upon his arrival, so he stowed away on a ship headed for the colony but was eventually discovered. *Id.* When the ship arrived in Canada, he was held captive. *Id.* When the patriarch of the Tilton family, James Tilton, learned that Charles had run away, he protested, and leveraged his connections to the local and federal government for the return of his property. *Id.* Representatives of the Crown Colony of Victoria hired a lawyer and filed a writ of habeas corpus to have Charles released. *A Fugitive Slave Case,* The Daily British Colonist, Sept. 26, 1860, at 2, (Last visited Jul. 27, 2020, https://archive.org/stream/dailycolonist18600926uvic/18600926#mode/1up). The writ of habeas corpus was granted. The judge held that no man could be held as a slave on British soil and "ordered Charles be forthwith set at liberty." *A Fugitive Slave Case*, The Daily British Colonist,

Sept. 27, 1860, at 2, (Last visited Jul. 27, 2020, https://archive.org/stream/dailycolonist18600927uvic/18600927#mode/1up).

The story of Washington's fugitive slave was reported in a collection of local papers. James Tilton was described as a master, an employer, a guardian, an owner, and a father-figure to Charles Mitchell. Lorraine McConaghy, *supra*. Conversely, Charles was called a slave, an employee, a ward, property, and like a son to Tilton. *Id.*

William Clark, of the Lewis and Clark expedition, brought a slave on the trip and refused to free him after the success of the expedition. See *An enslaved man was crucial to the Lewis and Clark expedition's success. Clark refused to free him afterward*, Washington Post, January 12, 2020, https://www.washingtonpost.com/history/2020/01/12/york-slave-lewis-clark-expedition/.

During the Civil War, many of Washington's political leaders sympathized with southern states and the desire for enslaving human beings but joined the Union forces to preserve the Union they looked forward to joining. John Caldbick, *Civil War and Washington Territory*. HistoryLink.org Essay 10253. (Jan. 12, 2013,https://www.historylink.org/File/10253). Eight counties in the state were named after men with connections to slavery. Knute Berger, Opinion, *8 Washington Counties Carry a Racist Legacy in Their Names*. Crosscut. (June 30, 2020, https://crosscut.com/2020/06/8-washington-counties-carry-racist-legacy-their-names). Senator Stephen A. Douglas, for whom Douglas County in Eastern Washington is named, was loyal to the Union, but also opposed abolition and wanted to allow states and territories to decide on slavery on their own. *Id.* Douglas inherited a family plantation of 100 slaves in Mississippi and managed the plantation personally from a distance, using its profits to fund his political ambitions through the 1850s. *Id*.

A local chapter of the United Daughters of the Confederacy commissioned a Confederate monument that was erected in Seattle in 1926. London Jones, *Confederate Monuments in Seattle, Hidden in Plain Site,* Seattle Spectator (2020), (Last visited Jul. 27, 2020, https://seattlespectator.com/2020/01/23/confederate-monuments-in-seattle-hidden-in-plain-sight/). Granite used for the monument was imported from Georgia's Stone Mountain, which is considered sacred ground by the Ku Klux Klan. Marjorie Ann Reeves and Paula Becker, *Alaska-Yukon-Pacific Exposition in Seattle Celebrates Dixie Day on August 24, 1909*. HistoryLink.org Essay 8802. (Oct. 6, 2008, https://www.historylink.org/File/8802). Further, the Daughters of the Confederacy petitioned to name a portion of U.S. Highway 99 after Confederate President

Jefferson Davis. Richard F. Weingroff, *Jefferson Davis Memorial Highway*, U.S. Dept. of Transportation Fed. Highway Admin. https://www.fhwa.dot.gov/infrastructure/jdavis.cfm. A stone marker for the highway served as a monument to Davis at the north end of the highway, at a small park in Blaine named after the Confederate President. The monument was removed in 2002. Susanna Ray, *Davis Marker Heads for Storage*, Herald Net, March 27, 2002, (Last visited Jul. 23, 2020, https://www.heraldnet.com/news/davis-marker-heads-for-storage/). The stone marker was donated to the Sons of Confederate Veterans Pacific NW Division along with a second marker placed in Vancouver, which was removed and placed in storage by the city of Vancouver in 1998. *Confederate memorial owners in Washington undeterred by recent removals*, YakTriNews.com, Jul. 8, 2020, (Last visited Jul. 23, 2020, https://www.yaktrinews.com/confederate-memorial-owners-in-washington-undeterred-by-recent-removals/). In 2007, the Sons of Confederate Veterans Pacific NW Division created a new monument to the Confederate President with stone markers on private property in Ridgefield. *Id.*

During World War II, Black refugees fled the South during the Great Migration. Many Black families arrived in Washington in search of a future free from the Jim Crow South but could not outrun the reach of white supremacy. Black southern workers were drawn to Kennewick, Pasco, and Richland (Tri-Cities). Kennewick was known as the "Birmingham of Washington." Robert Bauman, *Jim Crow in the Tri-Cities, 1943-1950*, 96 no. 3The Pacific Northwest Quarterly 124-31 (2005) (Last visited Jul. 15, 2020, www.jstor.org/stable/40491852). Workers were needed for power plant construction to help the war effort. *Id.* Black workers were relegated to temporary menial jobs and were denied government housing reserved for those who held permanent white-collar positions, mostly white employees. *Id.* Richland had covenants that prohibited the selling of homes to Black families, which forced Black families to live in East Pasco, often in trailers or shacks. *Id.* There was an influx of Black families in Pasco during the war. *Id.* In response, Pasco implemented its own brand of Jim Crow. Restaurants, bars, diners, and theatres developed a de facto segregation. *Id*.

In contrast to some of Washington's history, the city of Centralia was founded by a Black couple, George and Mary Jane Washington. In 1875 the couple established a town they named Centerville. Kit Oldham, *George and Mary Jane Washington found the town of Centerville (now Centralia) on January 8, 1875,* HistoryLink.org Essay 5276, Feb. 23, 2003, (last viewed Jul. 20, 2020, https://www.historylink.org/File/5276). Washington sold lots in town for $10 each to

anyone who would settle. *Id*. In 1883, as the town grew, the name was changed to Centralia to appease settlers who did not like the name Centerville. *Id*. Washington set aside land for Centralia's Central Park, which is now George Washington Park. *Id*. Washington sold property for little money down, offered loans at no interest, and provided work when nothing else was available. *Id*. Washington's assistance became crucial when the panic of 1893 hit and Centralia, along with the rest of the country, went into an economic downturn for most of the decade. *Id*. Washington organized a private relief program and traveled to Oregon by wagon for rice, flour, and sugar to be distributed to needy residents *Id*. Washington declined to foreclose on mortgages he held, and when other properties went up for auction, he bought them to save the town from absentee ownership or bankruptcy. *Id*. In 2018, the city unveiled a bronze statue of the city's founders. Brian Mittge, *Centralia Unveils Bronze Statue of Founders*, The Daily Chronicle, Aug. 24, 2018, (Last viewed Jul. 20, 2020, http://www.chronline.com/news/centralia-unveils-bronze-statue-of-founders/article_ec010640-a80c-11e8-bf9c-03116f8a2c74.html).

C. Against Washingtonians of Japanese Descent

Washingtonians of Japanese descent have also suffered discrimination. In the early 20th century, Japanese Americans became targets of discrimination by the federal government. In 1907, President Theodore Roosevelt brokered an agreement with the Japanese government to limit the number of visas and passports granted to day laborers. *See* History.com Editors, Gentlemen's Agreement, History.com (Last visited Jul. 19, 2020 https://www.history.com/topics/immigration/ gentlemens-agreement). That agreement would later be reinforced by the Immigration Act of 1924, which severely limited the number of Japanese immigrants into the United States. U.S. Office of the Historian, *The Immigration Act of 1924 (The Johnson-Reed Act)*, Milestones in U.S. History (Last visited Jul. 19, 2020 https://history.state.gov/milestones/1921-1936/immigration-act).

In 1902, the Washington Supreme Court refused to allow a law graduate from the University of Washington to be admitted to the bar because Japanese people were barred from becoming citizens under the U.S. law in force at the time. See *In re Takukji Yamashita,* 30 Wash. 234, 239, 70 P.482 (1902). Takuji Yamashita left Japan as a young teen in 1893 and made his way to Tacoma. Rebecca Cook, *Justice Failed Japanese Immigrant*, Los Angeles Times (2001). When he arrived in Tacoma, he attended Tacoma High School where he graduated in two years

and then attended law school at the University of Washington. David Wilma, *State Supreme Court denied citizenship for UW School of Law grad Takuji Yamashita on October 22, 1902*, HistoryLink (2000). Mr. Yamashita was among only 10 members of the class of 1902 at the University of Washington law school. Four days before receiving his law degree, he picked up his naturalization papers from the Pierce County Superior Court. Steven Goldsmith, *A civil action: UW Law School tries to right a historic wrong*, University of Washington Magazine (2000). The following week, Mr. Yamashita rode the train to Olympia with eight classmates to take the oral bar exam. *Id.* He passed with a performance that The Seattle Times described as "highly creditable." *Id.* Although he had passed the oral bar examination, he still needed to obtain citizenship in order to practice law. *Id.*

As the gatekeepers of the bar, the Supreme Court decided that Mr. Yamashita could not be a licensed lawyer in Washington because no person of his ethnicity could ever become a citizen and, therefore, he could not practice law. Washington Attorney General Wickliffe B. Stratton stated that Mr. Yamashita could not become a citizen because "in no classification of the human race is a native of Japan treated as belonging to any branch of the white or whitish race." Mr. Yamashita challenged Washington State's law and filed a 28-page brief arguing that shutting out a person on the grounds of race affronted the core values of "the most enlightened and liberty-loving nation of them all … in which all men are equal in rights and opportunities." At the end of the Washington Supreme Court's opinion in *In re Takukji Yamashita,* the Court clearly stated, "The applicant cannot be admitted, because he is not a citizen of the United States." 30 Wash. 234, 239, 70 P.482 (1902).[29]

Race was the central and deciding factor in not allowing Mr. Yamashita to be a licensed attorney in Washington. See *Id* at 234-39. The question presented to the Washington Supreme Court was whether someone of the Japanese race is eligible under the naturalization laws, for admission to citizenship and, therefore, eligible to be admitted to the Washington bar. *Id.* at 235. The Court deferred to Acts of Congress relating to naturalization in reaching its decision. The relevant revised statute stated that: "Any alien being a free white person may be admitted to be a

[29] The Washington Supreme Court posthumously admitted Mr. Yamashita to the Bar. See, "Takuji Yamashita: State's leaders honor a man once rejected because of his race", University of Washington News, at https://www.washington.edu/news/2001/02/12/takuji-yamashita-states-leaders-honor-a-man-once-rejected-because-of-his-race/.

citizen." 16 Stat. 256, § 7. This was afterward revised, and placed in the Revised Statutes, —section 2169 (see 18 Stat. 318), —so as to read, 'The provisions of this title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent." *Id.* at 236. This meant that only two races were eligible for citizenship under the naturalization laws: (1) free white persons and (2) aliens of African nativity and to persons of African descent. *Id.* The Court referred to Japanese people as part of the "yellow race" and that this division of race was described by Johann Blumenbach, an 18th-century anthropologist from Germany. *Id.;* Raj Bhopal et al., *The Beautiful Skull, and Blumenback's Errors: the Birth of the Scientific Concept of Race*, The BMJ (2007). The Court cited precedent that supported the notion that "white" does not extend to the "yellow race" or the "brown race" or the "red race." *Id.* at 237. The Washington Supreme Court wrote:

> In 1880 it was determined that a native of British Columbia, half Indian and half white, could not be naturalized. In re Camille (C. C.) 6 Fed. 256. In Re Po (City Ct. Alb.) 28 N. Y. Supp. 383, a native of British Burmah was denied admission. In Re Kanaka Nian, a Hawaiian was denied naturalization. 6 Utah, 659, 21 Pac. 993, 4 L. R. A. 726. In Re Saito, 62 Fed. 126, the federal circuit court adjudged that a native of Japan was of the Mongolian race, and therefore not eligible to naturalization.

Id.

Unfortunately for Mr. Yamashita, his story of oppression did not stop at Washington Supreme Court's decision in *In re Takukji Yamashita.* In 1922, Mr. Yamashita, undeterred by Washington State's treatment, attempted to start a real estate business. The Secretary of State refused to receive and file Mr. Yamashita's articles on the ground that, being of the Japanese race, Mr. Yamashita was never entitled to naturalization under the laws of the United States. *Yamashita v. Hinkle,* 260 U.S. 199, 43 S.Ct. 69 (1922). The Secretary of State said that Mr. Yamashita was not qualified under the laws of the State of Washington to form his proposed real estate corporation or file articles naming him as a sole trustee of said corporation. *Id.* Yamashita appealed to the Supreme Court of Washington for a writ of mandamus to compel the Secretary of State to receive and file the articles, but the Supreme Court refused. *Id.* Mr. Yamashita appealed to the Supreme Court of the United States by writ, only to be denied naturalization under the same holding as *Ozawa v. United States,* another case that was decided shortly before Mr. Yamashita's case. *Ozawa v. United States,* 260 U.S. 178, 43 S.Ct. 65 (1922) (stating that petitioner Takao Ozawa, a resident of the United States for over 20 years, a graduate of Berkeley

California High School and a student of the University of California, a father who raised his children in American schools and only spoke to them in English, could not be considered a United States citizen despite fully assimilating to U.S. values).

Discrimination and oppression persisted in Washington against Japanese Americans. Anti-Japanese sentiments emerged after the attack on Pearl Harbor. Days after the attack, FBI agents began arresting Japanese community leaders. *See* David Takami, *World War II Japanese American Internment — Seattle/King County*, HistoryLink.com (Nov. 6, 1998) https://www.historylink.org/File/240. After the signing of Executive Order 9066 by President Franklin D. Roosevelt, Japanese Americans were removed from their homes, farms, and communities. *Id.*

Mr. Yamashita was among those who were wrongfully interned[30] by the United States government. Takuji Yamashita Photograph Collection, University of Washington (1999). As an Issei, or first-generation Japanese immigrant, Mr. Yamashita's "loyalties" to the US government were being tested. Mr. Yamashita was forced to leave his business and home in Washington where he was the Proprietor of People's Cafe in Bremerton and ran an oyster business in Silverdale. *Id.* Mr. Yamashita was removed to internment camps across California and Idaho. *Id.* The internment camps were the final blow that weakened Mr. Yamashita's spirits. Goldsmith *supra*. Unable to pay their bills for three years locked inside three camps, the family lost all its holdings[31]. *Id.*

Across the West Coast of the United States, American citizens were removed from their homes, forced to put their belongings into trash bags, and incarcerated in barbed wire protected camps. Lt. General John DeWitt, head of the Western Defense Command, left no doubt that Japanese and Japanese Americans were singled out for mass exclusion on racial grounds. David Takami, *World War II Japanese American Internment- Seattle/King County,* HistoryLink,

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[30] We note the following comment in a news article:

> Use of the word "internment" is debatable. They were concentration camps—as defined by Merriam Webster as "a camp where persons (as prisoners of war, political prisoners, or refugees) are detained or confined." They're also associated with the mass imprisonment of ethnic minorities. That's not to say the camps were comparable to the hell Jews suffered in Nazi "concentration camps."

75 Years Ago, Only One Paper Opposed Japanese American Internment Camps, Seattle Met, April 2, 2017, at https://www.seattlemet.com/news-and-city-life/2017/04/75-years-ago-only-one-paper-opposed-japanese-american-internment-camps.

[31] On March 1, 2001, Takuji was posthumously inducted into the state bar in a formal ceremony. H.R. 2001-4626 (2001)(last visited July 24, 2020), http://lawfilesext.leg.wa.gov/biennium/2001-02/Pdf/Bills/House%20Resolutions/4626-Takuji%20Yamashita.pdf?q=20200720085750.

(November 06, 1998), https://www.historylink.org/File/240. On February 14, 1942, DeWitt wrote, "The Japanese race is an enemy race and while many second and third-generation Japanese born on United States soil, possessed of United States citizens have become 'Americanized,' the racial strains are undiluted." *Id.* On February 19, 1942, President Roosevelt signed Executive Order 9066, authorizing the forced evacuation. *Id.* Both Seattle Mayor Earl Millikan and Governor Arthur Langlie declared their support of the removal. *Id.* On March 30, 1942, Japanese Americans from Bainbridge Island in Puget Sound became the first group in the nation to be evacuated. *Id.*

A few weeks later in Seattle, on Tuesday, April 21, "evacuation" announcements were posted on telephone poles and bulletin boards. *Id.* The community was to leave the city in three groups the following Tuesday, Thursday, and Friday. *Id.* Because the Army limited Japanese Americans to bringing only what they could carry, people made arrangements to store their belongings at churches or at the homes or businesses of friends. *Id.* A total of 12,892 persons of Japanese ancestry from Washington state were incarcerated. *Id.* Seattle and Puyallup Valley Japanese were sent to the Puyallup "assembly center" and then onto Minidoka in Idaho. *Id.* The *Bainbridge Island Review* was the only newspaper that opposed the removal of Japanese-Americans. See, *75 Years Ago, Only One Paper Opposed Japanese American Internment Camps*, Seattle Met, April 2, 2017, at https://www.seattlemet.com/news-and-city-life/2017/04/75-years-ago-only-one-paper-opposed-japanese-american-internment-camps. When the war ended and these families came home, some decided not to return to their previous communities. In the Yakima Valley, only 10 percent of the Japanese American community returned, which caused Yakima's Japantown to fade and become a historical landmark. Yakima Herald Staff, *Not Forgotten*, Yakima Herald, (Last accessed Jul. 19, 2020), https://www.yakimaherald.com/special_ projects /not_forgotten/).

Judicial actors and entities have played a significant role in both perpetuating injustices against Japanese Americans and in correcting injustices against Japanese Americans. See e.g., *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193 (1944); *Korematsu v. United States*, 584 F.Supp.1406, 16 Fed. R. Evid. Serv. 1231, (1984) (conviction vacated under a writ of *coram nobis*).

In 1944, the Supreme Court of the United States affirmed Fred T. Korematsu's conviction for defying a military exclusion order which prohibited all persons of Japanese

ancestry from being in a certain place. *Korematsu,* 323 U.S. at 216. The Supreme Court reached its conclusion by accepting that "hardships are part of war", and that racial prejudice was unrelated to the issue at hand. See *Id.*at 223. The court stated that Mr. Korematsu was excluded merely because "we were at war with the Japanese Empire", and that the exclusion had nothing to do with his race. *Id.* Circuit Judge Schroeder described the Supreme Court's decision in *Korematsu* as one that has never occupied an honored place in history. *Hirabayashi v. U.S.,* 828 F.2d 591, 593 (9th Cir. 1987).

Much like Mr. Korematsu, Gordon Hirabayashi was a staunch advocate for justice. Mr. Hirabayashi, as a 22-year-old- college student, chose to defy the curfew and exclusions orders that culminated on the West Coast during World War II. Lorrain K. Bannai, INTRODUCTION: THE 25TH ANNIVERSARY OF THE UNITED STATES v. HIRABAYASHI CORAM NOBIS CASE: ITS MEANING THEN AND ITS RELEVANCE NOW, 11 Seattle J. for Soc. Just. 1 (2012). Mr. Hirabayashi was born and raised in Seattle. *Id.* at 3. Mr. Hirabayashi challenged the constitutionality of the curfew and exclusion orders, but the Supreme Court deferred to the government's argument of military necessity. *Id*. In 1983, a team of attorneys reopened Mr. Hirabayashi's case and argued that the government had suppressed and destroyed material evidence that would have shown that there was no bona fide military necessity for the internment of thousands of Japanese people. *Id.* An archival researcher, Aiko Herzig-Yoshinaga, discovered a report made in preparation of the State's case against Mr. Hirabayashi. *Id.* The report made by Lt. Commander Kenneth Ringle of the Office of Naval Intelligence advised against any mass removal of Japanese Americans. *Id.* at 6. The attorney for the Department of Justice advised Solicitor General Charles Fahy that the government had a duty to inform the court of Lt. Commander Ringle's report, and that "any other course of action might approximate the suppression of evidence." *Id.* The government ignored its counsel's advice and suppressed materially relevant information. *Id.* Considering the evidence that material information had been suppressed and destroyed, Judge Mary Schroeder affirmed the lower court's findings of prosecutorial fraud and vacated Mr. Hirabayashi's curfew conviction and exclusion conviction. The *coram nobis* cases are relevant examples of how judicial wrongs can be corrected and how there ought to be no statute of limitations on correcting moral wrongs.

D. Against Latinx Washingtonians

Mexican Americans have a history in Washington that began prior to the territory's statehood. Mexican Americans created the mule packing system, which was the backbone of the transportation system for the mining economy of the late nineteenth century. Gonzalo Guzman, *Latino History of Washington State,* Aug. 27, 2006 HistoryLink.org, (Last visited July 22, 2020, https://www.historylink.org/File/7901). Mexican mule packers were in high demand because of their skill. Because most white miners preferred mining to loading, many packers throughout the Pacific Northwest were Mexicans. *Id*. In the twentieth century, particularly after the start of World War II, Mexican migrants from the Southwest and immigrants from Mexico made up a large part of the labor force that brought in Yakima County's harvests. Elizabeth Salas, *Mexican American Women in Washington,* Dec 30, 2003, HistoryLink.org, (Last visited Jul. 22, 2020, https://historylink.org/File/5629. Migration from U.S. southwestern states and immigration from Mexico and South America began to increase dramatically in Washington during the 1940s. This was in part due to the demand for labor created by the departure for the war of men from the region, and in part due to significant racism toward Asian and Native American laborers. Conditions for migrant workers in the Yakima Valley were inadequate. Mexican laborers were forced into a state of political and economic subjugation. Oscar Rosales Castañeda, *The Fusion of El Movimiento and Farm Worker Organizing in the 1960s*. The Seattle Civil Rights and Labor History Project, University of Washington, 2009. (Last viewed July 23, 2020, https://depts.washington.edu/civilr/farmwk_ch6.htm#ftn_ref_13). A United States Department of Agriculture study ranked the economic status of the rural population of Yakima County among the lowest two-fifths of rural populations of all counties in the United States. Yakima farm workers suffered from low wages, lack of job security, poor health, high mortality and injury rates, inadequate nutrition, education and housing, discriminatory exclusion from the benefits of social welfare legislation enjoyed by others and a lack of political power. Charles E. Ehlert, *Report of the Yakima Valley Project* (Seattle: American Civil Liberties Union, 1969).

This ACLU report triggered a series of lawsuits and the spread of organizing efforts to improve the conditions of Mexican laborers. In 1969 farm workers sued Yakima County for the discriminatory practice of administering literacy tests for Mexican American voters. *Mexican American Fed'n-Washington State v. Naff*, 299 F. Supp. 587 (E.D. Wash. 1969). In 1968 the plaintiffs were attempting to register to vote, accompanied by Guadalupe Gamboa, who spoke to the deputy registrar in English. *Id*. at 589. Gamboa stated that he would interpret from Spanish to

English and English to Spanish for the plaintiff applicants so that the deputy registrars would be able to obtain essential information for their records in effecting a proper registration of the plaintiff applicants. *Id.* at 589-590. Plaintiffs were told they could not use interpreter services. *Id*. The defendant registrars refused to register plaintiffs because plaintiffs were unable to speak and read the English language. *Id*. In 1969 the Washington State Constitution required voters have the ability to read and write English. *Id*. at 588. The farm workers claimed the provision violated the Federal constitution, the Civil Rights Act and the Voting Rights Act. *Id*. The trial judge held that there was no evidence that a test had been administered by the defendant when plaintiffs were asked about their ability to read and write in English. *Id*. at 593. The judge found that the defendant's inquiry was not discriminatory, did not constitute a test and did not infringe on the rights of the plaintiff. *Id*. In 1971, the U.S. Supreme Court vacated the judgment. *Jimenez v. Naff*, 400 U.S. 986, 91 S. Ct. 448, 27 L. Ed. 2d 434 (1971).

E. Against Washingtonians of Chinese Descent

Asian immigrants have been in the Pacific Northwest since its inception. As Washington became a territory, Chinese immigrants were forced to endure conditions similar to the Jim Crow South. Matthew W. Klingle, *A History Bursting with Telling: Asian Americans in Washington State*, Center for the Study of the Pacific Northwest University of Washington Department of History, https://depts.washington.edu/cspn/wordpress/wp-content/uploads/2017/09/A-History-Bursting-With-Telling.pdf. The Washington Territory passed a series of anti-Chinese legislation, including a measure in 1853 that denied Washingtonians of Chinese descent the right to vote; an "Act to Protect Free White Labor Against Competition with Chinese Coolie Labor and to Discourage the Immigration of Chinese in the Territory," which lead to the "Chinese Police Poll Tax of 1864;" an Act relating to witnesses and evidence in 1864, which prohibited Washingtonians of Chinese descent from giving evidence in the courts in cases involving whites; a law in 1867 which disallowed Washingtonians of Chinese descent from voting in school elections; and legislation which disallowed Washingtonians of Chinese descent from owning land. Northwest Asian Weekly, *Seeking resolution for a sad chapter in Seattle's history* (2015), (Last visited Jul. 27, 2020, https://nwasianweekly.com/2015/07/seeking-resolution-for-a-sad-chapter-in-seattles-history/).

Following the enactment of the Chinese Exclusion Act of 1882, there was a rise in racial violence aimed at Chinese immigrants. Klingle, *supra.* In 1885, business and civic leaders in

Tacoma planned the expulsion of the city's Chinese residents. Priscilla Long, *Tacoma Expels the Entire Chinese Community on November 3, 1885*, HistoryLink.org, (Jan. 17, 2003) https://www.historylink.org/File/5063. In early November of that year, a white mob went door to door and forced Chinese residents from their homes. *Id.* The mob led the families to the train station, where Chinese families boarded to Portland. *Id.* Chinese families lost everything, as their homes and businesses were burned to the ground. *Id.* The perpetrators were indicted, brought to Vancouver in Washington Territory, and went before Judge Hoyt, who set them free on bail. *Id.* They returned to Tacoma as heroes in a welcoming parade. *Id.* The trial was transferred to Tacoma the following year and all the indictments against the perpetrators were dropped. *Id*. In 1993, the Tacoma City Council passed a resolution to make amends and apologize for the city's actions. *Id.* Spurred by a local pastor,[32] the City of Tacoma established The Tacoma Chinese Reconciliation Park. https://www.tacomachinesepark.org.

IV. Education Program Proposal for Minority and Justice Commission

For its 2022 Supreme Court Symposium, we recommend that the Commission present an educational program that addresses the aforementioned history of racial oppression and exclusion in Washington State, provides examples of reparations that have been provided in the United States, and presents reparations measures that Washington may take.

The MJC has previously presented symposia that address ways the state court system and other institutions are affected by racial bias. Some of the topics of more recent symposia include reentry, pre-trial justice, jury diversity, legal financial obligations, and bias within the use of artificial intelligence. *Minority and Justice Commission,* Supreme Court Symposium (Last visited Jul. 23, 2020, https://www.courts.wa.gov/?fa=home.sub&org=mjc&page=symposium&layout=2). A symposium on the racist history of Washington and on reparations measures that the Court and the State may take would address possible solutions for issues brought up in past symposia. Furthermore, such a symposium would align with the MJC's Education Committee's goal to improve the administration of justice by eliminating racism and its effects by offering and

[32] "Tacoma pastor wanted to right Tacoma's shameful past," News Tribune, April 27, 2018, at https://www.thenewstribune.com/news/local/article209992204.html.

supporting high quality education programs designed to improve the cultural competency of legal professionals. *Minority and Justice Commission,* Education Committee (Last visited Jul. 23, 2020, https://www.courts.wa.gov/?fa=home.sub&org=mjc&page=education&layout=2&parent=work).

Furthermore, we recommend that the Commission support the Mandatory Continuing Legal Education Board's suggested amendment to Admission to Practice Rules (APR) 11 that would require each licensed legal professional to complete at least one credit hour of equity, inclusion and the mitigation of bias as part of the minimum requirement of six ethics and professional responsibility credits per each three year MCLE reporting period. MCLE Board, *Special Meeting Agenda: Suggested Amendments to APR 11* (2020), (Last visited Jul. 23, 2020, https://www.wsba.org/docs/default-source/legal-community/committees/mcle-board/mcle-board-report-and-recommendation.pdf?sfvrsn=52e008f1_4). The suggested amendment would not increase the total number of ethics hours required. *Id.* The original proposal was drafted by the WSBA Diversity Committee and the Washington Women Lawyers with the support of eight minority bar associations: the Asian Bar Association of Washington, Cardozo Society of Washington State, Filipino Lawyers of Washington, Pierce County Minority Bar Association, Loren Miller Bar Association, Latina/o Bar Association of Washington, South Asian Bar Association of Washington, and QLaw. *Id.*

The MCLE Board has stated that this suggested amendment will better equip legal professionals with tools of cultural competency and understanding in working with the diverse public they serve. *Id.* at 3. Further, the Board has stated that part of the Board's role in determining compliance with the minimum education requirements is to develop, propose, and support continuing legal education that will not only educate Washington licensed legal professionals on the state of the law in various subjects but also improve intercultural communication, improve equitable outcomes, and reduce the risk of potential liability. *Id.* The MCLE Board was created and appointed by the Washington Supreme Court, and the Court will ultimately vote to approve or reject the amendment when the amendment recommendation is sent to the Court in October of 2020. *Id.* at 5. We recommend that the Commission consider the importance of such an amendment to expand upon racial equity education for the legal profession in Washington, and that the Commission advocate for the amendment to the Court.

As Ta-Nehisi Coates stated in his article, *The Case for Reparations*, "What I'm talking about is more than recompense for past injustices—more than a handout, a payoff, hush money, or a reluctant bribe. What I'm talking about is a national reckoning that would lead to spiritual renewal." Ta-Nehisi Coates, *The Case for Reparations*, The Atlantic (2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/. Our national reckoning must begin with education - the learning and understanding of our history and how such a racially violent past has affected our current struggles to achieve racial equity and justice.

V. Proposal to Commission for Research on Reparations

With the guidance of the preliminary research below, we recommend the MJC conduct a more extensive research study to determine how best to implement reparations measures in Washington. Further, we recommend that the Commission work with community organizations, such as King County Equity Now and Africatown Community Land Trust, in its research on how best to implement reparations measures in Washington. The three areas of reparations we have explored are the following: (1) monetary, (2) land, and (3) cultural. We have also explored some international reparations measures. In many of the examples below, reparation measures encompass more than one type of reparation.

A. Monetary Reparations

a. Japanese American Reparations

In 1978, thirty years after the closing of the internment camps, the Japanese American Citizens League ("JACL") launched a campaign for redress seeking restitution in the amount of $25,000 per internee, an apology by Congress acknowledging the wrong, and funds to establish an educational trust fund. *Id.* JACL's strategy was focused on the loss of individual freedoms guaranteed by the Constitution and enumerated in the Bill of Rights. *Id.* Because of how small the Japanese population was in America at the time of internment, they needed to be strategic. *Id.* JACL set out to utilize the media to educate the public about the internment camp atrocities and built a coalition group willing to support the legislative effort. *Id.* Within six months, JACL made its way into major newspapers, and network television. During this time the JACL made the critical decision to pursue legislation that would create a federal commission to investigate the facts and circumstances surrounding the exclusion and incarceration of Japanese Americans.

Id. Like any group of people, the Japanese people are not a monolithic group; many Japanese Americans were resistant to the idea of reparations. Isabella Rosario, *The Unlikely Story Behind Japanese Americans' Campaign For Reparations*, NPR: Code Switch, (2020) https://www.npr.org/sections/codeswitch/2020/03/24/820181127/the-unlikely-story-behind-japanese-americans-campaign-for-reparations. This conflict most often occurred between generations. *Id.* The Nisei generations, which means second-generation Japanese Americans, embraced traditional values that encouraged them to put the past behind them. *Id.* The Sansei generation, which means third-generation Japanese Americans, grew up in the midst of the Civil Rights Movement. *Id.* They viewed the internment camps as another form of racial oppression. *Id.*

JACL formed coalitions with civil rights groups and others to help support their interest in legislation that would research the Japanese internment camps. In 1979, H.R. 5499: Commission on Wartime Relocation and Internment of Civilian Act ("CWRIC Act") was introduced in Congress. By 1980, the CWRIC Act was signed into law by President Jimmy Carter. By 1982, the commission issued its findings to Congress and the president. The report, titled "Justice Denied," concluded that Japanese Americans were unjustly forced from their homes and incarcerated. The report stated that the underlying reasons for this treatment were racial prejudice and a failure of political leadership. A ten-year redress program was established in 1988 by the Civil Liberties Act of 1988. U.S. Department of Justice, *Ten Year Program to Compensate Japanese Interned During World War II Closes Its Doors* (1999) https://www.justice.gov/archive/opa/pr/1999/February/059cr.htm. The Justice Department's Office of Redress Administration ("ORA") was charged with administering the ten-year program. *Id.* ORA provided $20,000 in redress to 82,219 eligible claimants, totaling more than $1.6 billion. Monetary compensation was not the only form of redress that was provided to the Japanese Americans who were incarcerated. The Civil Liberties Act of 1988 also included an apology on behalf of Congress and a public education fund to finance efforts to inform the public about the internment of the Japanese Americans so as to prevent the recurrence of any similar event. Civil Liberties Act of 1988, https://www.govinfo.gov/content/pkg/STATUTE-102/pdf/STATUTE-102-Pg903.pdf.

b. Reparations for African Americans

i. Tuskegee Experiment Reparations

In 1974, the victims of the *Tuskegee Study of Untreated Syphilis on the Negro Male,* also called the Tuskegee Experiment, were awarded $10 million in an out-of-court settlement. Centers for Disease Control and Prevention, *The Tuskegee Timeline,* U.S Public Health Service Syphilis Study at Tuskegee (Last retrieved Jul. 15, 2020 https://www.cdc.gov/tuskegee/timeline.htm). The Tuskegee Experiments officially ended in 1972. More than 65 years later, President Clinton apologized for the U.S. government's role in the research study. Centers for Disease Control and Prevention, *Tuskegee Study, 1932-1972*, U.S Public Health Service Syphilis Study at Tuskegee, viewed July 15, 2020, https://www.cdc.gov/tuskegee/index.html.

In 1932 the United State Public Health Service, along with the Tuskegee Institute, began a study to record the natural history of syphilis on Black subjects in Macon County, Alabama. Centers for Disease Control and Prevention, *The Tuskegee Timeline,* U.S Public Health Service Syphilis Study at Tuskegee, viewed July 15, 2020, https://www.cdc.gov/tuskegee/timeline.htm. The initial study involved over 600 Black men. *Id*. The men recruited for the study were poor Black laborers and sharecroppers. The study was conducted without informed consent and patients were misled about the study's details. Black men with syphilis were deliberately left untreated to study the disease's progression. Although originally projected to last 6 months, the study actually went on for 40 years. *Id*. The men were never given adequate treatment for their disease. Even when penicillin became the drug of choice for syphilis in 1947, researchers did not offer it to the subjects. *Id*. As part of the 1974 settlement, the U.S. government promised to give lifetime medical benefits and burial services to all living participants. *Id*. In 1975, wives, widows and offspring were added to the program. *Id*.

c. Different Jurisdiction Measures

i. Chicago and Evanston

Chicago's City Council recently approved a revised resolution to create a subcommittee that will study how to pay reparations to Chicagoans and will make annual reports on its findings to the City Council. *See* Heather Cherone, *Chicago Will Not Create Reparations Commission After Lightfoot Objects*, WTTW (2020), https://news.wttw.com/2020/06/12/chicago-will-not-create-reparations-commission-after-lightfoot-objects; Fran Spielman, *City Council approves reparations resolution*, Chicago Sun Times (2020), https://chicago.suntimes.com/city-

hall/2020/6/17/21294638/city-council-slavery-reparation-subcommittee-resolution. More specifically, the subcommittee will be charged with exploring ways to close the racial gaps in homeownership, education, employment, health care and more that face the city's Black community. Cherone, *supra*. Chicago is not the only city in Illinois that has begun reparations. Evanston established a $10 million reparations fund in November 2019 to help the city's Black population stay in Evanston, as the suburb's Black population had been declining due to increasing disparities in wealth. *See* Eric Lutz, *One city's reparations program that could offer a blueprint for the nation*, The Guardian (2020), https://www.theguardian.com/us-news/2020/jan/19/reparations-program-evanston-illinois-african-americans-slavery; Genevieve Bookwalter, *Evanston will use recreational marijuana sales tax proceeds to fund local reparations program*, Chicago Tribune (2019), https://www.chicagotribune.com/suburbs/evanston/ct-evr-evanston-reparations-marijuana-tax-tl-1205-20191126-g3ifwaikrjfmrillfv6ytvwgii-story.html. The reparations fund will also provide training for jobs and other benefits for the town's Black community. Bookwalter, *supra*. The money in Evanston's fund will come from a cannabis sales tax. *Id.* The city's new measure came after City Alderman Rue Simmons partnered with Evanston's City Council's Equity and Empowerment Commission to hold community meetings on the subject of reparations. Lutz, *supra*. Following these town halls, Evanston's City Council approved a plan to establish a reparations program, in which housing initiatives aimed at addressing the impact of redlining on the suburb's black community will likely be prioritized. *Id.* The city will likely start disbursing the newly allocated reparations funds later this year or early next year. *Id.* According to Alderman Simmons, the source of the reparations fund is especially appropriate, as many Black residents were victims of the "war on drugs" and had spent time in jail for smoking marijuana, a substance that in specific quantities will soon be permitted in Illinois. *Id.*

Chicago has already established certain reparations measures specifically for victims of police violence. Following years of Chicago communities fighting police torture under police Commander Jon Burge, who for nearly three decades allegedly tortured more than 120 Black and Latino men into making false confessions, the city recognized that something had to be done to support survivors. Sarah Macaraeg and Yana Kunichoff, *How Chicago Became the First City to Make Reparations to Victims of Police Violence*, Yes Magazine (2017), https://www.yesmagazine.org/issue/science/2017/03/21/how-chicago-became-the-first-city-to-

make-reparations-to-victims-of-police-violence/. The city's first effort towards repairing harm was legal: Jon Burge and officers under his command were brought to trial, and Burge was sentenced for perjury. The statute of limitations had expired on many of the cases of police torture. *Id.* Attorney Joey Mogul, who litigated cases on behalf of people who claimed to be victims of Burge's torture, stated that Police Commander Burge's conviction was a hollow victory at best given the trauma and painful memories the survivors experienced under Burge's command. *Id.*

Recognizing that Burge's conviction did not ultimately resolve the trauma that many of his survivors were experiencing, Mogul and other activists and lawyers formed the Chicago Torture Justice Memorials (CTJM). G. Flint Taylor, *The Long Path to Reparations for the Survivors of Chicago Police Torture*, 11 NW J L & Soc Pol'y 330, 340 (2016), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1136&context=njlsp. The first project CTJM took on was calling for proposals on how to memorialize Chicago police torture cases, and eventually the group developed an idea for a city ordinance which, in part, would recognize the city's legacy of torture. Macaraeg, *supra.* The ordinance was drafted in 2012 and included a request for financial compensation for Burge's victims, a curriculum to teach about the Burge tortures in Chicago Public Schools, and free enrollment for survivors in the city's community colleges. *Id*. More specifically, the ordinance called for an official apology and compensation to the survivors, and requested tuition-free education at the City Colleges of Chicago for all torture survivors and their families as well as a center on the south side of Chicago that would provide psychological counseling, healthcare services, and vocational training to those affected by law enforcement torture and abuse. Taylor, *supra* at 344.

In May of 2015, the Chicago City Council unanimously adopted the ordinance and a resolution. *Id.* at 349; City Council of the City of Chicago, *Reparations for Burge Torture Victims Ordinance*, https://www.chicago.gov/content/dam/city/depts/dol/supp_info/Burge-Reparations-Information-Center/ORDINANCE.pdf; City Council of the City of Chicago, *Resolution*, https://www.chicago.gov/content/dam/city/depts/dol/supp_info/Burge-Reparations-Information-Center/BurgeRESOLUTION.pdf. In January of 2016, individual torture victims each received $100,000 in compensation. Taylor, *supra* at 351. The ordinance limited financial relief to people tortured during Burge's exact time on the force between May 1, 1972 to November 30, 1991, despite evidence that police torture continued after he left. Macaraeg, *supra.*

Further, the ordinance stated that victims who had already received compensation, such as by settlement of his or her claims arising out of the torture, would only receive up to $100,000 minus the amount of the prior compensation from the reparations fund. City Council of the City of Chicago Ordinance*, supra.* Fifty-seven survivors each received a total of $100,000 compensation from the city. Taylor, *supra* at 351.

After monetary compensation was sent to survivors, representatives from CTJM, the Chicago Public Schools, and the Chicago Teachers Union established a mutually acceptable curriculum for teaching the history of Chicago police torture to eighth and tenth grade students in Chicago's public schools. *Id.* In the spring of 2018, teachers began to implement this new curriculum citywide. Thai Jones, *How Chicago's Public Schools are Teaching the History of Police Torture*, The New Yorker (2018), https://www.newyorker.com/news/dispatch/how-chicagos-public-schools-are-teaching-the-history-of-police-torture. While the Chicago police union denounced the curriculum as "biased and incomplete" and parents in some neighborhoods expressed concerns about exposing their children to graphic details of police torture, instructors noticed that students quickly made connections between the torture cases of the nineteen-seventies and eighties and recent stories of police abuse, including their own firsthand encounters. *Id.* Jen Johnson, the chief of staff at the Chicago Teachers Union, recognized that, particularly for communities of color, where students have had their own experiences with police, and at the high-school level, where there are actual police officers in the schools, the students are learning not just about history but also about the present state of policing by which they are affected. *Id.*

Although the City Council's resolution included plans to work with the Chicago Torture Justice Memorial to construct a permanent memorial to the Burge victims, the memorial is the only piece of the ordinance which the city has not yet implemented. City Council of the City of Chicago Resolution, *supra*; Logan Jaffe, *The Nation's First Reparations Package to Survivors of Police Torture Included a Public Memorial. Survivors are Still Waiting*, ProPublica Illinois (2020), https://www.propublica.org/article/the-nations-first-reparations-package-to-survivors-of-police-torture-included-a-public-memorial-survivors-are-still-waiting. A reason for this may be that former Chicago Mayor Rahm Emanuel did not commit funds to building the memorial before he left office, and while current Mayor Lori Lightfoot has expressed her commitment to continuing to work "on proposals for a memorial that honors the victims of injustice," it has been

unclear where she stands on building a specific memorial to recognize Burge torture survivors. Jaffe, *supra.* Advocates for the memorial say that the memorial's specificity is important to help establish the experiences of survivors as the dominant narrative of how the city remembers a shameful part of its past. *Id.*

ii. Asheville, North Carolina

Just recently, the Asheville City Council apologized for the city's role in slavery, discrimination, and denial of basic liberties to Black residents. Joel Burgess, *In historic move, North Carolina city approves reparations for Black residents,* USA Today (2020), https://www.usatoday.com/story/news/nation/2020/07/15/asheville-passes-reparations-black-residents-historic/5441792002/?fbclid=IwAR1HqSdYx8zaT1zPjFJ7YA3HXGA4J_CBB9EiwpN2WZ3XD5voOdrTX3SSmNs. Further, the Council unanimously voted to provide reparations to the city's Black residents and their descendants. *Id.*; Resolution Supporting Community Reparations for Black Asheville (2020), https://drive.google.com/file/d/1WKialVISWzu72mhasyy9SslDbVGMSj5U/view. The resolution will make investments in areas where Black residents face disparities, as opposed to mandating direct payments, in order to increase minority home ownership and access to other affordable housing, increase minority business ownership and career opportunities, grow generational wealth, and close the gaps in health care, education, employment and pay. Burgess, *supra.* To determine how best to invest the public funding over the coming year, the resolution calls for a panel of experts to convene a commission and examine how to create equity among the city's Black residents on issues including education, public transportation and home ownership. Vanessa Romo, *Asheville, N.C., Approves Steps Towards Reparations for Black Residents*, NPR (2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/15/891700076/asheville-n-c-approves-steps-toward-reparations-for-black-residents.

iii. Tulsa, Oklahoma

In 1921, Tulsa, Oklahoma, was the site of the Greenwood Race Massacre. Human Rights Watch, *The Case for Reparations in Tulsa, Oklahoma*, (Last accessed Jul. 19 2020 https://www.hrw.org/news/2020/05/29/case-reparations-tulsa-oklahoma#_ftnref187). This Race

Massacre destroyed what was known as Black Wall Street. *Id.* In response to decades of activism within the community, the Oklahoma state legislature began to consider the claims for reparations. *Id.* The legislature passed a bill to create the Tulsa Race Riot Commission, which was tasked with investigating the impacts of the Greenwood Race Massacre on the Black community of Tulsa. *See* Okla. Stat. Ann. tit. 74, § 8000.1 (West). Upon the completion of the report the Commission recommended the following:

> 1) Direct payment of reparations to survivors of the Tulsa Race Riot. 2) Direct payment of reparations to descendants of the survivors of the Tulsa Race Riot. 3) A scholarship fund available to students affected by the Tulsa Race Riot. 4) Establishment of an economic development enterprise zone in the historic area of the Greenwood District. 5) A memorial for the reburial of any human remains found in the search for unmarked graves of riot victims. . . [and] [e]xtension of the Tulsa Race Riot Commission.

Oklahoma Commission to Study the Tulsa Race Riots of 1921, *Final Report*, 21 (Feb. 7, 2000).

As a result of the Commission's report, the Oklahoma state legislature created a scholarship fund for the descendants of those affected by the Greenwood Race Massacre. *See* Okla. Stat. Ann. tit. 70, § 2621 (West). In addition to the scholarship fund, the legislature created other revolving fund programs for redevelopment of the Greenwood area. *See* Okla. Stat. Ann. tit. 74, § 8207 (West) (1921 Tulsa Race Riot Centennial Memorial Revolving Fund); Okla. Stat. Ann. tit. 74, § 8223 (West) (Greenwood Area Redevelopment Authority); Okla. Stat. Ann. tit. 74, § 8206 (West) (Funds for the 1921 Tulsa Race Riot Memorial of Reconciliation). Recently, forensic investigators broke ground at a possible site of a mass grave in Oaklawn Cemetery. Ben Fenwick, *The Massacre That Destroyed Tulsa's 'Black Wall Street'*, New York Times (Jul. 13, 2020) https://www.nytimes.com/2020/07/13/us/tulsa-massacre-graves-excavation.html.

iv. Florida

Florida, like Oklahoma, has recognized the past atrocities committed against Black communities in the state. The Florida legislature recognized the harm of the Rosewood Massacre of 1923 when it decided to grant "equity, justice, fairness and healing" to survivors of the massacre and authorized financial compensation:

> An appropriation of $500,000 from the General Revenue Fund is made to the office of the Attorney General to compensate African American families who can demonstrate real and personal property damages sustained as a result of the destruction of Rosewood. Each eligible family is to receive $20,000, but the Attorney General is authorized to settle claims up to $l00,00 if he finds the losses exceed $20,000… [Also, t]he Comptroller is to distribute the $1.5 million from the General Revenue Fund based on information supplied by the Attorney General and to prorate the funds if they are insufficient to make maximum awards to each eligible person.

Fla. HB 591 (1994); Jerry Fallstrom, *Senate Oks $2.1 Million for Rosewood Reparations*, SunSentinel (1994), (Last visited Jul. 22, 2020, https://www.sun-sentinel.com/news/fl-xpm-1994-04-09-9404080701-story.html).

Senator Daryl Jones from Miami stated that the "system of justice failed the citizens of Rosewood" and that passing the legislation was the Senate's "chance to right an atrocious wrong." Fallstrom, *supra.* Additionally, the legislature passed funds for twenty-five scholarships of $4,000 each for descendants of the Rosewood Massacre. Fla. HB 591 (1994). The full payment of the reparations totaled $2.1 million. *Id.*

Following the Rosewood reparations, Florida apologized for slavery in 2008. In its joint resolution, the legislature "express[ed] its profound regret for Florida's role in sanctioning and perpetuating involuntary servitude upon generations of African slaves." Fla. Concurrent Resolution 2930 (2008). Even more recently, Florida passed a bill that directs the Commissioner of Education's African American History Task Force to examine ways in which the history of the 1920 Ocoee Election Day Riots may be included in required instruction on African American history and to submit any recommendations to the Commissioner of Education and the State Board of Education by March 1, 2021. Fla. HB 1213 (2020). The 1920 Ocoee Election Day violence occurred on the day of the general election in November of 1920, when a Black resident named Mose Norman went to the polls to vote but was told he was not permitted to do so because he had not paid his poll tax. Office of Program Policy Analysis and Government Accountability, *Ocoee Election Day Violence – November 1920* (2019), 3, https://oppaga.fl.gov/Documents/Reports/19-15.pdf.

Norman's attorney advised him to return to the polling place and record names of the polling officials who were denying people the right to vote, but when Norman returned, he was again told that he could not vote. *Id.* According to varying accounts, Norman stopped at the home of July Perry before fleeing Ocoee that evening. *Id.* Later in the day, white Ocoee residents

formed a posse, and the Sheriff Deputy granted them the power to arrest Norman and Perry. *Id.* The posse kidnapped Perry's daughter, and Perry was eventually captured by a white mob who lynched and shot him. *Id.* at 4. After Perry was murdered, a mob set fire to all of the Black-owned buildings in the northern part of Ocoee throughout the night, which destroyed more than 20 houses and killed what was reported to have been upwards of 60 people. *Id.* At least 253 Black residents were displaced from Ocoee after fleeing the Election Day violence. *Id.* at 5.

This new bill not only requires instruction on the 1920 Ocoee Election Day Riots in school curricula, but according to the bill's language it also directs the Secretary of State to determine ways in which the Museum of Florida History and other state museums will promote the history of the riots through exhibits and educational programs, and to collaborate with the National Museum of African American History and Culture of the Smithsonian Institution to seek inclusion of the history of riots in the museum's exhibits. *Id.* Finally, the bill directs the Secretary of Environmental Protection to assess if any state park or facility will be named in recognition of any victim of the riots and encourages district school boards to assess opportunities for naming school facilities in recognition of victims of the riots. *Id.*

v. Other Jurisdictions

Other states have begun taking steps towards addressing reparations and slavery in their states. California, Vermont, and New York have introduced bills in their respective legislatures that would create workgroups to study reparations. See N.Y. Assembly Bill A3080A (2019); Cal. AB-3121 (2019); Vermont H. 478 (2019). Nine states, Alabama, Connecticut, Delaware, Florida, Maryland, New Jersey, North Carolina, Virginia, have passed resolutions that acknowledged and apologized for slavery. Alabama House Joint Resolution 321 (2007); Con. House Joint Resolution 1 (2009); Del. House Joint Resolution 10 (2016); Fla. Concurrent Resolution 2930 (2008); Maryland Joint Resolution 1 (2007); N.J. Assembly Concurrent Resolution 270 (2008); N.C. Joint Senate Resolution 1557 (2007); Virginia Senate Joint Resolution 332 (2007). Tennessee passed a joint resolution that stated, "the General Assembly acknowledges with profound regret the fundamental injustice, brutality, and inhumanity of slavery and the discrimination that was slavery's legacy." Tennessee Joint House Resolution 847 (2014).

At the federal level, both the House and Senate have issued apologies for their involvement and reinforcement of slavery in the United States. *See* U.S. S.Con.Res.26 (2009);

U.S. H.Res.194 (2008). But, Congress has yet to implement reparations for slavery. In 1990, Representative John Conyers introduced House Resolution 3745, a bill that would acknowledge the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to examine the institution of slavery, subsequent de jure and de facto racial and economic discrimination against African Americans, and the impact of these forces on living African Americans, to make recommendations to the Congress on appropriate remedies, and for other purposes. U.S. H.R. 3745 (1990). This same bill has been introduced in every Congress since 1990, a total of 30 years, and had its first committee hearing in over a decade in 2019 as House Resolution 40. Adam Harris, *Everyone Wants to Talk About Reparations. But for How Long?*, The Atlantic (Jun. 19, 2019), https://www.theatlantic.com/politics/archive/2019/06/house-committee-explores-bill-study-reparations/592096/. The resolution's namesake comes from Special Field Order No. 15 by General William T. Sherman which would have granted 40 acres of land and a mule to all freed saves. *Id.*

B. Land Reparations

a. Reparations in Hawaii

Prior to the arrival of the first Europeans in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion. Overthrow of Hawaii, PL 103-150, 107 Stat 1510 (1993). At that time, Native lands were divided up into three different categories: (1) crown lands, (2) government lands, and (3) konohiki lands[33]. Jon Van Dkyke, What Are the 'Ceded Lands' of Hawaii? Civil Beat (2010). https://www.civilbeat.org/2010/10/5914-what-are-the-ceded-lands-of-hawaii/.

In 1893, American businessmen, with the support of US military forces, staged a coup to overthrow the Hawaiian Kingdom and deposed Queen Lili'uokalani for the purpose of annexing Hawai'i to the United States as a means for business interests. Native Hawaiian Data Book,

[33] Konohiki are heads of ahupua`a or land divisions under the chief of a particular district. Konohiki manage land and fishing rights within their ahupua`a as well as the people residing in the ahupua`a boundaries. It was the responsibility of the konohiki to be an expert in the land he cared for in order to ensure the prosperity of his land and the people.

Chronology of Government in the Hawaiian Islands, Office of Hawaiian Affairs (2020)[34]. In order to avoid violence against her people, Queen Lili'uokalani yielded her authority to the businessmen. Those businessmen declared themselves the "Republic of Hawai'i" (The Republic). The leaders of the Republic broke up the Crown and Government lands into homesteads for small farmers, and enacted the Land Act of 1895, which repealed an 1865 statute that prohibited Crown Lands to be sold. Van Dkyke, *supra.* By 1895, around 46,594 acres of Crown and Government Lands were sold by the Republic. *Id.* In addition to the sale of these lands, the Republic recategorized the land, no longer respecting the three divisions mentioned above.

Issues of land ownership would prove to be central to reparation movements for Native Hawaiians. Native Hawaiians have fought for reparations to regain their sacred lands in many different ways, such as through constitutional amendments, legislation, community organizing, and litigation. See e.g., Melody Kapilialoha and MacKenzie, *Hawai'i '78: Where We Went and Where We Go From Here,* Ka Huli Ao Center For Excellence in Native Hawaiian Law (2018)(last visited July 23, 2020), https://blog.hawaii.edu/kahuliao/ka-moae/spring-2018/hawai%CA%BBi-%CA%BB78/; H.R. 15666, 93d Cong., 2d Sess. (1974); H.R. 1944. Office of Hawaiian Affairs, *History: The Establishment of OHA* (2020) https://www.oha.org/about/abouthistory; *Ka'ai'ai v. Drake,* Civ. No. 92-3742-10 (1st Cir. 1992). Native Hawaiians were able to gain traction through constitutional amendments due to the unique history of Hawai'i and its colonization. In 1898 the Fifty-fifth Congress of the United States of America, in a joint resolution, accepted The Republic's cession of the Hawaiian Islands. In this resolution, Congress wrote:

> The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local

[34] The Office of Hawaiian Affairs' (OHA) *Native Hawaiian Data Book* is an effort initiated in 1994. The data book is produced as a response to OHA's fiduciary obligation as written in Hawai'i Revised Statute (HRS), Chapter 10. The statutes calls for compiling "basic demographic data on native Hawaiians and Hawaiians" and to identify "the physical, sociological, psychological, and economic needs of native Hawaiians and Hawaiians." [HRS, Chapter 10, § 10–6(1)].

> government, s*hall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.* [Emphasis added].

Cong.J.Res. To Provide For Annexing the Hawaiian Islands to the United States, 55th Cong. (1898)(last visited July 23, 2020), https://www.ourdocuments.gov/doc_large_image.php?flash=false&doc=54.

The Fifty-Fifth Congress acknowledged that the Hawaiian lands were special and that "[t]he existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands." *Id.* This acknowledgement and promise that the land in Hawaii was to be used for the benefit of the Hawaiian people was one of many in a long list of congressional resolutions.

In 1921, Congress had passed the Hawaiian Homes Commission Act (HHCA) to "rehabilitate" Native Hawaiians of not less than 50 percent Hawaiian ancestry through a homesteading program. Melody Kapilialoha MacKenzie, Native Hawaiian Law: A Treatise, Ch. 5, 10 Native Hawaiian Legal Corporation, Ka Huli Ao Center for Excellence in Native Hawaiian Law at the William S. Richardson School of Law, and Kamehameha Publishing (2015). The HHCA had set aside approximately 203,500 acres of the former Government and Crown Lands for the homesteading program. *Id.*

In 1959, the United States granted all public lands to the State of Hawaii through the Admissions Act. Admission Act of 1959, Pub. L. No. 86-3, § 5(f), 73 Stat 4 (1959), https://www.doi.gov/sites/doi.gov/files/migrated/ohr/upload/An-Act-to-Provide-for-the-Admission-of-the-State-of-Hawai.pdf. The Admissions Act directed the state to hold the following types of lands and proceeds of these lands in trust for the Hawaiian people:

> The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians.

Id.

Subsection (b) of the Admissions Act includes all the public lands and other public property, and all lands defined as "available lands" by section 203 of the HHCA.[35] Section 203 of HHCA is defined as follows:

> All public lands of the description and acreage, as follows, excluding (a) all lands within any forest reservation, (b) all cultivated sugar-cane lands, and (c) all public lands held under a certificate of occupation, homestead lease, right of purchase lease, or special homestead agreement, are hereby designated, and hereinafter referred to, as "available lands."

Hawaiian Homes Commission Act of 1921, *supra.*

Subsection (c), (d), and (e) of the Admissions Act states that the United States government is able to retain some land however, within five years from the date that Hawaii is admitted into the Union, each federal agency having control over any land or property must report to the President of the United States "the facts regarding its continued need for such land or property…" *Id.* Subsection (f) of the Admissions act listed the five purposes for which the land and the revenue of these lands must be used for: (1) the support of public education, (2) the betterment of the conditions of Native Hawaiians as defined in the Hawaiian Homes Commission Act of 1920, (3) the development of farm and home ownership, (4) the making of public improvements, and (5) the provision of lands for public use. *Id.*

The State's obligation to provide revenue from public land to Native Hawaiians did not come to fruition until the mid-70's after political pressure. See Office of Hawaiian Affairs, History: The Establishment of OHA (2020) https://www.oha.org/about/abouthistory. During Hawaii's 1978 Constitutional Convention, several amendments were made for the advancement of Native Hawaiians to regain their share of land and revenue. Melody, *supra.* One of the most impactful constitutional amendments was the creation of the Office of Hawaiian Affairs (OHA) and its mandate to administer twenty percent of Native Hawaiians' pro rata share of revenue made from the public lands. *Id.*

Today, OHA provides more than $800,000 in scholarship money to help pay for college for Native Hawaiian students annually. Office of Hawaiian Affairs, *About* (Last visited July 23,

[35] Section 203 of the HHCA goes into greater detail of what constitutes as "available lands." See e.g., Hawaiian Homes Commission Act of 1921.

2020), https://www.oha.org/about/. OHA has given out more than $34 million in loans within the past 10 years to help Native Hawaiians start businesses, improve homes, consolidate debts and continue their education. *Id.* OHA has also awarded an estimated $16 million to various organizations aiding Hawaiians, including Hawaiian-focused charter schools. *Id.* In 2006, the Legislature and OHA agreed to $15.1 million as the temporary amount that should be transferred annually to OHA. Office of Hawaiian Affairs, *Fulfilling the State's Public Land Trust Revenue Obligations* (last visited July 23, 2020), https://www.oha.org/plt. In 2019, Act 178 was enacted by the legislature of Hawaii, which required state agency reporting to provide data on what revenue was being generated from the use of public land trust (PLT) lands. H.R. 173, 13th Leg., (2019). Based on independent audits and the state's own accounting, this "interim" amount falls far short of the 20 percent of PLT revenues that Native Hawaiians and OHA are entitled to. Office of Hawaiian Affairs, Fulfilling the State's Public Land Trust Revenue Obligations, *supra.* The Department of Hawaiian Homelands (DHHL), which is governed by the HHCA of 1921, over sees over 200,000 acres of public land. Department of Hawaiian Homelands, About the Department of Hawaiian Home Lands (last visited July 24, 2020), https://dhhl.hawaii.gov/dhhl/#:~:text=The%20land%20trust%20consists%20of,native%20Hawaiians%20in%20many%20ways. DHHL provides direct benefits to native Hawaiians; for example, beneficiaries may receive 99-year homestead leases at $1 per year for residential, agricultural, or pastoral purposes. *Id.*

Native Hawaiians have also attempted to achieve reparations through legislative action. In 1972, the Aboriginal Lands of Hawaiian Ancestry, Inc. Association ("ALOHA") was one of the most active groups that was calling attention to the U.S. involvement in the overthrow of the Hawaiian government. As a result of ALOHA's efforts, a series of reparations bills were introduced in Congress. See, e.g., H.R. 15666, 93rd Cong., 2d Sess. (1974); H.R. 1944, 94th Cong., 1st Sess (1975).

Native Hawaiians also fought for land reparations in court. In 2008, the Office of Hawaiian Affairs (OHA), and native Hawaiians, brought action for declaratory and injunctive relief against the State of Hawaii and the Community Development Corporation of Hawaii (HCDCH). *Office of Hawaiian Affairs v. Housing and Community Development Corp,* 117 Hawai'i 174, 177 P.3d 884, (2009). OHA was seeking to enjoin the defendants from alienating ceded lands from the public lands trust. *Id.* OHA argued that an injunction was proper because,

in light of the Apology Resolution, any transfer of ceded lands by the State to third-parties would amount to a breach of trust inasmuch as such transfers would be "without regard for the claims of Hawaiians to those lands" to whom the State, as trustee, owes a fiduciary duty. *Id.* at 189; See e.g., Apology Resolution, Pub.L. No. 103–150, 107 Stat. 1510.

The Hawai'i Supreme Court held in *Office of Hawaiian Affairs,* that the State possessed a fiduciary duty to preserve the ceded lands as an integral part of the reconciliation process. *Office of Hawaiian Affairs, supra.* The Court used the following reasons in its holding: (1) that the land has cultural importance to Native Hawaiians, (2) that the ceded lands were illegally taken from the Native Hawaiian monarchy, (3) that future reconciliation between the state and the Native Hawaiian people is contemplated, and (4) that once any ceded lands are alienated from the public lands trust, they will be gone forever. *Id.*

C. Cultural Reparations

a. Native American Grave Protection and Repatriation Act

In 1990, Congress enacted the Native American Graves Protection and Repatriation Act (NAGPRA) to provide for the protection of Native American graves and the repatriation of Native American remains and cultural patrimony. U.S. Senate Report 101-473 (1990), (Last visited Jul. 22, 2020, https://www.nps.gov/subjects/nagpra/upload/SR101-473.pdf). The NAGPRA had its origins in a hearing that was held by the Select Committee on Indian Affairs in February of 1987. *Id.* at 1. In his testimony on a bill to provide for the repatriation of Indian artifacts, Smithsonian Secretary Robert McCormick Adams indicated that of the 34,000 human remains that were in the Institution's collection at that time, approximately 42.5% or 14,523 of the specimens were the remains of North American populations, and another 11.9% or 4,061 of the specimens represented Eskimo and Aleut populations. *Id.* Following Secretary Adams' testimony, Indigenous tribes around the country called for the repatriation of those human remains that could be identified as associated with a specific tribe or region for their permanent disposition in accordance with tribal customs and traditions, and for the proper burial elsewhere of those remains of Native Americans that could not be so identified. *Id.*

During 1989, the Heard Museum in Phoenix, Arizona, sponsored a year-long dialogue between museum professionals and Native Americans. *Id.* at 2. The purpose of the dialogue was to develop recommendations to address the necessity of responding to tribal demands for

repatriation. *Id.* Findings and recommendations made by the participants in the dialogue were published in the Report of the Panel for a National Dialogue on Museum/Native American Relations in 1990, which found that the process for determining the appropriate disposition and treatment of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony should be governed by respect for Native human rights. *Id.* The Panel also recommended the development of judicially enforceable standards for repatriation of Native American human remains and objects. *Id.*

On May 11, 1989, Senator Daniel Inouye introduced S. 978, the National Museum of the American Indian Act. *Id.* This bill included provisions related to the proper treatment and appropriate disposition of Native American human remains and sacred objects. *Id.* The President signed S. 978 into law on November 28, 1989 (Public Law 101-185), the provisions of which authorize the repatriation of human remains and funerary objects from the collections of the Smithsonian Institution, and which established a precedent for further legislative action. *Id.* On May 17, 1989, Senator McCain introduced S. 1021, the Native American Grave and Burial Protection Act, to provide for the protection of Indian graves and burial grounds. *Id.* On November 21, 1989, Senator Inouye introduced S. 1980, the Native American Repatriation of Cultural Patrimony Act, to provide for the repatriation of Native Americans group or cultural patrimony. *Id.* The provisions of S. 1980 would extend the inventory, identification and repatriation provisions of Public Law 101-185 to all Federal agencies and any institution which receives Federal funding. *Id.* On May 14, 1990, the Select Committee on Indian Affairs held a hearing on S. 1021, S. 1980, and the Report of the Panel for a National Dialogue on Museum and Native American Relations. *Id.* After hearing testimony from museum representatives, tribal leaders, and archaeologists, the Committee adopted an amendment to S. 1980 to enact the NAGPRA with the belief that the Act would prevent future instances of cultural insensitivity to Native American peoples and with the intent that the legislation would encourage a continuing dialogue and promote greater understanding between museums and Native American tribes and Native Hawaiian organizations . *Id.* at 3-4. The Act was signed by the President in November of 1990 and became effective law under 25 U.S. Code, Sections 3001-3013. 25 U.S. Code, Chapter 32, Section 3001-3013, (Last visited Jul. 22, 2020, https://www.law.cornell.edu/uscode/text/25/chapter-32).

Under NAGPRA, federal agencies and institutions that receive Federal funds, including museums, universities, state agencies, and local governments, are required to transfer Native American human remains and other cultural items to the appropriate parties by consulting with lineal descendants, Native American tribes, and Native Hawaiian organizations. *Id.*; National Park Service, *Native American Graves Protection and Repatriation Act* (2019), (Last visited Jul. 22, 2020, https://www.nps.gov/subjects/nagpra/getting-started.htm). Further, federal agencies and institutions must identify and report all Native American human remains and other cultural items in inventories and summaries of holdings and must draft a notice for publication prior to repatriating human remains and other cultural items. 25 U.S. Code § 3005. Finally, NAGPRA also has a provision that allows for the Secretary of the Interior to make grants to Native American tribes and Native Hawaiian organizations for the purpose of assisting such tribes and organizations in the repatriation of Native American cultural items. 25 U.S. Code § 3008.

b. Equal Justice Initiative Memorial

The Equal Justice Initiative (EJI), started by Bryan Stevenson, opened the National Memorial for Peace and Justice in Montgomery, Alabama, in the spring of 2018 to remember the legacy of enslaved black people, people terrorized by lynching, and people of color burdened with contemporary presumptions of guilt and police violence. Equal Justice Initiative, *The National Memorial for Peace and Justice*, (Last visited Jul. 18, 2020, https://museumandmemorial.eji.org/memorial). The memorial was built because EJI believes that publicly confronting the truth about our country's history is the first step toward recovery and reconciliation with our past, and because our history of racial injustice must be acknowledged before our society can recover from mass violence. *Id.* The public commemoration of a memorial plays an important role in prompting the community to learn the truth of our nation's history. *Id.*

In addition to the memorial, EJI has developed the Community Remembrance Project, which partners with community coalitions to memorialize documented victims of racial violence throughout history and foster dialogue about race today. Equal Justice Initiative, *Community Remembrance Project*, (Last visited Jul. 18, 2020, https://eji.org/projects/community-remembrance-project/). Through the Community Remembrance Project, EJI has begun joining with communities to install narrative historical markers at the sites of racial terror lynchings across the country and has collaborated with partners to gather soil at lynching sites for display

in exhibits that bear the victims' names. *Id.* As of February 2020, EJI has sponsored historical markers to memorialize lynching victims in eighteen different communities across the South and has collaborated with five community partners across the country to facilitate soil collection ceremonies. Equal Justice Initiative, *Community Historical Marker Project*, (Last visited Jul. 18, 2020, https://eji.org/projects/community-historical-marker-project/). An example of these markers is the Alexandria Community Remembrance Project in Alexandria, Virginia.[36] The project has identified two lynchings that took place in the city.

c. Native Arts and Cultures Foundation

Earlier this month, Portland arts organization, Yale Union, announced that it would be transferring its land and building to Native ownership. Naomi Ishisaka, *Arts organization Yale Union transfers its land and building to Native ownership*, The Seattle Times (2020), (Last visited Jul. 23, 2020, https://www.seattletimes.com/entertainment/arts-organization-yale-union-transfers-its-land-and-building-to-native-ownership/). Specifically, Yale Union will be transferred to the Vancouver, Washington-based Native Arts and Cultures Foundation (NACF), which is a Native-led national organization that works with artists, communities, and leaders to advance Indigenous arts and artists. *Id.* NACF Board Chair and U.S. Poet Laureate Joy Harjo has called the transfer "unprecedented" and has stated that "this sharing of resources in a place first occupied by Indigenous peoples initiates healing for the whole community." *Id.* Since its opening in 2010, Yale Union has presented the work of hundreds of artists and has created a cultural community by hosting events, providing subsidized studio space to local artists, and facilitating numerous community programs. Native Arts and Cultures Foundation, *NACF to Gain Ownership of the Yale Union Building in Portland, Oregon* (2020), (Last visited Jul. 23, 2020, https://www.nativeartsandcultures.org/nacf-yu-press-release). Yale Union will collaborate with NACF to co-present artistic programming in 2021 and will dissolve its nonprofit later in 2021 to transfer the property to NACF. *Id.* The new national headquarters for NACF will be called the Center for Native Arts and Cultures and will be a gathering place for Indigenous artists and local partnerships to present and exhibit their art. *Id.*

[36] See web page at https://www.alexandriava.gov/historic/blackhistory/default.aspx?id=106501.

D. Reparations Around the World

a. New Zealand Reparations Measures

New Zealand has had a tumultuous history in recognizing past wrongs. The Māori people were the original inhabitants of New Zealand. Te Ahukaramū Charles Royal, *Māori - Pre-European society*, Te Ara - the Encyclopedia of New Zealand, (Last accessed Jul. 10, 2020, www.TeAra.govt.nz/en/ maori/page-2). The first European contact occurred in the late-17th century and colonization efforts began in the mid-18th century. *Id.* European settlement and the introduction of new technology, such as muskets, sparked significant upheaval and war between the Māori tribes. *Id.* In 1840, Māori Chiefs and representatives of Queen Victoria signed the Treaty of Waitangi. *Id.* The English version of the treaty stated sovereignty was ceded to England whereas the Māori version guaranteed chieftainship to the Māori. *Id.* Following the signing of the Treaty of Waitangi, millions of acres of land were confiscated from the Māori; an estimated 50 percent of the Māori population died from war and infectious diseases; and the government banned Māori language and cultural practices. *See* Malcom Mulholland, *New Zealand's Indigenous Reconciliation Efforts Show Having a Treaty Isn't Enough*, The Conversation (May 11, 2016) https://theconversation.com/new-zealands-indigenous-reconciliation-efforts-show-having-a-treaty-isnt-enough-49890; Tamaki Māori Village, *Fascinating History of New Zealand's Native Language*, (Last visited Jul. 10, 2020, www.tamakimaorivillage.co.nz/blog/maori-language-history/); NZ History, *Te Wiki o Te Reo Māori - Māori Language Week*, (Last visited Jul. 10, 2020 https://nzhistory.govt.nz/culture/maori-language-week/history-of-the-maori-language).

In the early-20th century, the Māori people began a cultural and political movement to bring awareness to the impact of the colonization of New Zealand. Te Ahukaramū Charles Royal, *Māori - Pre-European society*, Te Ara - the Encyclopedia of New Zealand, (Last accessed Jul. 10, 2020, www.TeAra.govt.nz/en/ maori/page-2). As a result of this political movement, the Crown apologized to the Māori and after nearly thirty years of advocacy passed the Treaty of Waitangi Act of 1975. Te Ahukaramū Charles Royal, *Story: Treaty of Waitangi*, Te Ara - the Encyclopedia of New Zealand (Last accessed Jul. 14, 2020 https://teara.govt.nz/en /treaty-of- waitangi/page-7. This act honored the original terms of the Treaty of Waitangi and created parity between the Māori and New Zealand governments. *Id*. Further, the act created the Waitangi Tribunal, which was tasked with considering the claims of the Māori people and

providing recommendations to parliament. *Id.* As a result of the treaty, Māori culture has become a central part of New Zealand governance. Parliament created entities such as the Office of Race Relations, the Office of Treaty Settlements, and the Te Puni Kōkiri (Minister of Māori Development) to represent Māori interests. *Id.* As of 2018, the New Zealand Government has paid cash settlements of more than 2.2 billion New Zealand dollars, which amounts to nearly 1.5 billion U.S. dollars, to the Māori people. New Zealand Office of Treaty Settlements, *Healing the Past, Building a Future*, 22 (Jun. 2018) https://www.govt.nz/assets/Documents/OTS /The-Red-Book/The-Red-Book.pdf. This settlement valuation does not include the land and fishing rights granted to the Māori people since claims began. *Id.*

b. Germany

In 1952, following the atrocities committed by the Nazi regime in World War II, only 5 percent of West Germans surveyed reported feeling guilty about the Holocaust, and only 29 percent believed that Jews were owed restitution from the German people. Coates, *supra.* This unwillingness among Germans to face squarely their history went beyond the polls and permeated other facets of German society. *Id.* Because of this resistance by Germany to make amends for the Holocaust, the country was divided in its decision to pay reparations to Israel. *Id.* On the other side of the conversation of reparations were the Jews of Israel, for whom such conversations provoked violent reactions. *Id.* On January 7, 1952, the future prime minister of Israel, Menachem Begin, claimed that all Germans were Nazis and were guilty of murder. *Id.* The reparations conversations that followed set off a wave of bomb attempts by Israeli militants aimed at the German foreign ministry in Tel Aviv and at the postwar German Chancellor Adenauer, and ultimately led to West Germany's agreement to pay Israel what would be more than $7 billion in today's dollars. *Id.* Individual reparations to Jews followed, including reparations for psychological trauma, for offense to Jewish honor, for halting law careers, for life insurance, and for time spent in concentration camps. *Id.* According to Israeli historian Tom Segev, the reparations money from Germany funded about a third of the total investment in Israel's electrical system, which tripled its capacity, and nearly half of the total investment in the railways from 1953 to 1963. *Id.* (quoting Tom Segev, *The Seventh Million*).

Since 1952, the German government has paid over $80 billion in pensions and social welfare payments to Jews who suffered under the Nazi regime and has also agreed to pay into

the Claims Conference fund for "Righteous Gentiles," or non-Jews who helped Jewish people survive the Holocaust. Rebecca Staudenmaier, *Germany extends Holocaust compensation to include survivor spouses,* Deutsche Welle (2019), (Last visited Jul. 22, 2020, https://www.dw.com/en/germany-extends-holocaust-compensation-to-include-survivor-spouses/a-49438399). Moreover, Germany has more than 2,000 memorial sites that acknowledge the Nazi-committed horrors that killed 6 million Jews and millions of others during World War II. Kim Hjelmgaard, *Germany slowly relaxes its grip on how it confronts the Holocaust*, USA Today (2017), (Last visited Jul. 22, 20, https://www.usatoday.com/story/news/world/2017/01/18/germany-wannsee-conference-nazis-holocaust/96480360/).

German officials also established a task force charged with determining the provenance of various pieces of art that Nazis had stolen from a Jewish home during the Third Reich after discovering many of the pieces of art in the apartment of the son of head art buyer for Adolf Hitler, Hildebrand Gurlitt, in 2012. Becky Little, *Four Works of Nazi-Looted Art Identified and Returned to Jewish Family*, History (2018), (Last visited Jul. 26, 2020, https://www.history.com/news/nazi-stolen-art-identified). A number of the pieces that were recovered, for which the task force was able to determine the works' provenance, have been returned to the heirs of the artworks' original owners. *Id.* In March of 2017, Germany's Lost Art Foundation partnered with university researchers and descendants of Rudolf Mosse, who fled to France in 1933 after the Nazis began to rise to power, in support of the Mosse Art Research Initiative to locate expansive lost art from Mosse's collection. Jewish Virtual Library, *Holocaust Restitution: Recovering Stolen Art*, (Last visited Jul. 27, 2020, https://www.jewishvirtuallibrary.org/recovering-stolen-art-from-the-holocaust). In 2018, a stolen sculpture discovered in the Bode Museum in Berlin, Germany, was returned to the original owners' heirs, who have been successful in finding eleven other pieces out of the hundreds that were stolen from their family. *Id.*

Furthermore, Germany has included in its Criminal Code a provision against the use of symbols of unconstitutional organizations. Anyone who disseminates in Germany or produces, stocks, imports or exports or makes publicly available through data storage media for dissemination in Germany or abroad the propaganda material of a political party which has been declared unconstitutional by the Federal Constitutional Court, of an organization which has been

banned because it is directed against the constitutional order, or of which is intended to further the activities of a former National Socialist organization, may incur a penalty of imprisonment for a term not exceeding three years or a fine. German Criminal Code, Section 86(1), *Dissemination of propaganda material of unconstitutional organizations,* (Last visited Jul. 20, 2020, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html). Further, Criminal Code Section 86(a) bans the public use of symbols of unconstitutional organizations, including the use of flags, insignia, uniforms, slogans, and forms of greetings. German Criminal Code, Section 86(a), *Use of symbols of unconstitutional organizations,* (Last visited Jul. 20, 2020, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html). The purpose of these sections is to prevent the revival of banned organizations and to safeguard political peace. Andreas Stegbauer, *The Ban of Right-Wing Extremist Symbols According to Section 86a of the German Criminal Code*, German Law Journal Vol. 08 No. 02, 178, 184 (2007), (Last visited Jul. 20, 2020, https://www.time.com/wp-content/uploads/2018/08/3e228-glj_vol_08_no_02_stegbauer.pdf).

VI. Recommendation for Reparations in Washington

A. Renaming Counties

Eight counties in Washington State were named after slaveholders, white supremacists, people who sought to extend slavery in the United States, or people who tried to ban Black people from the Pacific Northwest altogether. Berger, *supra*. These counties include Pierce, Douglas, Stevens, Grant, Thurston, Jefferson, Clark, and Lewis counties. *Id.* Washington has already re-designated King County to honor Dr. Martin Luther King Jr. in 2005. The county was originally named for an Alabama slave owner, William Rufus De Vane King. *Id.* Washington should not celebrate slave owners and white supremacists by memorializing them through county names. We recommend that the MJC support renaming these eight counties after the Native American tribes who live in or near these counties. For example, Pierce County may be renamed as Muckleshoot County after the Muckleshoot Tribe, Douglas County may be called Colville County after the Colville Confederated Tribes, Stevens County can be renamed as Kalispel County for the Kalispel Tribe, Grant County may be called Wanapum County after the Wanapum Tribe, Thurston County can be renamed as Nisqually County after the Nisqually Tribe, Jefferson County may be called Hoh County after the Hoh Tribe, Clark County can be

renamed as Chinook County after the Chinook Indian Nation, and Lewis County may be renamed as Chehalis County after the Confederated Tribes of the Chehalis Reservation. Tribal Directory & Map (Last visited Jul. 24, 2020, http://www.indian-ed.org/resources/tribal-directory-map/); Millie Hobaish, *Tribes of the Columbia River System* (2019), (Last visited Jul. 24, 2020, https://www.confluenceproject.org/library-post/tribes-of-the-columbia-river-system/).

B. Eliminating the Bar Examination

The Washington State Supreme Court granted diploma privilege on June 12, 2020, in response to the extraordinary barriers facing applicants who were registered to take the bar examination in July or September 2020. Supreme Court of Washington, *Order Granting Diploma Privilege and Temporarily Modifying Admission & Practice Rules* (2020). It is not certain that the public health emergency of COVID-19 may be ended by February when the next bar exam is scheduled. And, applicants may still face racial disparities associated with the exam, which are further detailed below. Bar testing began around 1870 and was in use in most states by the 1920s, when strong anti-immigration sentiments were on the rise. Dan Subotnik, *Does Testing = Race Discrimination?: Ricci, the Bar Exam, the LSAT, and the Challenge to Learning*, 8 U. Mass. L. Rev. 332, 365 (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2436495. In the 1920s, after the American Bar Association (ABA) unwittingly admitted three black lawyers, the ABA asked its membership to vote on possible expulsion and emphasized the importance of "keeping pure the Anglo-Saxon race." *Id.*

Today, the cumulative cost of the bar examination and bar preparation courses can be as much as $4,500 to $5,000, depending on the bar preparation course. See *Washington Lawyer Bar Examination: Frequently Asked Questions*, Washington State Bar Association (2020), (Last visited Jul. 26, 2020, https://www.wsba.org/docs/default-source/licensing/admissions/bar-exam/bar-exam-faq.pdf?sfvrsn=62120df1_28); *Breaking Down the Cost of the Bar*, Bar Exam Toolbox (2019), (Last visited Jul. 26, 2020, https://barexamtoolbox.com/breaking-down-the-cost-of-the-bar-the-fees-no-one-tells-you-about/). The expenses associated with the bar examination negatively affect those who cannot afford quality bar preparation courses. As our society still has economic disparity that adversely affects Black law graduates, inability to afford quality bar preparation can lead to the skewed bar passage rates along racial lines, which has led

to a profession in which Black lawyers only make up 5 percent. Lauren Hutton-Work and Rae Guyse, *Requiring a Bar Exam in 2020 Perpetuates Systemic Inequities in the Legal System* (2020), (Last visited Jul. 23, 2020, https://theappeal.org/2020-bar-exam-coronavirus-inequities-legal-system/). A six-year study commissioned by the Law School Admission Council (LSAC) showed that first-time bar examination pass rates were 92% for white applicants, 61% for Black applicants, 66% for Native Americans, 75% for Latino/Latina and 81% for Asian Americans. Society of American Law Teachers, "Statement on the Bar Exam" (2002). *Statements*. 2, 5. https://scholars.law.unlv.edu/saltarchive_statements/2. Although the disparity between pass rates narrowed when applicants retook the bar examination, a substantial number of applicants who failed on the first attempt did not re-take the exam, and for those who did re-take the examination, the psychological and financial cost of doing so was extremely high. *Id*.

The authors of the aforementioned articles have both recommended that state bar associations reimagine the assessment process for determining who will make a competent lawyer. *Id.* at 7; Hutton-Work and Guyse, *supra.* They argue that maintaining the status quo of justifying policies and procedures that disadvantage diverse and low-income test-takers is not enough. *Id*. The Society of American Law Teachers has offered possible alternatives to the bar exam, including diploma privilege for graduates of ABA accredited law schools; a practical skill teaching term, which would include completion of a ten-week teaching term to improve interviewing, advocacy, legal writing, and legal drafting skills; and a "public service alternative to the bar exam," which would give bar applicants the option of taking the existing bar exam or working for 350 hours over ten weeks within the court system and completing a variety of assignments that would be evaluated by law school clinical teachers. Society of American Law Teachers, *supra* at 6.

The legal profession may start to address its racial disparities and become more of an equitable profession if the bar examination is eliminated and an alternative to assessing applicants' competence is used. To that end, we recommend that the MJC encourage the Court to eliminate the bar exam and replace it with one of the above alternatives suggested by the Society of American Law Teachers for graduates of ABA accredited law schools.

C. Setting a Standard of Retroactive Application under the Washington Constitution

Retroactive application of statutes can be used as a form of reparation when the retroactivity would help alleviate racial disparities. In 2019, Washington's legislature enacted Senate Bill 5288, which removed robbery in the second degree from the list of offenses that qualify an individual as a persistent offender. Under RCW 9.94A.570, a persistent offender must be sentenced to life in prison without parole when the person is convicted of a most serious offense on three separate occasions, or when the person is convicted of certain sex offenses on at least two separate occasions. Final Bill Report, S.B. 5288, 66th Leg (2019). The language in the original bill included a retroactivity provision that would allow people sentenced under the old three-strikes law to be eligible for resentencing. *Id*. However, largely because of an amendment that was pushed by the Washington Association of Prosecuting Attorneys, the bill that was passed into law does not have a retroactive application. Tom James, *Lifer inmates excluded from Washington '3 strikes' change, The Seattle Times,* (May 20, 2019, 10:11 pm), https://www.seattletimes.com/seattle-news/its-just-wrong-3-strikes-sentencing-reform-leaves-out-62-washington-state-inmates.

If it were not for the removal of the retroactive language in the bill, 62 incarcerated people convicted of second-degree robbery would have been eligible for resentencing and would not likely be facing a sentence of life without parole. *Id.* The racial makeup of these 62 prisoners is grossly disproportionate, as nearly half are Black. *Id.* The harsh reality of not having a retroactive application in this bill is that all 62 prisoners whose sentences could have been re-calculated will die in prison for a law that no longer applies to people similarly situated. *Id.* In other words, preventing retroactivity creates an inescapable disparity: Two prisoners with identical records could end up with vastly different sentences, solely based on when they were sentenced. *Id.* We encourage the MJC to advocate for retroactivity as a tool to fix laws that have a racially disproportionate effect.

D. Including Lessons on Washington's Racial History in K-12 Curricula

Similarly to actions in Chicago and Florida, the Commission should support implementing more in-depth curriculum on slavery with a specific focus on Washington's racial history in Washington public schools. In the Seattle Public School system, the 2019-2020 K-12 Social Studies Learning Standards curriculum included the word "slavery" four times in 119 pages of writing and did not mention how racism has been upheld through other systems since

slavery ended. Washington State Learning Standards, *Washington State K–12 Learning Standards for Social Studies*, Office of Superintendent of Public Instruction (2019), (Last visited Jul. 23, 2020, https://www.k12.wa.us/sites/default/files/public/socialstudies/standards/OSPI_SocStudies_Standards_2019.pdf). Given the importance of learning the truth of our history and acknowledging our past, Seattle Public Schools and the rest of the state's public school systems should move toward implementing in the curricula lessons that tell the honest truth about slavery and racism, including teachings on the Washington experience outlined above, the Tulsa Race Massacre, redlining, the Tuskegee experiment, anti-literacy laws, Jim Crow, voter suppression laws, and mass incarceration.

E. Memorials to Remember Leaders of Color and Victims of Racial Violence in Washington

We recommend that the Commission support the creation of monuments to memorialize leaders of color in Washington, including a replacement to Capitol Hill's Lake View Cemetery Confederate monument. One possible monument would be to memorialize the Gang of Four, which was a group made up of four Seattle-based activists from different ethnic groups, including Bernie Whitebear, Roberto Maestas, Bob Santos, and Larry Gossett, who is the only member still alive. *Robert "Bob" Santos Oral History, Part 4: The "Gang of Four" and What It Accomplished, Writing a Book, Winning over Foes, and a Few Regrets*, History Link (2014), (Last visited Jul. 20, 2020, https://www.historylink.org/File/10964). Through their activism, the Gang of Four were able to acquire an old school that is now the community building of El Centro de la Raza. *Id.* The men also provided services to the Black community, especially in the central area, and worked to preserve neighborhoods and build housing in the International District. *Id.* The Gang of Four fought to build community and better their neighborhoods, and the Commission should consider publicly memorializing and remembering them for their work.

Another possibility for the Commission to consider supporting is that of establishing a memorial or marker similar to those created by EJI to raise local consciousness of racial history, memorialize victims of racial violence in Washington, and remember the state's past, as EJI has not yet sponsored historical markers or facilitated soil collection ceremonies in Washington State.

Minority & Justice Commission
Administrative Office of the Courts
Post Office Box 41170
Olympia, WA 98504-1170

July 30, 2020

The Honorable Justice G. Helen Whitener
The Honorable Justice Mary Yu

My name is Corliss Samaniego; I work for a non-profit organization that offers **free** service to assist low-income drivers. We are a community partner with the **King County District Court Relicensing Program**. I have four (4) years' experience assisting drivers whose licenses are suspended due to unpaid traffic fines.

King County District Court Relicensing Program is a year around generous and free program. Honorable Judge pulls the tickets out of collections, reduces the amount and allows options such a community services hours in lieu of a cash payment, work crew or a reasonable payment plan. This past March 2020, I saw something that amazed me; The Judge gave sober support meetings in lieu of a cash payment! Unfortunately, COVID-19 hit, he is attending but is unable to have them documented.

I will say that during the Pandemic; I have received some very generous rulings from various courts, giving my clients a year to pay the court, reducing tickets tremendously and dismissing some.

I had a gentleman call me this week, this is his story in a nutshell. *"I had a couple of tickets I couldn't pay, my license got suspended. I had to drive to get to and from my job so unfortunately I got a driving while license suspended ticket which put me in the criminal court. A year later I called the collection agency and inquired about a payment plan for the tickets. They said I had other debts (unpaid hospital bill), and they wouldn't pull just the tickets out, it was all or nothing…so I gave up!"* He begged me to help him to get his tickets pulled from collections.

This is just one story, there are **many** more! Construction industry is booming in Washington State; they need their driver's license for Union pre-apprentice/ apprentice/journeyman programs. This is hard labor and generally speaking, these people come from lower income backgrounds. Once in the industry, this is a good paying job with excellent benefits.

I love the work I do and have seen many man and woman regain their driver's license and get good paying jobs/careers, many just out of incarceration.

COVID-19 has put a tremendous stress on people who are trying to keep up the payment plans that are currently set up for their driving infractions; they are worried and scared about having their driver's licenses suspended. And those who are ready to reinstate their driver's licenses; can't get an appointment with DOL (Department of Licensing) to do so but still need to drive, at this point it is a vicious cycle.

I would like to thank you for this opportunity you have graciously given the Drivers Relicensing Taskforce. If you have further questions please contact me @ (206) 850-4668 or email rydersv1@gmail.com

Respectfully,
Corliss Samaniego
Relicensing Program Coordinator
Member of Drivers Relicensing Taskforce

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF STATEWIDE RESPONSE BY WASHINGTON STATE COURTS TO THE COVID-19 PUBLIC HEALTH EMERGENCY	ORDER TO TEMPORARILY STOP SENDING DRIVERS LICENSE SUSPENSION REQUESTS TO DEPARTMENT OF LICENSING No.

WHEREAS, the court recognizes the extraordinary barriers facing individuals having their license suspended during the COVID-19 pandemic; and

WHEREAS, the court acknowledges that license suspension for non-criminal reasons disproportionately affects historically marginalized communities; and

WHEREAS, license suspension for non-criminal reasons disproportionately affects people in economic distress; and

WHEREAS, COVID-19 has further exacerbated economic distress; and

WHEREAS, access to public transportation is limited and poses increased risk to health; and

WHEREAS, access to the courts has been drastically limited.

The Court unanimously enters the following order establishing temporarily:

1) Ceasing to send license suspension requests to the Department of Licensing for non-criminal cases subject to RCW 46.20.289, including, but not limited to, cases where the person failed to respond to a notice of traffic infraction for a moving violation, failed to appear at a requested hearing for a moving violation, violated a written promise to appear in court for a notice of infraction for a moving violation, or has failed to comply with the terms of a notice of traffic infraction."

This order is effective upon signature and will remain in effect until six months past the full re-opening of the Washington State Court system.

DATED at Olympia, Washington this ____ day of _____, 2020.

For the Court

_____
CHIEF JUSTICE

Organizational Commitments and Expectations
(working draft June 28, 2020)

Organizations will play a crucial role in the new ad hoc Task Force on Race and Washington's Criminal Justice System (Task Force 2.0).

If your organization joins, you agree

- to include your organization's name as an organizational participant on the task force;
- to allow the task force to include the name of your organization on any task force materials, including its webpage (not yet created), and on social media;
- to designate one person to serve as primary liaison or point of contact between the Task Force and your organization;
- to communicate with your members and your constituencies to periodically update them about the task force's work, including any publicly issued interim reports and recommendations as well as the final report and recommendations; and
- to commit through your representative and your members to participate in at least one working group (Oversight; Research; Community Outreach; Education; Recommendations/Implementation); and
- to commit to furthering the objective of the task force in redressing racial disproportionality where it exists in Washington's criminal justice system.

Being an organizational participant means that you have a seat at the table and a voice through your representative or members. Any organization that joins is free to leave at any point. In our public materials, we will include when an organization joins and if/when an organization exits.

The Oversight Working Group will operate as an executive committee for the task force. Not every organization will have a representative on the Oversight Working Group. We will endeavor to ensure that it is constituted in a way that is sensitive to the diversity of stakeholders. Whenever we can, we will make decisions by consensus. If consensus cannot be achieved, decisions will be made by the co-chairs.

No financial contribution is sought at this time. Because we find ourselves in a zoom world, we expect that there will not be much in the way of travel expenses, but any expenses incurred by your representative or members will be your responsibility. Financial contributions that directly support the work of the task force will be appropriately acknowledged.

Members of your organization are welcome to join and to participate as a member of your organization or in an individual capacity.

FOR IMMEDIATE RELEASE

FOR MORE INFORMATION, CONTACT:
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June 24, 2020

Washington's Three Law Schools Announce Launch of Ad Hoc Task Force on Race and Washington's Criminal Justice System

SEATTLE and SPOKANE – Answering the Washington Supreme Court's call to address systemic discrimination in the criminal justice system, the deans of Washington's three law schools, Mario Barnes (UW), Annette Clark (SU), and Jacob Rooksby (GU) have agreed to serve as co-chairs to re-launch an ad hoc Task Force on Race and Washington's Criminal Justice System.

This task force takes up the work of the previous Task Force on the Criminal Justice System, which came together as a collective response to a statement made by a then-sitting justice who explained away black disproportionality in Washington's prisons by saying that blacks commit more crimes. Reported in the Seattle Times, news of this statement caused a crisis that endangered public confidence in the judiciary.

Judicial officers, academics, prosecutors, defenders, law enforcement, and community leaders met and formed working groups to examine race disproportionality in the criminal justice system in order to present findings and recommendations. The Research Working Group prepared, and the Task Force presented to the Court, the 2011 Preliminary Report on Race and Washington's Criminal Justice System.[1] The following year, the Task Force presented the 2012 Report on Juvenile Justice and Racial Disproportionality. Though the ad hoc task force disbanded in 2012, its work was carried forward by advocates who addressed systemic discrimination in various aspects of the criminal justice system.

Some important changes have occurred since the first report. The death penalty was found to be unconstitutional by the Washington Supreme Court because of race disproportionality in its administration. The Court began reforming its jurisprudence on the exercise of peremptory challenges, leading to a new court rule adopted by the Court to address discrimination in jury selection that recognized implicit bias and difficult to prove explicit bias, which was constitutionalized in a subsequent case. Important changes have been made to the treatment of legal financial obligations.

Deans Barnes, Clark, and Rooksby offer the following joint statement:

> Despite some positive changes, we find ourselves still living in a world where race matters too much in the wrong ways in our criminal justice system. We need a system where Black lives matter. We need to and can do better. Reconvening the ad hoc task force is one step, an attempt to answer the call of the Court that has called on us to "lean in to do this hard and necessary work."
>
> In turn, we call on you to join us.

Individuals and organizations interested in joining the task force: contact Professor Chang.

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[1] The report was later published by all three law schools' law reviews. *See* Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 47 GONZ. L. REV. 251 (2012), 35 SEATTLE U. L. REV. 623 (2012), 87 WASH. L. REV. 1 (2012).

Task Force on Race and the Criminal Justice System

Preliminary Report on Race and Washington's Criminal Justice System

Research Working Group

A Publication by the
Task Force on Race and the
Criminal Justice System

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Message from the Task Force Co-Chairs

Chief Justice Madsen, Justices of the Washington Supreme Court, Governors of the Washington State Bar Association and the Access to Justice Board, leaders of Washington's Specialty Bar Associations, and the people of the great state of Washington:

We are pleased to present the *Preliminary Report on Race and Washington's Criminal Justice System*, authored by the Research Working Group of the Task Force on Race and the Criminal Justice System. The Research Working Group's mandate was to investigate disproportionalities in the criminal justice system and, where disproportionalities existed, to investigate possible causes. This fact-based inquiry was designed to serve as a basis for making recommendations for changes to promote fairness, reduce disparity, ensure legitimate public safety objectives, and instill public confidence in our criminal justice system.

The Task Force came into being after a group of us met to discuss remarks on race and crime reportedly made by two sitting justices on the Washington Supreme Court. This first meeting was attended by representatives from the Washington State Bar Association, the Washington State Access to Justice Board, the commissions on Minority and Justice and Gender and Justice, and all three Washington law schools, as well as leaders from nearly all of the state's specialty bar associations, and other leaders from the community and the bar.

We agreed that we shared a commitment to ensure fairness in the criminal justice system. We developed working groups, including the Research Working Group, whose *Preliminary Report* finds that race and racial bias affect outcomes in the criminal justice system and matter in ways that are not fair, that do not advance legitimate public safety objectives, and that undermine public confidence in our criminal justice system.

All of our working groups – Oversight, Community Engagement, Research, Recommendations/Implementation, and Education – are working together to develop solutions. We are fortunate to have the formal participation of a broad range of organizations and institutions, with each week bringing in new participants. A full list of the organizations and institutions on the Task Force appears on the next page. We also have many people who are contributing in an individual capacity, including many judges.

We have come together to offer our time, our energy, our expertise, and our dedication to achieve fairness in our criminal justice system.

Sincerely,

Judge Steven C. González, Chair of the Washington State Access to Justice Board

Professor Robert S. Chang, Director, Fred T. Korematsu Center for Law and Equality

Co-Chairs, Task Force on Race and the Criminal Justice System

Participating Organizations and Institutions

Administrative Office of the Courts

American Civil Liberties Union of Washington

The Asian Bar Association of Washington

Central Washington University, Department of Law and Justice

The Defender Association/Racial Disparity Project

Filipino Lawyers of Washington

Fred T. Korematsu Center for Law and Equality, SU Law

Gonzaga University School of Law

The Korean American Bar Association of Washington

Latina/o Bar Association of Washington

Loren Miller Bar Association

Middle Eastern Legal Association of Washington

Mother Attorneys Mentoring Association of Seattle

QLaw: The GLBT Bar Association of Washington

Seattle City Attorney's Office

Seattle University School of Law

University of Washington, College of Arts and Sciences

University of Washington School of Law

Vietnamese American Bar Association of Washington

Washington Defender Association

Washington State Access to Justice Board

Washington State Bar Association

Washington State Commission on Asian Pacific American Affairs

Washington State Commission on Hispanic Affairs

Washington State Criminal Justice Training Commission

Washington State Gender and Justice Commission

Washington State Minority and Justice Commission

Acknowledgments

We would like to thank the members of the Research Working Group for their work in researching and drafting this report. The team included:

Katherine Beckett, Professor, Sociology, University of Washington

Robert Chang, Professor of Law and Director, Korematsu Center, Seattle University School of Law

Julius Debro, Professor Emeritus, Law, Societies and Justice Program, University of Washington

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Charles Reasons, Professor and Department Chair, Law and Justice, Central Washington University

Mary Whisner, Reference Librarian, University of Washington School of Law

Stephanie Wilson, Head of Reference Services, Seattle University School of Law

We are also grateful for the assistance of the Office of Financial Management, the Washington State Center for Court Research, and the Washington Association of Sheriffs and Police Chiefs for providing us with data.

Thanks to the Korematsu Center for underwriting the printing of the report. Additional thanks to Garvey Schubert Barer for last minute help with document production.

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Executive Summary

In 1980, of all states, Washington had the highest rate of disproportionate minority representation in its prisons. Today, minority racial and ethnic groups remain disproportionately represented in Washington State's court, prison, and jail populations, relative to their share of the state's general population. The fact of racial and ethnic disproportionality in our criminal justice system is indisputable.

Our research focused on trying to answer why these disproportionalities exist. We examined differential commission rates, facially neutral policies, and bias as possible contributing causes.

We found that the assertion attributed to then-Justice Sanders, that "African Americans are overrepresented in the prison population because they commit a disproportionate number of crimes,"[1] is a gross oversimplification. Many studies of particular Washington State criminal justice practices and institutions find that race and ethnicity influence criminal justice outcomes over and above commission rates. Moreover, global assertions about differential crime commission rates are difficult to substantiate. Most crime victims do not report crimes and most criminal offenders are never arrested. We never truly know exact commission rates. If problematic arrest rates are used as a proxy for underlying commission rates, 2009 data shows that 36% of Washington's imprisonment disproportionality cannot be accounted for by disproportionality at arrest.

We reviewed research that focused on particular areas of Washington's criminal justice system, and conclude that much of the disproportionality is explained by facially neutral policies that have racially disparate effects. For the areas, agencies, and time periods that were studied, the following disparities were found:

- In Washington's juvenile justice system, it has been found that similarly situated minority juveniles face harsher sentencing outcomes and disparate treatment by probation officers.
- Defendants of color were significantly less likely than similarly situated White defendants to receive sentences that fell below the standard range.
- Among felony drug offenders, Black defendants were 62% more likely to be sentenced to prison than similarly situated White defendants.
- With regard to legal financial obligations, which are now a common though largely discretionary supplement to prison, jail, and probation sentences for people convicted of crimes, similarly situated Latino defendants receive significantly greater legal financial obligations than their White counterparts.

1. Steve Miletich, *Two State Supreme Court Justices Stun Some Listeners with Race Comments*, SEATTLE TIMES, Oct. 21, 2010, *available at* http://seattletimes.nwsource.com/html/localnews/2013226310_justices22m.html (last visited Feb. 22, 2011).

- Disparate treatment has been discovered in the context of pretrial release decisions, which systematically disfavor minority defendants.

- Regarding the enforcement of drug laws, researchers have discovered a focus on crack cocaine – a drug associated with Blacks stereotypically and in practice – at the expense of other drugs, and the focus on crack cocaine results in greater disproportionality, without a legitimate policy justification.

- This disparity in drug law enforcement informs related asset forfeitures, which involve distorted financial incentives for seizing agencies and facilitate further disparity.

- With regard to the Washington State Patrol, researchers have found that although racial groups are subject to traffic stops at equitable rates, minorities are more likely to be subjected to searches, while the rate at which searches result in seizures is lower for minorities.

- This disparity in traffic law enforcement informs the disproportionate imposition of "Driving While License Suspended" charges, which inflicts disparate financial costs.

In all of these areas, facially neutral policies resulted in disparate treatment of minorities over time.

Disproportionality also is explained in part by the prevalence of racial bias – whether explicit or implicit – and the influence of bias on decision-making within the criminal justice system. Race (and in particular racial stereotypes) plays a role in the judgments and decision-making of human actors within the criminal justice system. The influence of such bias is subtle and often undetectable in any given case, but its effects are significant and observable over time. When policymakers determine policy, when official actors exercise discretion, and when citizens proffer testimony or jury-service, bias often plays a role.

To sum up:

- We find the assertion that Black disproportionality in incarceration is due solely to differential crime commission rates is inaccurate.

- We find that facially neutral policies that have a disparate impact on people of color contribute significantly to disproportionalities in the criminal justice system.

- We find that racial and ethnic bias distorts decision-making at various stages in the criminal justice system, thus contributing to disproportionalities in the criminal justice system.

- We find that race and racial bias matter in ways that are not fair, that do not advance legitimate public safety objectives, that produce disparities in the criminal justice system, and that undermine public confidence in our legal system.

Definitions

WHAT WE MEAN BY "DISPROPORTIONALITY" AND "DISPARITY"

Although the terms disproportionality and disparity often are used interchangeably, there is an important distinction between these two concepts. Researchers have found it useful to distinguish between racial inequities that result from differential crime commission rates and racial inequities that result from practices or policies. In this report, we use disproportionality to refer to a discrepancy between reference groups' representation in the general population and in criminal justice institutions. In contrast, we use disparity when similarly situated groups of individuals are treated differently within those institutions or to refer to overrepresentation of particular groups in the criminal justice system that stems from criminal justice practices or policies.

WHAT WE MEAN BY "IMPRISONMENT" AND "INCARCERATION"

Imprisonment refers to being held in state prisons. Incarceration refers to being held in state prisons or local jails. Many local jails do not collect and report on ethnicity.

WHAT WE MEAN BY "RATE" AND "RATIO"

When discussing incarceration or imprisonment (as well as other aspects of the criminal justice system), we often discuss the rate of incarceration or imprisonment in comparison to a particular population. Thus, the White incarceration rate is measured by taking the number of Whites incarcerated, dividing it by the number of Whites in the general population, and then multiplying by 100,000 to determine the number of Whites incarcerated per 100,000 Whites in the general population. To compare Black and White incarceration, we take the Black incarceration rate and divide it by the White incarceration rate – a ratio that provides a useful measure of comparison.

WHAT WE MEAN BY "RACE" AND "ETHNICITY"

One of the most perplexing problems with race is that few people seem to know what "race" means. Widely accepted understandings of race focus on biology, invariably pointing to physical differences amongst humans that are used to define, in genetic terms, different racial groups.[2] The distinctions that we employ today to categorize humans, such as Black, White, and Latino, date back only a few centuries or less.[3] These labels do not signal genetically separate branches of humankind, for there is only one *human* race; no other biological race of humanity exists. Racial distinctions are largely social constructs based upon perception and history.

Not only are these distinctions socially constructed, they are also in constant flux, and under perpetual siege by those who dispute the arbitrary lines that they draw. The problem is compounded by the fact that different institutions use the terms differently. This lack of

2. Ian Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 6 (1994).

3. *Id*. at 7-8.

common nomenclature makes some comparisons difficult. When a term like "Asian" may encompass over two billion individuals, its ability to precisely and accurately describe an individual, much less a group of individuals, becomes challenging. Similar difficulties imperil the classifications of "Hispanic" and "Latino," which are used to describe not only Dominicans whose descendants may be from Africa, but also Argentines whose ancestry may be traced to Italy, and Peruvians whose forefathers may have emigrated from Japan. Additionally, these traditional categories have come under increasing strain because one in seven marriages within the United States is now "interracial" or "interethnic," rendering single labels less accurate.[4]

In this report, we use "race" to refer to groups of people loosely bound together by history, ancestry, and socially significant elements of their physical appearance. For instance, when using the term "Latina/o" – which we will use where possible rather than "Hispanic" – we mean to describe those individuals whose ancestry is traced back to Latin America, Spain, and Portugal. This definition contemplates race and ethnicity as social phenomena, wherein certain characteristics (i.e., history and morphology) are given meanings by society. In this way, race and ethnicity are not objective observations rooted in biology, but rather self-reinforcing processes rooted in the daily decisions we make as individuals and as institutions. Although socially constructed and enacted, race and ethnicity have important consequences for people's lived experiences.

WHAT WE MEAN BY "STRUCTURAL RACISM"

A structurally racist system can be understood best as a system in which a society and its institutions are embedded, and from which racial disparity results. Within such systems, notions and stereotypes about race and ethnicity shape actors' identities, beliefs, attitudes and value orientations. In turn, individuals interact and behave in ways that reinforce these stereotypes. Thus, even with facially race-neutral policies, processing decisions are informed by actors' understandings (or lack thereof) about race and ethnicity, often leading to disparities in treatment of people of color. As a consequence, structural racism produces cumulative and persistent racial and ethnic inequalities.

Racism should not be viewed as an ideology or an orientation towards a certain group, but instead as a system: "after a society becomes racialized, racialization develops a life of its own. Although it interacts with class and gender structurations in the social system, it becomes an organizing principle of social relations itself."[5] The persistent inequality experienced by Blacks and other people of color in America is the result of this racial structure. The contemporary racial structure is distinct from the past in that it is covert, is embedded within the regular practices of institutions, does not rely on a racial vocabulary, and is invisible to most Whites.[6]

4. Susan Saulny, *Counting by Race Can Throw Off Some Numbers*, N.Y. TIMES, Feb. 10, 2011, at A1, *available at* http://www.nytimes.com/2011/02/10/us/10count.html?scp=1&sq=race%20counting&st=cse.

5. Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465, 475 (1997).

6. *Id*. at 467.

I
INTRODUCTION

Washington State has had a mixed history when it comes to its treatment of racial and ethnic minorities. It was founded through the displacement of its native peoples by legal and extralegal means.[7] Washington's early history included severe anti-immigrant sentiment expressed first toward Chinese immigrants[8] and then Japanese immigrants, who were the target of the state's Alien Land Laws.[9] Yet unlike other states that instituted de jure segregation of schools and severely limited participation in the legal system,[10] Washington did not mandate by state law that schools be segregated and was the only western state to not ban interracial marriage.[11] In fact, Washington became so well-known for its openness that interracial couples would travel from far and wide to get married in the state.[12] A ready coalition of four distinct racial minorities – Blacks, Chinese, Filipinos, and Japanese – worked together during the 1930s to defeat various policies that targeted racial minorities.[13] These initial campaigns laid the groundwork for future collaboration that would cut across racial lines.

Despite this coalition, troubling manifestations of racial discrimination in the public and private spheres continued, demonstrating that Washington State was hardly immune to racial bias. For instance, in March 1942, 14,400 persons of Japanese descent lived in Washington State, including 9,600 in King County alone. Of these, nearly 13,000 were incarcerated and placed into internment camps.[14] Over 30% of those forcibly removed from Seattle never returned to their homes.[15] After the war, Seattle's Black population experienced its own backlash, as restrictive covenants and other forms of housing discrimination proliferated throughout Washington State between 1940 and 1960.[16] These covenants were so effective in

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7. *See generally* HUBERT H. BANCROFT, HISTORY OF WASHINGTON, IDAHO, AND MONTANA 1845-1889 (1890).

8. *See, e.g.*, ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850, at 59 (1988) (forcible removal of Chinese from Tacoma in 1885); DOUG CHIN, SEATTLE'S INTERNATIONAL DISTRICT: THE MAKING OF A PAN-ASIAN AMERICAN COMMUNITY 22 (2001) (attempted forcible removal in 1886 of 350 Chinese immigrants from Seattle).

9. *See* Mark L. Lazarus III, *An Historical Analysis of Alien Land Law: Washington Territory & State 1853-1889*, 12 SEATTLE U. L. REV. 197, 235-36 (1989).

10. *See, e.g.*, CAL. EDUC. CODE §§ 8003, 8004 (Deering 1944) (authorizing the segregation of children of Chinese, Japanese, or Mongolian parentage, and Indians under certain circumstances) (repealed 1947); *People v. Hall*, 4 Cal. 399 (1854) (statute excluded "Blacks" and "Indians" from testifying against White defendants; court classified Chinese as either "Indian" or "Black" in order to exclude testimony of Chinese witness against White defendant).

11. Stefanie Johnson, *Blocking Racial Intermarriage Laws in 1935 and 1937: Seattle's First Civil Rights Coalition*, Seattle Civil Rights & Labor History Project (2005), *available at* http://depts.washington.edu/civilr/antimiscegenation.htm (last visited Feb. 22, 2011).

12. RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 342 (1990).

13. Johnson, *supra* note 11 ("Four distinct racial minorities—blacks, Filipinos, Japanese, and Chinese—dominated the Seattle's civil rights politics over the 1930s, and each group brought something different to the political table . . . .").

14. *See* DAVID A. TAKAMI, DIVIDED DESTINY: A HISTORY OF JAPANESE AMERICANS IN SEATTLE (1998).

15. Robert S. Chang & Catherine E. Smith, *John Calmore's America*, 86 N.C. L. REV. 739, 748 (2008).

16. CALVIN F. SCHMID ET AL., NONWHITE RACES: STATE OF WASHINGTON 18, fig. 2.1 (1968).

Seattle that they functionally concentrated 78% of the Black community into the area known as the "Central District."[17] While residential discrimination is no longer sanctioned by the law, its effects continue to reverberate even today.[18]

Even after Japanese American incarceration ended, and residential discrimination became less overt, one area continued to produce racialized outcomes: the criminal justice system. In 1980 Scott Christianson published findings showing that Washington State led the nation in its disproportionate imprisonment of Blacks.[19] Christianson compared the racial composition of state populations to the racial composition of state prison populations. While every state disproportionately imprisoned Blacks, the over-representation of Blacks relative to the size of the Black population was greatest in Washington. Christianson found that while Blacks constituted approximately 28% of the prison population, they constituted approximately 3% of the general population. The Black share of the prison population was more than nine times greater than the Black share of the general population. Nationally, the Black share of the prison population was four times greater than the Black share of the general population.[20]

Christianson's findings sparked a firestorm of concern amongst policymakers, researchers, and citizens in Washington State. The State Legislature responded by commissioning a study to determine whether racial disparity existed in Washington's criminal justice system. The Crutchfield and Bridges (1986) study was the first in a series of studies over the last 25 years to find that racial bias exists along various points in Washington's criminal justice system. In particular, this first study found that race affects the processing of felony cases in Washington State, even after controlling for legally relevant factors.[21]

In the wake of the 1986 Crutchfield and Bridges report, the state legislature established the Washington State Minority and Justice Task Force to study "the treatment of minorities in the state court system, to recommend reforms and to provide an education program for the judiciary."[22] Among the findings included in the inaugural 1990 report was that there exists a perception amongst minorities "that bias pervades the entire legal system in general and hence [minorities] do not trust the court system to resolve their disputes or administer justice even-handedly."[23] In particular, this perception of bias extended to criminal proceedings, where minorities reported that they received disparate treatment from prosecutors, law enforcement authorities, and the public defender system.[24] The report concluded that more research was needed to determine whether race affects various points of Washington's

17. Henry W. McGee, Jr., *Seattle's Central District, 1996-2006: Integration or Displacement?*, 39 URB. LAW. 167, 167 (2007).

18. *Id*. at 214-16.

19. Scott Christianson, *Legal Implications of Racially Disproportionate Incarceration Rates*, 16 CRIM. L. BULLETIN 1, 59-63 (1980).

20. *Id*.

21. ROBERT D. CRUTCHFIELD & GEORGE S. BRIDGES, RACIAL AND ETHNIC DISPARITIES IN IMPRISONMENT: FINAL REPORT (Inst. for Pub. Pol'y & Mgmt., Grad. Sch. of Pub. Aff., Univ. of Wash. 1986).

22. WASH. ST. MINORITY & JUSTICE COMM'N, 1990 FINAL REPORT xxi (1990), *available at* http://www.courts.wa.gov/committee/pdf/TaskForce.pdf (last visited: Feb. 20, 2011) [hereinafter 1990 Report].

23. *Id*. at 10, 25-33.

24. *Id*.

criminal justice system, such as pretrial release, bail setting, prosecutorial discretion, and quality of counsel.[25]

Decades later, the perception that racial bias permeates the criminal justice system persists. But now there is substantial evidence to support the notion that racial iniquities do permeate the criminal justice system. Indeed, subsequent studies commissioned since 1986 have confirmed that Washington cannot justify its disproportionate minority incarceration rates on the sole basis that minorities commit more crimes.[26] For instance, the extant research concerning the Washington State Patrol suggests that race does not affect police discretion with regard to stops, but does affect searches.[27] Other research involving Washington police seems to indicate that race affects decisions to arrest.[28] Another study found that even after controlling for legally relevant factors, racial differences affect how cases are processed: Whites are less likely to have charges filed against them, bail is recommended for Blacks more often than for Whites, and Blacks are more likely to receive higher rates of confinement and longer sentences.[29] While these and other studies have focused on different decision-points in the criminal justice system, one troubling conclusion in particular underlies each study's findings: when it comes to Washington State's criminal justice system, race matters.

Given this state's history and the evidence demonstrating the importance of race in the criminal justice system, members of the community were understandably concerned when two sitting Washington State Supreme Court Justices, on October 7, 2010, opined that racial minorities are overrepresented in the prison population solely because they commit more crimes and not because any bias exists in the criminal justice system.[30] The comments themselves betrayed a common misunderstanding about whether this issue is more complex than a cursory review of certain crime commission rates might imply. Conviction rates are not a valid proxy for commission rates.

In the wake of these comments by Supreme Court Justices, concerned community members came together to form the Task Force on Race and the Criminal Justice System. We met

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25. *Id*. at 22.

26. Robert D. Crutchfield, *Racial Disparity in the Washington State Criminal Justice System*, "Exhibit 2," *2, Oct. 25, 2005, *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/exhibitsstatementofmaterialfactspart3.pdf.

27. *See, e.g.*, CLAYTON MOSHER, VANCOUVER POLICE DEPARTMENT – CITIZEN CONTACT DATA ANALYSIS PROJECT: PRELIMINARY REPORT (Vancouver Police Dep't, Washington 2003) (finding that police stops involving Blacks, Native Americans, and Hispanics are more likely to result in searches); NICHOLAS LOVRICH ET AL., ANALYSIS OF TRAFFIC STOP DATA COLLECTED BY THE WASHINGTON STATE PATROL: ASSESSMENT OF RACIAL AND ETHNIC EQUITY AND BIAS IN STOPS, CITATIONS, AND SEARCHES USING MULTIVARIATE QUANTITATIVE AND MULTI-METHOD QUALITATIVE RESEARCH TECHNIQUES: PROJECT FINAL REPORT (Div. of Governmental Studies & Servs., Dep't of Political Science & Crim. Just., Wash. St. Univ. 2005) (same).

28. Katherine Beckett, Kris Nyrop & Lori Pfingst, *Race, Drugs and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 1, 105-138 (2006) (concluding that racially disproportionate drug arrest rates in Seattle cannot be explained by comparing commission rates, but rather are the result of police practices that have a racially disparate impact); Katherine Beckett, Kris Nyrop, Lori Pfingst & Melissa Bowen, *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOCIAL PROBLEMS 3, 419-41 (2005) (same).

29. Robert D. Crutchfield, *Ethnicity, Labor Markets, and Crime*, *in* ETHNICITY, RACE, AND CRIME: PERSPECTIVES ACROSS TIME AND SPACE (Darnell Hawkins ed., 1995).

30. Miletich, *supra* note 1.

because the simplistic notion that Black overrepresentation in our prisons occurs because Blacks commit more crimes did not fit with our sense of how racial and ethnic minorities are treated in today's society and in our criminal justice system. We realized quickly, though, that it was important not to proceed on assumptions that unfair treatment existed.

The task force divided into five working groups: Oversight, Community Engagement, Research, Recommendations/Implementation, and Education. The Research Working Group's mandate was to investigate disproportionalities in the criminal justice system and, where disproportionalities existed, to investigate possible causes. This fact-based inquiry was designed to serve as a basis for making recommendations for changes that would promote fairness, reduce disparity, ensure legitimate public safety objectives, and instill public confidence in our criminal justice system. As we engaged in this work, the Research Working Group reported back to the broader Task Force. Our membership grew as more and more organizations and institutions recognized the importance of this issue, not just to the affected racial and ethnic groups, but how it relates to the best aspirations we have as a state. One measure of the goodwill of the people of the State of Washington can be seen in the broad range of organizations and individuals who have joined the Task Force, for what all of us have come to realize is a multi-year project.

For this report, the Research Working Group reviewed evidence on disproportionality in Washington's criminal justice system and reviewed whether crime commission rates accounted for this disproportionality. We found that crime commission rates by race and ethnicity are largely unknown and perhaps unknowable, but that many researchers simply take arrest rates as good proxies for underlying commission rates for all crimes. We found that use of arrest rates likely overstates Black crime commission rates for several reasons unrelated to actual commission rates. Even if arrest rates are used as a proxy for underlying crime commission rates, the extent of racial disproportionality is not explained by commission rates. In 1982, 80% of Black imprisonment in Washington for serious crimes could not be accounted for based on arrest rates, though by 2009, this had dropped to 36%.[31]

We then identified and synthesized research on nine issues for which evidence exists regarding the causes of Washington's disproportionality: (1) Juvenile Justice; (2) Prosecutorial Decision-Making; (3) Confinement Sentencing Outcomes; (4) Legal Financial Obligations (LFO); (5) Pretrial Release; (6) Drug Enforcement; (7) Asset Forfeiture; (8) Traffic Stops; and (9) Driving While License Suspended (DWLS). In each of these areas, the research, data, and findings pertain specifically to Washington State.[32]

We also reviewed evidence regarding bias, especially research on unconscious or implicit bias. We found that cognitive neuroscience and social psychology help us to understand better the existence and behavioral consequences of unconscious or implicit racism.

31. *See infra* Part III.A.

32. The informational resources and preliminary findings were made available to the Recommendations and Implementation Working Group to help inform their policy recommendations.

The evidence we gathered demonstrates that within Washington State's criminal justice system, race and ethnicity matter in ways that are inconsistent with fairness, that do not advance legitimate public safety objectives, and that undermine public confidence.

Part II presents the working group's findings and data regarding racial disproportionality within Washington State's criminal justice system. Part III discusses three possible causes for this disproportionality. Part III.A discusses differential commission rates, concluding that this factor alone cannot account for the disproportionality observed in the criminal justice system. Part III.B discusses seven racially neutral policies that have racially disparate effects, and thus help explain racial disproportionality. Finally, Part III.C discusses another factor that produces racial disparity: bias, whether explicit or implicit. Appendix A provides a more detailed discussion of each of the seven policies and practices that we examined, as well as further discussion of research on bias. Appendix B includes select recent news articles and commentary that relate to the comments of the Justices, police conduct and community distrust, and the danger that police face.

II
RACIAL DISPROPORTIONALITY WITHIN WASHINGTON STATE'S CRIMINAL JUSTICE SYSTEM

For context, we note that the United States has the highest incarceration rate of any industrialized country, more than twice as great as the two OECD countries with the next highest rates (Chile and Israel), more than six times that of Canada, nearly four times that of Mexico, and nearly five times as great as the United Kingdom.[33] Within the United States, the high incarceration rate is disproportionately experienced by certain racial and ethnic groups, with Whites incarcerated at a rate of 412 per 100,000 White residents, Blacks incarcerated at a rate of 2,290 per 100,000 Black residents, and Latinos incarcerated at a rate of 742 per 100,000 Latino residents.[34] In the United States, drawing from 2005 data, Blacks are incarcerated at 5.6 times and Latinos at 1.8 times the rate of Whites.[35]

Table 1 – Prison & Jail Incarceration Rates and Ratios, 2005, United States

	Incarceration rate (per 100,000)	Disproportionality ratio (in comparison to White)
White	412	n/a
Black	2,290	5.6
Latino	742	1.8

Source: The Sentencing Project, Uneven Justice: State Rates of Incarceration By Race and Ethnicity

33. Int'l Centre for Prison Studies at King's College, London, *Prison Brief – Highest to Lowest Rates, Entire World – Prison Population Rates per 100,000 of the National Population* (last modified Mar. 18, 2010), http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_poprate (last visited Feb. 27, 2011). An OECD country is one that participates in the Organization for Economic Cooperation and Development whose purpose is to coordinate policy among certain developed countries.

34. MARC MAUER & RYAN S. KING, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 4 (The Sentencing Project 2007), *available at* http://sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf (last visited Feb. 27, 2011).

35. *Id*. at 3.

In Washington in 2005, the Black incarceration rate, 2,522 per 100,000 Black residents, is greater than the national average.[36] The Latino incarceration rate, as reported at 527 per 100,000 Latino residents, is lower than the national average, but we include this figure with caution because many local jails, including King County's, do not collect ethnic demographic information. In 2005 in Washington, Blacks are incarcerated at 6.4 times and Latinos at 1.3 times the rate of Whites, with the caveat that the Latino figure likely reflects both an undercount of Latinos and an overcount of Whites.[37]

Table 2. Prison & Jail Incarceration Rates and Ratios, 2005, Washington

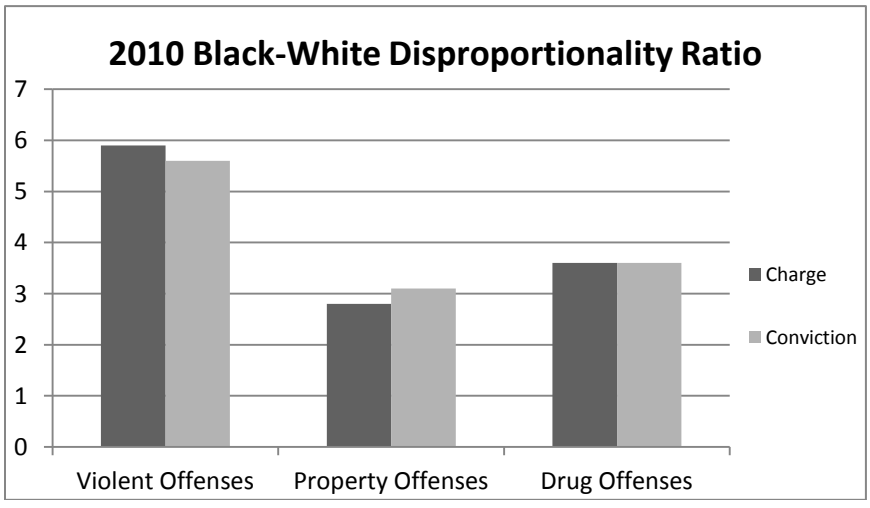
	Incarceration rate (per 100,000)	Disproportionality ratio (in comparison to White)
White	393	n/a
Black	2522	6.4
Latino	527	1.3

Source: The Sentencing Project, Uneven Justice: State Rates of Incarceration By Race and Ethnicity

The fact of racial and ethnic disproportionality in Washington's incarcerated population is indisputable.

Our review of more recent data reveals that racial and ethnic disproportionalities exist at many different stages of the criminal justice system, including at arrest, charging, conviction, and imprisonment. The figures below show 2010 Black-White and Native-White disproportionality ratios at charge and conviction for serious felonies by offense categories. We do not offer information about Latinos because of incomplete reporting by different agencies in the criminal justice system. The figures show that the disproportionalities are not consistent for different offense categories.

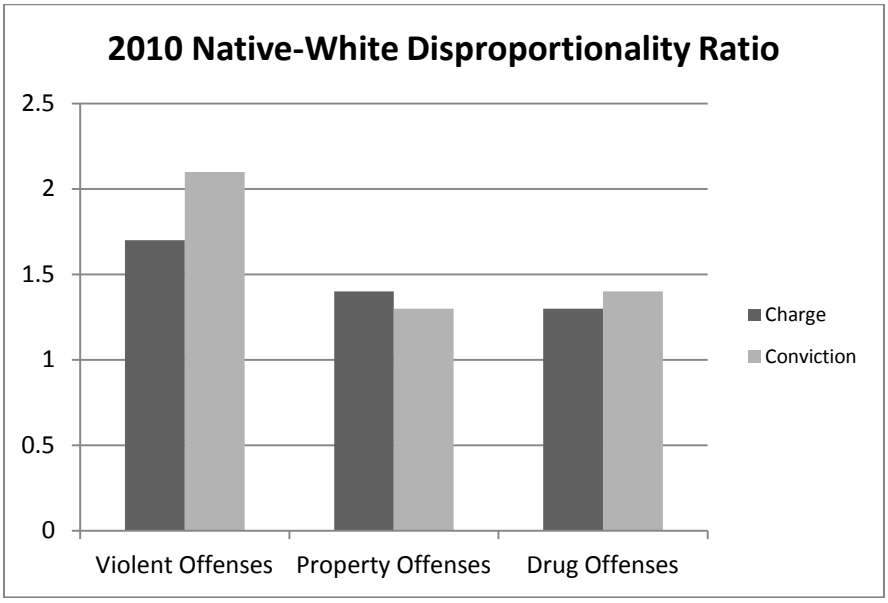
Figure 1 - Black-White Disproportionality Ratios at Charge and Conviction for Serious Felonies by Offense Categories



36. *Id*. at 6, 11, 13.

37. The result is that the Latino-White ratio is likely significantly greater than 1.3 to 1 and the Black-White ratio is probably slightly higher than 6.4 to 1.

Figure 2 - Native-White Disproportionality Ratios at Charge and Conviction for Serious Felonies by Offense Categories



Our review of the most recent data provided to us by the Office of Financial Management, the Washington State Center for Court Research, and the Washington Association of Sheriffs and Police Chiefs on arrests, charges, conviction, and imprisonment shows that racial and ethnic disproportionalities still exist at these different points in Washington's criminal justice system.

We turn now to examine possible causes of these disproportionalities.

III.
PROFFERED CAUSES FOR RACIAL DISPROPORTIONALITY

A. CRIME COMMISSION RATES

The best available evidence suggests that the disproportionalities discussed in Part II above are only partly attributable to differences in crime commission rates. It is important to note that crime commission rates are difficult to approximate. Generally, two methods are used to estimate the level of crime commission among different racial and ethnic groups. Some criminologists use household crime victimization survey data in which victims identify the race of their assailant as proxies for differential commission rates by race.[38] These data reflect victim perceptions of racial identity of their assailant, and include only non-fatal crimes where there is direct contact between the victim and the perpetrator (e.g., robbery, rape, and assault). Because information about victim perceptions of perpetrators' race is only

38. *See, e.g.*, Patrick A. Langan, *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 J. CRIM. L. & CRIMINOLOGY 666 (1985).

available for a few violent offenses, crime victimization survey data presents an incomplete picture of crime commission rates by race.

Other criminologists use arrests as a proxy for crime commission.[39] However, this likely presents a distorted picture. First, over half of violent crimes and over 60% of property crimes are not reported by their victims.[40] Second, most White victims identify their assailants as White, and most Black victims identify their assailants as Black.[41] Third, Black victims are more likely than White victims to report their victimization to the police.[42] Higher reporting rates among Blacks means that crimes involving Black suspects are more likely to come to the attention of the police. Use of arrest data also seems problematic when clearance rates (the percentage of crimes that comes to the attention of the police that lead to arrest) are as low as they are. In the Pacific region, encompassing Alaska, California, Hawaii, Oregon, and Washington, 44.9% of violent crimes and 15.2% of property crimes are "cleared" by arrest.

Further, there is strong evidence that the share of arrestees who are Black is significantly greater than the share of perpetrators identified as Black by crime victims. For example, in the 2005 crime victim survey, victims of non-fatal violent crimes (e.g., rape, robbery, assault) identified their assailants as Black 24.7% of the time. By contrast, 40% of those arrested for non-fatal violent crimes in 2005 were Black.[43] All of this leads to the conclusion that arrests are a poor proxy for crime commission. Studies that treat arrests as a measure of crime commission will likely overstate the rate of crime commission by Blacks and therefore underestimate racial disparity in criminal justice processing.

Even if we use arrest rates as a proxy for crime commission, there remains a very significant disproportionality at imprisonment that is not accounted for by disproportionate arrest rates. Crutchfield *et al*. compared Black-White disproportionality in 1982 index crime arrests and incarceration rates, and found that differential rates of crime commission (as measured by arrest) explained only 20% of the Black-White disproportionality in Washington State prisons.[44] Using data from 2009, we found that 64% of the Black-White disproportionality in

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39. *See, e.g.*, Albert Blumstein, *On the Disproportionality of the U.S. States' Prison Population,* 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982).

40. JENNIFER L. TRUMAN & MICHAEL R. RAND, BUREAU OF JUSTICE STATISTICS BULLETIN, NATIONAL CRIME VICTIMIZATION SURVEY, CRIMINAL VICTIMIZATION, 2009 9 (2010) (Table 12: Percentage of crimes reported to the police, by gender, race, and Hispanic origin, 2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cv09.pdf (last visited Feb. 27, 2011).

41. ERIKA HARRELL, BLACK VICTIMS OF VIOLENT CRIME, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 5, Table 5 (2007) (percent of violent victimization, by victim race/Hispanic origin and offender race, 2001-2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/bvvc.pdf (last visited Feb. 27, 2011).

42. *Id*.

43. Victimization survey data is drawn from SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE Tables 3.29 and 3.31, *available at* http://www.albany.edu/sourcebook/pdf/t3292005.pdf and http://www.albany.edu/sourcebook/pdf/t3312005.pdf (last visited Feb. 27, 2011). Arrest data is drawn from CRIME IN THE UNITED STATES, 2005 Table 43 (2006), *available at* http://www2.fbi.gov/ucr/05cius/data/table_43.html (last visited Feb. 27, 2011).

44. Robert Crutchfield, George Bridges & Susan Pitchford, *Analytical and Aggregation Biases in Analyses of Imprisonment: Reconciling Discrepancies in Studies of Racial Disparity*, 31 J. RES. CRIME & DELINQUENCY 166 (1994).

imprisonment rates is attributable to index crime arrest rates. Thus, it appears that racial disproportionality in Washington State prisons has diminished somewhat, and that a larger portion of this disproportionality reflects the racial distribution of arrest rates.

However, the 64% figure likely overestimates the extent to which racial disproportionality in imprisonment is a function of differential crime rates, for several reasons. First, this method assumes arrests are an accurate measure of crime, but it is likely that they over-represent people of color for the reasons stated above. In particular, arrest data probably over-represent Black suspects. In addition, Latinos are not identified as such in the data from which the 64% figure is derived. Because most Latinos in Washington State are identified racially as White in these data, the White arrest and incarceration rates used in these calculations are inflated, and the results therefore underestimate the extent to which racial disproportionality exists. Finally, this method assesses disproportionality in state prisons, but does not tell us anything about racial disproportionalities in jails, community supervision, and misdemeanor courts. Indeed, it is likely that discretion and disproportionality are greater in these parts of the criminal justice system. Thus it appears that the 64% figure overestimates the extent to which racial disproportionality in imprisonment (and criminal justice institutions more generally) is a function of differential rates of crime commission.

Whatever the precise figure, it is clear that differential crime commission rates can explain only a part of the racial disproportionalities that characterize Washington State courts, jails and prisons.

B. FACIALLY NEUTRAL POLICIES WITH RACIALLY DISPARATE EFFECTS

The Research Working Group focused its efforts on nine issues covered by existing research and data, and in each area we found that observed racial disproportionalities are caused, in part, by practices and policies that produce racially disparate outcomes.

In this section, we are not arguing that particular individuals, actors, or agencies are intentionally discriminating. The studies described below do not prove that any one actor or group of actors is racist. Rather, the research as a whole suggests that Washington State's criminal justice system facilitates racially disparate outcomes in two more subtle ways. First, in some instances, facially neutral policies have racially disparate outcomes. For instance, judicial consideration of ostensibly race-neutral factors such as employment status, when making pre-trial release decisions, disadvantages defendants of color because they are less likely than White defendants to be employed.

Second, the research suggests that the race/ethnicity of suspects and defendants affects how those individuals are perceived, and that this perception impacts how they are treated within the criminal justice system. The literature on implicit bias, discussed in Part III.C below, shows that these race-effects are likely to be unconscious and unintended rather than conscious and purposeful. While traditional models of racism emphasize individual acts of discrimination or racially charged policies, structural racism describes the interaction

between various institutions and practices that are neutral on face, but nevertheless produce racialized outcomes.[45]

Put differently, structures matter and a system's structure has a tremendous influence over the results a system produces. Policies can produce foreseeable, if unintended, harms that run along racial lines.[46] Moreover, bias may be unconscious or conscious. This suggests that we should not concentrate on individual motives, but instead should focus on those practices and procedures whose cumulative effect is to facilitate racialized outcomes. By identifying and then reforming these structures and processes, we can begin to address racial disproportionality within Washington's criminal justice system.

The Research Working Group's findings are discussed below regarding each studied context of disproportionality in Washington State's criminal justice system. More detailed discussions and references related to each topic are provided in the Appendices.

1. JUVENILE JUSTICE.[47]

Our research found troubling practices within Washington State's juvenile justice system. Disproportionate minority contact (DMC) has persisted for decades, and in some areas has worsened. For instance, while Black youth comprise only four percent of the youth population, they receive 15% of the juvenile dispositions. This disproportionality is even greater for youth committed to the Juvenile Rehabilitation Administration (JRA). Native American and Latino youth reside in JRA facilities at rates almost five and two times the proportion of their respective populations in Washington State, while the proportion of Black youth in residential care is seven times the proportion of their population in the state. The evidence also shows that minority juveniles are more likely to receive harsher sentences than similarly situated White juveniles. More research is needed to uncover the precise mechanisms that help to produce these outcomes, especially since early contact with the criminal justice system can be an important indicator of additional contact later in life.

2. PROSECUTORIAL DECISION-MAKING

Prosecutors' charging decisions and sentencing recommendations have an important impact on criminal justice outcomes. Crutchfield, Weis, Engen and Gainey (1995) found that prosecutors were significantly less likely to file charges against white defendants than they were against defendants of color. This difference persisted even after legally relevant factors – offense seriousness, criminal history, and weapons charges – were taken into account. Crutchfield et al. also found that King County prosecutors recommended longer confinement sentences for black defendants (after legal factors were held constant), and that prosecutors were 75% less likely to recommend alternative sentences for black defendants than for similarly situated white defendants.[48]

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45. *See generally* john a. powell, *Structural Racism: Building Upon the Insights on John Calmore*, 86 N.C. L. REV. 791 (2008).

46. *Id*. at 794.

47. *See* Appendix A.1: Juvenile Justice.

48. Robert D. Crutchfield et al., *A Study on Racial and Ethnic Disparities in the Prosecution of Criminal Cases in King County Washington: Final Report*, Washington State Minority and Justice Commission (1995).

3. CONFINEMENT SENTENCING OUTCOMES

Several studies of post-Sentencing Reform Act confinement sentence data find that race shapes confinement sentence outcomes in Washington State. Engen, Gainey, Crutchfield and Weis (2003) found that defendants of color are significantly less likely than similarly situated white defendants to receive sentences that fell below the standard range.[49] Fernandez and Bowman found that Latino defendants sentenced in conservative counties with comparatively large Latino populations are less likely to receive the statutorily established drug offender sentencing alternative than other defendants.[50] And most recently, Steen, Engen and Gainey (2005) found that among felony drug offenders, the odds that a black defendant would be sentenced to prison were 62% greater than among similarly situated white defendants.[51] These studies clearly indicate that race and ethnicity matter for confinement sentencing outcomes.

4. LEGAL FINANCIAL OBLIGATIONS (LFOS).[52]

LFOs are now a common, though largely discretionary, supplement to prison, jail and probation sentences for people convicted of crimes in Washington State courts. Judges have wide discretion when deciding whether and how to impose an LFO. Enormous variability exists in the assessment of LFOs, even when comparing exact charges and similarly situated defendants. Research suggests that extra-legal factors, such as race and ethnicity, affect this variability, and significantly impacts how LFOs are assessed. In particular, the evidence demonstrates that Latino defendants receive significantly greater LFOs than similarly situated non-Latino defendants. Additionally, the debt that accrues from the assessment of fees and fines is substantial relative to ex-defendants' expected earnings and often take many years to pay, exposing defendants to an increased likelihood of arrest and reincarceration.

5. PRETRIAL RELEASE.[53]

Whether an individual is released pending trial has a significant influence on the outcome of a case, and can have cascading effects on a defendant's family, ability to maintain a job, and ability to pay for representation. For instance, the Bureau of Justice Statistics found that 78% of defendants held on bail while awaiting trial were convicted, but just 60% of defendants who were released pending trial were convicted. In addition, defendants held on bail receive more severe sentences, are offered less attractive plea bargains, and are more likely to become "reentry" clients for no other reason than their pretrial detention. Judges enjoy significant discretion when determining whether to release defendants on their own recognizance or whether to impose bail. Although court rules specify what factors judges

49. Robert D. Crutchfield et al., *Racial/Ethnic Disparities and Exceptional Sentences in Washington State: Final Report*, Washington State Minority and Justice Commission (1993).

50. Kenneth E. Fernandez & Timothy Bowman, *Race, Political Institutions, and Criminal Justice: An Examination of the Sentencing of Latino Offenders*, COLUMB. HUM. R. L. REV. 42 (2004).

51. Sara Steen, Rodney L. Gainey & Randy R. Gainey, *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435 (2005).

52. *See* Appendix A.2: Legal Financial Obligations.

53. *See* Appendix A.3: Pretrial Release.

should consider when making this determination, studies show that extra-legal factors, such as race and ethnicity, affect this determination. In particular, Blacks and Latinos are detained pretrial at higher rates than White defendants, even when they face similar charges. The evidence suggests the factors judges use when making this determination facilitate racially disparate outcomes.

6. DRUG ENFORCEMENT.[54]

Seattle has one of the highest rates of racial disparity in drug arrests in the United States. For instance, even though only 8% of Seattle's population is Black, 67% of those arrested for delivery of a serious drug are Black. Research demonstrates that the Seattle Police Department's focus on crack cocaine is the primary cause for this disproportionality in drug arrests. Yet the focus on crack cocaine is not attributable to public health concerns, safety concerns, or citizen complaints, and thus does not appear to be a race-neutral practice. A more equitable enforcement of drug laws would begin immediately to address racial disproportionality, especially when illicit drug use is roughly equal for each racial or ethnic group.

7. ASSET FORFEITURE.[55]

Washington State allows its law enforcement agencies to retain 90% of the proceeds from all assets it recovers from drug-related activity. Additionally, the evidentiary burden that a seizing agency must meet is very deferential to law enforcement. The evidence suggests that the combination of tremendous financial incentives and limited property rights distorts drug-related priorities, and pressures police to make operational decisions to maximize perceived financial rewards. The result is a financial incentive to continue drug-related practices that have a disparate impact on racial minorities. Diverting asset forfeiture funds into a neutral account, such as the state's general treasury, would correct most of the distorting effects of Washington's asset forfeiture system.

8. TRAFFIC STOPS.[56]

Since 2000, the Washington State Patrol ("WSP") has collected data on its traffic stops. WSP requires its troopers to maintain data for every contact they have with a motorist, including whether the motorist is stopped, searched, and cited, and the driver's race/ethnicity. Studies based on this data have found no evidence of racial profiling or any observable racial disparity in traffic stops. However, there is a substantial racial disparity in the outcomes of these stops. The data shows that minorities are cited more often, and that when they are cited, their citations are for more serious offenses. Additionally, after a stop, police are more likely to search minority motorists. For instance, one study found that, compared to White drivers, Latino drivers were twice as likely to be searched, Black drivers were 2.5 times more likely, and Native American drivers were nearly five times more likely. However, the "hit rate" – that is, the percentage of searches that result in seizures – is substantially higher for Whites.

54. *See* Appendix A.4: Drug Enforcement.
55. *See* Appendix A.5: Asset Forfeiture.
56. *See* Appendix A.6: Traffic Stops.

This suggests that the higher search rate is not warranted by any legitimate policing purpose. The data and evidence demonstrate that, after police stop a motorist, race is an important factor influencing the likelihood of a search, and the seriousness of the offense charged.

9. DRIVING WHILE LICENSE SUSPENDED (DWLS).[57]

Washington courts adjudicate approximately 100,000 cases of DWLS each year, and for some misdemeanor courts the offense is one-third of the typical caseload. The evidence shows that this facially-neutral policy – e.g. treating driving while license suspended as a misdemeanor offense – has racially disparate effects. This is the case because poverty rates are higher among Blacks, Latinos, and Native Americans, than among Whites. It is likely that racially disparate enforcement practices also contribute to racial disparity in DWLS 3 charges. For instance, one study found that Black drivers in Seattle are stopped more frequently and are far more likely to receive tickets and be cited for defective headlights and other minor infractions, than White drivers. Because the failure to pay fines stemming from traffic tickets can lead to a license suspension, the DWLS law disproportionately affects minority drivers.

In conclusion, the evidence thus shows a wide variety of policies and practices that facilitate racial disparity in Washington's criminal justice system. In the nine aforementioned areas – juvenile justice, prosecutorial discretion, confinement sentencing outcomes, LFOs, pretrial release, drug law enforcement, asset forfeiture, traffic stops, and DWLS – research actually has been undertaken to evaluate the underlying causes of racial disproportionality in Washington State's criminal justice system, and the research has revealed that race matters at various stages in the disposition of criminal cases. Similarly situated persons are treated differently, along racial lines, in the studied contexts. These findings raise serious concerns regarding other criminal justice contexts yet to be examined, and show how structural racism can and does affect outcomes in Washington's criminal justice system. At different stages in the system, small differences in the ways that individuals are treated can lead to significant differences in group outcomes over time. These effects may be undetectable in any given case, but the effects certainly are observable at a systemic level. These are the effects that have been discovered within Washington's criminal justice system.

C. BIAS

Nobody wants to be called a racist. Most people do not want to be racist. Yet many of us harbor explicit and implicit racial biases, regardless of our professed commitments to racial equality. Though he later claimed to be taken out of context, Jesse Jackson once remarked, "There is nothing more painful for me at this stage in my life . . .than to walk down the street and hear footsteps and start thinking about robbery—and then look around and see somebody white and feel relieved."[58] If one of our most prominent civil rights leaders felt this way, what hope do the rest of us have of being immune from these feelings? And if we have these

57. *See* Appendix A.7: Driving While License Suspended.

58. Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES MAG., June 20, 1999. Jesse Jackson later said that "his quotation was 'taken out of context'" and that the context was "that violence is the inevitable byproduct of poor education and healthcare." *Id.*

feelings, how many of us will admit them to ourselves, let alone to others? Then, how do we know if these feelings in fact affect our behavior? Finally, if we admit that these feelings can affect our behaviors, are there ways to prevent racialized outcomes that are inconsistent with our shared commitment to equality? This part explores evidence regarding bias, the relationship between bias and behavior, and the potential for solutions to prevent racially disparate outcomes.

1. EXPLICIT BIAS AS REFLECTED IN SURVEY DATA

One of the best sources of survey data on racial attitudes comes from the General Social Survey conducted by the National Opinion Research Center at the University of Chicago, which has collected data from face-to-face surveys since 1942.[59] It has revealed, over time, that White attitudes toward Blacks, as measured by expressed principles, have shifted dramatically. For example, in 1964, 60% of White respondents were in favor of laws against intermarriage between Blacks and Whites.[60] By 2002, the number had dropped to 10% in favor of such laws, though 24% still opposed intermarriage between Whites and Blacks.[61] Similar trend data show that when White respondents were asked about Black inequality and its causes, in 1977, 27% of White respondents reported that it was due to Blacks having less ability. By 2006, this number had dropped to 7%.[62] Interestingly, in 1977, 66% of White respondents, when asked questions about Black inequality, expressed that Blacks had no motivation. In 2006, 52% of White respondents said that Blacks had no motivation, and 58% agreed somewhat or strongly that Blacks should try harder.[63] Some negative views, attribution of no motivation, seem to persist at a very high rate. It is also worth noting that a large percentage of White respondents believe that Blacks are treated unfairly by police, with 36% holding this view in 1997 and 35% holding this view in 2004.[64]

The survey data show a significant diminishment in White negative racial attitudes toward Blacks in many areas, but even this should be taken with a grain of salt. Any survey is subject to the problem of response bias.[65] Indeed, the authors of the best work looking at

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59. SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 59 (rev. ed. 1997).

60. *Id*. at 106-7 (Table 3.1B, Questions concerning principles, 1958-1997 (white respondents)).

61. Racial Attitudes: Updated data (Table 3.1B, Questions concerning principles, 1958-1997 (white respondents)), available at http://igpa.uillinois.edu/programs/racial-attitudes/data/white/t31b (last visited Feb. 28, 2011).

62. SCHUMAN, *supra note* 59 at 156-57 (Table 3.4A, Explanations for inequality (white respondents)).

63. Racial Attitudes: Updated data (Table 3.4A, Explanations for inequality (white respondents)), *available at* http://igpa.uillinois.edu/programs/racial-attitudes/data/white/t34a (last visited Feb. 28, 2011)

64. Racial Attititudes: Updated data (Table 3.4B, Supplement, New data on perceptions of discrimination (whites), *available at* http://igpa.uillinois.edu/programs/racial-attitudes/data/white/t34asupp (last visited Feb. 28, 2011)

65. This can be produced by such things as question wording, question context, race of the interviewer, and privacy. *See* SCHUMAN, *supra* note 59, at 78-79 (question wording); Cynthia Webster, *Hispanic and Anglo Interviewer and Respondent Ethnicity and Gender: The Impact on Survey Response Quality*, 33 J. MARKETING RES. 62 (February 1996) (race and ethnicity of interviewer and respondent); Maria Krysan, *Privacy and the Expression of White Racial Attitudes: A Comparison across Three Contexts*, 62 PUB. OPINION Q. 506 (1998) (privacy effect).

racial attitudes based on survey data, including the GSS, note that their book, *Racial Attitudes in America*, might better be called *Racial Norms in America*.[66]

2. IMPLICIT BIAS[67]

What tends to be expressed may not provide good data about "true" attitudes, especially when people wish to conceal their motives or if they have unconscious biases.

Consider the following example:

> [W]e think that most people wish to avoid contact with the physically handicapped but do not want to admit it. If we give a person a choice between sitting next to a handicapped person or sitting beside a normal [sic] one, he may choose the handicapped so as to conceal his desire to avoid. However, if we ask a person to choose between two movies, one of which apparently by accident happens to entail sitting next to a handicapped person, the other next to a normal [sic], he can avoid the handicapped while appearing to exercise a preference for a movie.[68]

In a carefully designed experiment, researchers found that when offered a choice of two rooms in which movies were playing, people avoided the room with a handicapped person, but only when doing so could masquerade as movie preference.[69] This experiment, and others like it,[70] suggest that if reasons exist that provide plausible deniability that one is acting from bias, that people will in fact act on biases.

The gap between "true attitudes" and what is expressed is exacerbated by the problem of unconscious or implicit bias. Much of this research is done in connection with the Implicit Association Test (IAT), which measures reaction times in response to certain visual stimuli.[71] Other methodologies include testing subjects while "measuring cardiovascular response, micro-facial movements, or neurological activity."[72]

The general findings, confirmed by hundreds of articles in peer-reviewed scientific journals are that "[i]mplicit biases—by which we mean implicit attitudes and stereotypes—are both pervasive (most individuals show evidence of some biases), and large in magnitude, statistically speaking. In other words, we are not, on average or generally, cognitively colorblind."[73]

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66. SCHUMAN, *supra* note 59, at 3.
67. *See* Appendix A.8: Implicit Bias.
68. Melvin L. Snyder, Robert E. Kleck, Angelo Strenta & Steven J. Mentzer, *Avoidance of the Handicapped: An Attributional Ambiguity Analysis*, 37 J. PERSONALITY & SOC. PSYCHOL. 2297, 2297 (1979).
69. *Id*. at 2304.
70. *Id*. (discussing bystander intervention experiments varying race of victim).
71. For a more full discussion, see *id*.
72. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 471 (2010) (citations omitted).
73. *Id*. at 473.

3. BIAS AND OUTCOMES

Research also demonstrates that bias, whether held consciously or unconsciously, affects behaviors. But how do we take the insights that are learned in experimental settings and apply them to real life? In one study, résumés were sent to 1,250 employers who had advertised that they were hiring. Each received four résumés from the researchers, altered so that some had stereotypically White-sounding names while others had stereotypically Black-sounding names. Each prospective employer received four résumés from the researchers: "an average white applicant, an average black applicant, a highly skilled white applicant and a highly skilled black applicant."[74] Much to the surprise of the researchers,

> the résumés with white-sounding names triggered 50 percent more callbacks than résumés with black-sounding names. Furthermore, the researchers found that the high-quality black résumés drew no more calls than the average black résumés. Highly skilled candidates with white names got more calls than average white candidates, but lower-skilled candidates with white names got many more callbacks than even highly skilled black applicants.[75]

While this study involved fictitious Black and White applicants in an employment setting, a significant body of research has been done to test bias and outcomes in the criminal justice system as well.

The criminal justice system involves numerous actors—such as police officers, prosecutors, judges, jurors, and eyewitnesses—whose decisions and judgments have a significant impact on the conviction and punishment of criminal defendants. A great deal of research has shown that race significantly affects the decisions and judgments of most people, and some of this research has been conducted on particular actors (or tasks) within the criminal justice system. For example, the research on bias tends to show that a juror who associates Blacks (as opposed to Whites) with a particular crime will be more likely to convict Blacks (as opposed to Whites) of that crime on the *same* evidence. As another example, police officers in one experiment exhibited a tendency to associate Black (as opposed to White) faces with criminality. In yet another experiment, both police and probation officers exhibited a significant influence of race on their judgments of culpability and decisions to arrest and to charge.[76] These and other biases are subtle phenomena that have some influence in any given case, but which have their most substantial effects over time. The research suggests that biased decision-making artificially inflates the proportion of minorities in the criminal justice system, which likely creates more stereotypes and associations, and thus results in a negative feedback loop.

A difficulty remains, though, with connecting bias to behavior to particular outcomes. It is very difficult in any particular instance to prove these connections, at least within the confines of traditional antidiscrimination law. With regard to the person who chooses not to

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74. Shankar Vedantam, *See No Bias*, WASH. POST., Jan. 23, 2005, at W12, available at http://www.washingtonpost.com/wp-dyn/articles/A27067-2005Jan21.html (last visited Feb. 28, 2011).

75. *Id.*

76. These experiments are discussed in more detail in Appendix A.8. Implicit Bias.

sit with the handicapped person, absent an admission by the person that she or he was acting based on bias, we would never be able to prove discrimination. Yet at the end of the day, the handicapped person, more often than not, finds himself or herself watching the movie alone.

With regard to Blacks, Latinos, and Native Americans who are stopped while driving their cars and searched, absent an admission from officers that they were acting based on bias, intentional discrimination cannot be proven. Yet at the end of each day, more Blacks, Latinos, and Native Americans will be searched, even though, statistically, those individuals are less likely to be in possession of narcotics.

At the end of each day, because of the cumulative effect of facially neutral policies that have disproportionate impacts and because of the subtle operation of bias at various decision points, a disproportionate number of people of color in Washington State find themselves incarcerated or otherwise involved with the criminal justice system, a disproportion that cannot be accounted for fully by involvement in crime.

Because of the difficulties in proving intent and the limits of current antidiscrimination law, many of the solutions to the problem of bias in the criminal justice system will have to come from outside of the courtroom. The research shows that implicit racial bias is not an unavoidable component of human decision-making. Substantial research has begun to determine the most effective methods of minimizing such bias.[77] Implicit bias research should inform policymaking and training within the criminal justice system, albeit with great care and consideration.[78]

IV.
CONCLUSION

We have presented evidence of disproportionality in the criminal justice system. Arrest and conviction rates do not correlate precisely with criminal behavior rates and cannot serve as a proxy for criminality. While commission rates may be higher for some categories of crimes, they are lower in others. A very large portion of disproportionality cannot be explained by legitimate race neutral factors, leading us to conclude that race matters in ways that are not fair, that do not advance legitimate public safety objectives, that produce racial disparities in the criminal justice system, and that undermine public confidence in our legal system.

77. *See, e.g.*, Sophie Lebrecht et al., *Perceptual Other-Race Training Reduces Implicit Racial Bias*, 4 PLOS ONE e4215 (2009) (training in distinguishing other-race faces decreases bias shown in IAT); Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY AND SOC. PSYCHOL. 800 (2001) (exposure to images of liked/disliked members of racial groups affects performance on IAT).

78. *See, e.g.*, Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. SOC. JUST. 139, 169 (2010) (recommending "mak[ing] the IAT universal in jury assembly rooms . . . and test[ing] jurors for the categories most likely to generate bias that could playa role in the cases scheduled for the day"); Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCHOL., PUB. POL'Y, AND LAW 230, 241-43 (2001) (suggesting more lineup foils and own-race lineup construction in cases of other-race eyewitness identification).

Our democracy is based on the rule of law and faith in the fairness of the justice system. This faith is undermined by disparity and by high profile incidents of violence toward people of color by law enforcement. The problem is not a “people of color” problem. It is our problem as a society to address.

Closing Remarks from the Task Force Co-Chairs

"A time comes when silence is betrayal."
--Martin Luther King, Jr.

There is a problem in our justice system. We have found disparity and mistrust. Together, we must fix it for the sake of our democracy.

In this report, we find that race and racial bias affect outcomes in the criminal justice system and matter in ways that are not fair, that increase disparity in incarceration rates, that do not advance legitimate public safety objectives, and that undermine public confidence in our criminal justice system.

Now, with these facts before us, the question for all of us is what we will do with this knowledge. We ask this of everyone who has joined us on March 2, 2011, at the Temple of Justice in Olympia, Washington. We ask this of everyone who will read this report.

We, the Task Force on Race and the Criminal Justice System, are devoted to reducing racial disparity in the justice system. Existence would be intolerable were we never to dream. We dream of completely eliminating bias in criminal, civil, juvenile and family law matters. But there is a long history of over-promising and under-delivering. We ask that you join us with energy and good will so we are not added to this list of failures. We prefer the folly of enthusiasm to the indifference of wisdom from those who purport to know better.

We ask that you trust only action because progress happens at the level of events, not of words. Please join our effort to address bias in the justice system at every level. We have hope because we are united and committed to working collaboratively despite our differences. We celebrate the efforts of this Task Force to work together to build a community based on trust, equality, and respect.

Sincerely,

Judge Steven C. González, Chair of the Washington State Access to Justice Board

Professor Robert S. Chang, Director, Fred T. Korematsu Center for Law and Equality

Co-Chairs, Task Force on Race and the Criminal Justice System

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RACIAL DISPARITY IN JUVENILE JUSTICE

PROBLEM

Youth of color in Washington State are disproportionately overrepresented in juvenile sentencing. This disproportionate minority contact (DMC) has been the focus of policy makers, practitioners, and researchers in Washington for the past twenty years. However, DMC has continued, and in some areas, has increased. For example, in 2009, African American youth comprised just over four percent of the State's population, but received over *fifteen* percent of juvenile dispositions in Washington State. There was a similar pattern of overrepresentation for Latino youth (eleven percent of the State population, yet received fourteen percent of the juvenile dispositions)[79] and for Native American youth (two percent of the State population and received over four percent of the juvenile dispositions). This disproportionality is even greater for youth committed to the Juvenile Rehabilitation Administration (JRA). The proportion of African American youth in residential care is seven times the proportion of their population in the state; Native American and Latino youth reside in JRA facilities at rates almost five and two times the proportion of their respective populations in Washington State.

Furthermore, it appears that youth of color may receive disparate sentencing decisions. In 2005 African American and Asian/Pacific Islander youth were sentenced to the longest average terms in county detention. African American youth also received the longest terms of dispositions involving electronic home monitoring and work crew.

KEY POINTS

a. **While Washington State has been the leader in the nation in its efforts to study and decrease DMC, disproportionality still remains.** Between 1990 and 1999 the proportion of youth of color receiving adjudications remained relatively stable at 32%, however in the same time the percentage of minority youth sentenced to correctional supervision rose from 38% to 43%.

b. **A study of probation officers' assessments of youth in Washington State has found that African American youth receive more negative attribution assessments about the causes of their offenses than White youth and these characterizations lead to more punitive sentence recommendations.**[80] Probation officers consistently portrayed Black youth differently than White youth in descriptions about the nature of their criminal offending. Causes of the Black youths' crimes were commonly attributed to internal traits (attitudes and personalities) while causes of White youths' crimes were attributed to their social environment (peers and family). These characterizations shape probation officers' assessments about the threat of future offending and sentencing recommendations and lead to more severe sanctioning for Black youth.

79. The Hispanic numbers are based on 2005 data.
80. Bridges and Steen 1998.

c. Further policy changes are needed to both assess and address rates of DMC and to investigate the mechanisms that produce the disproportionate and disparate outcomes. Increasing the quality and access to data management systems that can generate case characteristics is key to investigating the extent of DMC and the processes that lead to the overrepresentation. Decision-making environments need to be explored for points of discretion that can lead to youth of color being over selected for more severe sanctioning decisions (such as policies leading to detention decisions and practices of case assessments and recommendations). Organizational climates should recognize the ways in which subtle biases can enter into decision-making and decision-makers should openly discuss how differences in culture can influence processing decisions.

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VARIABILITY AND ETHNIC DISPARITY IN THE ASSESSMENT OF "LEGAL FINANCIAL OBLIGATIONS" IN WASHINGTON STATE COURTS

PROBLEM

Legal financial obligations (LFO) are now a common, though largely discretionary, supplement to prison, jail and probation sentences for people convicted of crimes in Washington State courts. Although fine and fee amounts are specified statutorily, judges have significant discretion in determining whether to impose many authorized fees and fines.[81] The evidence suggests that extra-legal factors, including ethnicity, significantly impact the assessment of fees and fines.

KEY POINTS

a. **The assessment of fees and fines is highly variable even across cases involving identical charges and similarly situated defendants.** In 2004, the dollar value of assessed fees and fines ranged from a low of $500 to a high of $21,110 per felony conviction. Significant variation exists even among similar cases and similarly-situated offenders. For example, one first-time defendant convicted of delivery of methamphetamine in the first two months of 2004 was assessed $610 in fees and fines; in a different county, another first-time defendant convicted of the same crime during the same time period was assessed $6,710 in fees and fines.

b. **Statistical analysis (including Ordinary Logistic Regression and Hierarchical Linear Modeling techniques) indicates that a number of extra-legal factors influence the assessment of fees and fines after controlling for offender and Sentencing Reform Act (SRA) offense score. In particular, Latino defendants receive significantly greater fees and fines than similarly situated non-Latino defendants.** In addition, drug offenders receive significantly greater fees and fines than non-drug offenders, and defendants convicted at trial receive significantly greater fees and fines than others.

c. **The debt that accrues from the assessment of fees and fines is substantial relative to ex-offenders' expected earnings and often consequential.** Defendants sentenced in the first two months of 2004 had been assessed an average of $11,471 by the courts over their lifetime. Washington State currently charges 12% interest on unpaid LFOs. By 2008, these individuals still owed an average of $10,840 in court debt. Ex-offenders who consistently pay $50 a month will still possess legal debt after thirty years of regular monthly payments. Legal debt – and poor credit ratings – constrains opportunities and limits access to housing, education, and economic markets. Non-payment of legal debt may also trigger arrest and re-incarceration

81. The DNA Collection Fee is mandatory for first-time offenders (RCW 43.43.690), and the Victim Penalty Assessment penalty is mandatory for all offenders for each conviction (RCW 7.68.035). Judges possess significant discretion in deciding whether to impose the remaining twenty-two fees and fines. Although some fees and fines may only be assessed in some kinds of cases, judges may or may not assess those fees and fines in eligible cases.

d. The fairness and wisdom of the laws authorizing the discretionary assessment of legal financial obligations need to be re-evaluated.

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ETHNIC/RACIAL DISPARITY IN PRETRIAL RELEASE DECISIONS IN WASHINGTON STATE COURTS

PROBLEM

Whether an individual who is charged with a crime will be released pending trial has a significant influence on the outcome of the case. Although court rules specify factors courts must consider when determining whether to release a defendant, judges have significant discretion in making this determination. Research suggests that extra-legal factors, including race and ethnicity, significantly impact pre-trial release decisions. In particular, Blacks and Latinos are detained pretrial at higher rates than White defendants.

KEY POINTS

a. **Pretrial release significantly impacts the outcome of a case.** The Bureau of Justice Statistics found that 78% of defendants held on bail while awaiting trial were convicted, but just 60% of defendants who were released pending trial were convicted. In addition, defendants held on bail receive more severe sentences, are offered less attractive plea bargains and are more likely to become "reentry" clients for no other reason than their pretrial detention.[82] According to one scholar, "There is no more powerful predictor of post-conviction incarceration than pretrial detention."[83] Studies suggest that this correlation is not solely a function of case characteristics. Rather, detention itself affects case outcomes.[84]

b. **Statistical analysis indicates that a number of extra-legal factors influence the imposition of bail after controlling for criminal history. In particular, defendants of color are held on bail at higher rates than other defendants.** A 1997 University of Washington study found that "minority defendants and men were less likely to be released on their own recognizance than others even after controlling for differences among defendants in the severity of their crimes, prior criminal records, ties to the community and the prosecuting attorney's recommendation" (Bridges, 1997).

c. **Judges' consideration of seemingly race-neutral factors may result in disparate pre-trial detention of defendants of color.** Judges often consider the defendant's employment status, length and character of the defendant's residence in the community, and the defendant's family ties and relationships when determining whether to release a defendant or to impose bail. Though presumably not designed to disadvantage people of color, consideration of these factors has that consequence.

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82. Cohen, Thomas H. and Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts. Washington D.C.: Bureau of Justice Statistics,* NCJ 214994. November 2007.

83. John S. Goldkamp. *Two Classes of the Accused: A Study of Bail and Detention in American Justice*. Cambridge, Massachusetts: Ballinger Publishing Co, 1979.

84. Phillips, Mary T. *Bail, Detention and Non-Felony Case Outcomes*, Research Briefs Series No. 14, May 2007 (New York: New York City Criminal Justice Agency, Inc.); Phillips, Mary T., *Bail, Detention and Felony Case Outcomes*, Research Briefs Series No. 18, September 2008 (New York City Criminal Justice Agency, Inc.).

African Americans, Native Americans, and Latinos are more likely to be economically disadvantaged, have unstable employment, experience more family disruptions, and have more residential mobility. Judicial focus on such factors means that people from these ethnic groups are less likely to be released on their own recognizance than Whites.

d. When making pretrial detention decisions, including whether to set bail and the amount of bail, courts should consider factors that are not only race-neutral on face, but also race-neutral in practice and effects.

FURTHER READINGS FOR PRETRIAL RELEASE

- Bridges, George S. 1997. *A Study on Racial and Ethnic Disparities in Superior Court Bail and Pre-Trial Detention Practices in Washington*. Washington State Minority and Justice Commission, Olympia WA.

RACIAL DISPARITY IN DRUG LAW ENFORCEMENT

PROBLEM

Despite the fact that only 8% of the general Seattle population is Black, two-thirds (67%) of those who are arrested for delivery of a serious drug (narcotics other than marijuana) in Seattle are Black. Yet, a rigorous, data-driven analysis of drug use, delivery, and law enforcement patterns in Seattle, conducted in 2008, indicates that this tremendous racial disparity in arrest rates does not reflect the reality of the local drug economy, nor it is a function of public health, public safety, or civilian concerns.

KEY POINTS

a. Seattle has one of the highest rates of racial disparity in drug arrests in the United States. According to Seattle Police Department (SPD) arrest figures, the total Black drug arrest rate was more than 13 times higher than the White drug arrest rate in 2006. Blacks were more than 21 times more likely to be arrested for selling serious drugs than Whites in 2005-2006, despite the fact that multiple data sources suggest that Whites are the majority of sellers and users of serious drugs in Seattle. This rate of disparity is surpassed by only one of the other 38 comparably-sized cities in the nation for which data are available.

b. Law enforcement's focus on crack cocaine – despite the presence of other serious drugs in the City – drives the extreme racial disparity in Seattle arrest rates. The data suggest that the primary cause of racial disparity in Seattle's drug law enforcement is SPD's focus on crack cocaine – to the virtual exclusion of other serious drugs like heroin, powder cocaine, Ecstasy, and methamphetamine. In 2005-2006, *nearly three-quarters (74.1%) of all planned arrests for delivery of a serious drug involved crack cocaine*, a pattern that has remained consistent over time. Of those individuals arrested for crack cocaine delivery, 73.4% were Black. By contrast, fewer than 20% of those arrested for delivering any other serious drug were Black.

c. The over-representation of crack-cocaine offenders among drug arrestees does not appear to be a function of public health and safety concerns, nor of resident complaints. Powder cocaine and Ecstasy – not crack cocaine – are the most widely used serious drugs in Seattle. Although crack cocaine use poses health risks, it is less likely than other serious drugs, such as heroin and other opiates, to be associated with infectious disease and drug-related mortality. Moreover, those arrested for crack cocaine offenses were *least* likely to possess a dangerous weapon at the time of arrest. Lastly, there is little geographic correspondence between the areas identified by civilian complainants and the places where planned drug delivery arrests occur.

d. A less harmful approach to drug law enforcement is necessary. Community-based diversion programs provide a viable alternative to traditional drug law enforcement methods.

FURTHER READINGS FOR DRUG ARRESTS

- Beckett, Katherine. "Executive Summary." *Race and Drug Law Enforcement in Seattle: Report Prepared for the ACLU Drug Law Reform Project and The Defender Association.* September, 2008.

- Beckett, Katherine. *Race and Drug Law Enforcement in Seattle: Report Prepared for the ACLU Drug Law Reform Project and The Defender Association.* September, 2008.

- Beckett, Katherine, Kris Nyrop and Lori Pfingst. 2006. "Race, Drugs and Policing: Understanding Disparities in Drug Delivery Arrests." *Criminology* 44, 1: 105-138.

- Beckett, Katherine, Kris Nyrop, Lori Pfingst and Melissa Bowen. 2005. "Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle" *Social Problems* 52, 3: 419-41.

DRUG-RELATED ASSET FORFEITURE DISTORTS LAW ENFORCEMENT PRIORITIES IN WASHINGTON STATE

PROBLEM

Washington State allows law enforcement agencies to retain 90% of the net proceeds from drug-related assets seized, and requires that these funds be used "exclusively for the expansion and improvement of controlled substances related law enforcement activity."[85] Additionally, the evidentiary burden that a seizing agency must meet is very deferential to law enforcement. Evidence suggests that the combination of tremendous financial incentives and limited property rights distorts drug-related priorities, and pressures police to make operational decisions to maximize perceived financial rewards. The result is a financial incentive to continue drug-related practices that have a disparate impact on racial minorities.

KEY POINTS

a. **Drug-related asset forfeiture is an important tool for law enforcement.** Forfeiture laws reduce the incentive for financially-motivated crimes, such as drug trafficking, by removing the assets that help make such activities profitable.

b. **However, allocating 90% of the net proceeds from drug-related asset forfeitures to the seizing agency creates a conflict between an agency's economic self-interest and traditional law enforcement objectives.** RCW 69.50.505 creates a perverse dependence whereby law enforcement agencies rely upon assets seized during drug investigations to fund their operations. This dependence inevitably skews how law enforcement agencies allocate their resources, and affects operational decisions regarding whether to target particular crimes and how to exercise discretion when making arrests. Legitimate goals of crime prevention are compromised when salaries, equipment, and departmental budgets depend on how many assets are seized. Eight states have enacted reforms **to** end the direct profit incentive under Washington's drug-related asset forfeiture laws by placing forfeiture revenue into a neutral account, such as education, drug treatment, or, ideally, in the general treasury of the city, county, or state government that oversees the seizing agency.[86] The evidence suggests that this single measure would cure the forfeiture law of its most corrupting effects. So long as police agencies can expect a financial reward for asset seizures, they will remain dependent on current tactics that have a disparate impact on racial minorities.

c. **The standard of proof in Washington State for the government to successfully claim property through asset forfeiture is one of the lowest in the country.** RCW 69.50.505 only requires that a law enforcement officer have "probable cause" to believe the property is linked to criminal activity. If a property owner challenges the

85. RCW §§ 69.50.505(9) – (10). The remaining 10% of the net proceeds are deposited into the state general fund.

86. Indiana, Maine, Maryland, Missouri, North Carolina, North Dakota, Ohio, and Vermont, distribute 0% of the proceeds to law enforcement.

seizure, the burden is only slightly increased to "preponderance of the evidence." Requiring seizing agencies to demonstrate with "clear and convincing" evidence that the assets seized were linked to criminal activity would help protect property owners from arbitrary seizures.

d. Despite the substantial property interests involved, indigent defendants do not have a right to appointed counsel when challenging an asset seizure. Because indigent defendants tend to be people of color, minority property owners are at a distinct disadvantage, and bear greater risks that their assets will be liquidated. Providing counsel for indigent defendants would help protect property interests that are often key to their livelihood.

e. Asset forfeiture has a disparate impact on racial minorities. The combination of financial dependence and limited procedural safeguards reinforces drug-related law enforcement tactics that University of Washington researchers have found to have a disparate impact on racial minorities. Two-thirds of those arrested for delivery of a serious narcotics offense in Seattle are Black. Consequently, because a drug arrest automatically renders much of a defendant's property seizable, RCW 69.50.505 has a disparate impact on defendants of color.

f. Many property owners whose assets are seized are never charged with a crime, or are never convicted. Investigators at the *Seattle Post-Intelligencer* found that 20% of people whose property was seized were never charged with a crime, and that 40% of the time there is no conviction.

FURTHER READINGS FOR ASSET FORFEITURE

- Marian R. Williams, et. al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, INSTITUTE FOR JUSTICE (March 2010), *available at* http://www.ij.org/index.php?option=com_content&task=view&id=3114&Itemid=165

- Eric D. Blumenson & Eva Nilsen, *The Next Stage of Forfeiture Reform*, 14 Fed. Sent. R. 76 (2001).

- Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35 (1998).

RACIAL DISPARITY IN TRAFFIC STOPS

PROBLEM

Since 2000, the Washington State Patrol ("WSP") has collected data on its traffic stops. WSP requires its troopers to maintain data for every contact they have with a motorist, including whether the motorist is stopped, searched, and cited. The data also includes the motorist's race and ethnicity. Multiple studies have been conducted based on this data. There is no evidence of racial profiling or any observable racial disparity in traffic stops. However, there is a substantial racial disparity in the outcomes of these stops. The data shows that minorities are cited more often, and that when they are cited, their citations are for more serious offenses. Additionally, after a stop, police are more likely to search minority motorists, even though searches of White drivers more often lead to seizures. This suggests that the higher search rate is not warranted by any legitimate policing purpose.

KEY POINTS

a. **The Washington State Patrol is one of a few agencies studied that does not exhibit a pattern of disproportionate minority contact at the "stop level."**[87] In particular, Blacks are overrepresented in two of the 40 distinct patrol areas (Tacoma Freeway and Seattle South); Native Americans and Asians are not over-represented in any of the 40 areas; and Latinos are over-represented in one area (Sunnyside), but substantially underrepresented in five areas (Yakima, Ephrata, Moses Lake, Everett Central, and Everett East).[88]

b. **However, the evidence also suggests racially disparate rates of citations and vehicle searches.** At the statewide level, Blacks, Latinos, and Native Americans received substantially more violations per stop than White and Asian drivers, and these disproportionalities were even higher for every patrol area in King County.[89]

c. **Even after controlling for legally relevant factors, the evidence shows that minority drivers are more likely to be searched once stopped than White drivers. Race is clearly an important factor influencing the likelihood of a search.** One study found that, compared to White drivers, Native American drivers are twice as likely to be searched, Black drivers are 20% more likely to be searched, and Latino drivers are 10% more likely to be searched.[90] Another study compared low discretion

87. Clayton Mosher, "Vancouver Police Department – Citizen Contact Data Analysis Project: Preliminary Report," Vancouver Police Dep't, Washington State (2003) [hereinafter: Mosher 2003].

88. *See* Nicholas Lovrich, et al., "Data Analysis Project Report," WSP Stop Data Analysis Project, *41 (Jun. 1, 2003), *available at* http://www.wsp.wa.gov/publications/reports/wsu_2003_report.pdf [hereinafter: Lovrich 2003].

89. *Id*. at 52.

90. Lovrich, et al., "Analysis of Traffic Stop Data Collected by the Ashington State Patrol: Assessment of Racial and Ethnic Equity and Bias in Stops, Citations, and Searches Using Multivariate Quantitative and Multi-Method Qualitative Research Techniques: Project Final Report," Div. of Gov't Stud., Wash. St. Univ. (2005) [hereinafter: Lovrich 2005].

searches and high discretion searches.[91] For both low and high discretion searches, compared to White drivers, Latino drivers were twice as likely to be searched, Black drivers were 2.5 times more likely, and Native American drivers were nearly five times more likely.[92]

However, the "hit rate" – that is, the percentage of searches that result in seizures – is substantially higher for Whites. Searches of Whites led to seizures 24.9% of the time. The hit rates for minorities were all lower: 16.5% for Latinos, 18.4% for Blacks, and 22% for Native Americans.[93]

These two findings suggest that minorities are subject to a higher rate of searches, compared to White drivers, but that this higher rate is not warranted by any policing purpose because Whites are more likely to have items worth seizing.

d. Additionally, an important predictor of law enforcement and criminal justice outcomes is the *seriousness of the offense charged*. The evidence shows that Native American, Black, and Latino drivers were charged with more serious offenses on average compared to White drivers. The WSP data calculated a "seriousness score" per stop. Statewide, Asian drivers had the lowest seriousness score at .14, while White drivers had a seriousness score of .19. Black drivers, however, scored .31, Latino drivers scored .33, and Native Americans scored .45. The disproportionalities are particularly extreme in King County. For instance, in the Seattle South patrol area, Black and Latino, seriousness scores were almost double the White score, while the Native American score was more than double.[94] One possible explanation, however, is that minority drivers are more likely to have prior records of commission of traffic violations than White drivers.

The data and evidence demonstrate that, after police stop a motorist, race is an important factor influencing the likelihood of a search, and the seriousness of the offense charged.

FURTHER READINGS FOR TRAFFIC STOPS

- Clayton Mosher, "Vancouver Police Department – Citizen Contact Data Analysis Project: Preliminary Report," Vancouver Police Dep't, Washington State (2003).

- Nicholas Lovrich, et al., "Data Analysis Project Report," WSP Stop Data Analysis Project, (Jun. 1, 2003), *available at* http://www.wsp.wa.gov/publications/reports/wsu_2003_report.pdf.

91. Low discretion searches include searches incident to arrest, impound search, and warrant search. High discretion searches include consent searches, K9 searches, and Terry stops.

92. J. Mitchell Pickerill, Clayton Mosher, & Travis Pratt, *Search and Seizure, Racial Profiling, and Traffic Stops: A Disparate Impact Framework*, 31 Law & Pol'y 1, 12 (2009) [hereinafter: Pickerill, *Search and Seizure*].

93. *Id.* at 13.

94. Lovrich 2003, *supra* note 83, at 53-55.

- Lovrich, et al., "Analysis of Traffic Stop Data Collected by the Ashington State Patrol: Assessment of Racial and Ethnic Equity and Bias in Stops, Citations, and Searches Using Multivariate Quantitative and Multi-Method Qualitative Research Techniques: Project Final Report," Div. of Gov't Stud., Wash. St. Univ. (2005).

- J. Mitchell Pickerill, Clayton Mosher, & Travis Pratt, *Search and Seizure, Racial Profiling, and Traffic Stops: A Disparate Impact Framework*, 31 Law & Pol'y 1, 12 (2009).

RACIAL DISPARITY IN DRIVING WHILE LICENSE SUSPENDED THIRD DEGREE CASES

PROBLEM

In many misdemeanor courts, driving while license suspended in the third degree (DWLS 3) cases constitute at least one-third of the caseload. There are an estimated 100,000 cases in Washington per year.[95] The great majority of these cases result from failure to pay a traffic ticket or to appear in court for the ticket. RCW 46.20.342(1)(c)(iv).[96]

Because of a combination of economic status and police deployment decisions, and possibly in some situations because of racial profiling, people of color are more likely to have suspended licenses for failure to pay a ticket. In 2000, a *Seattle Times* investigation found that Black drivers in Seattle receive more tickets and are more likely to be cited for defective headlights than are White drivers.[97] As a result, people of color are more likely to be charged with DWLS 3.

In some misdemeanor courts, there is no counsel available for indigent persons at first appearance or arraignment hearings. And in some misdemeanor courts, public defense counsel are overwhelmed with cases. Some prosecutors have established diversion programs and some courts have re-licensing programs, both of which have demonstrated the ability to reduce costs and in some cases to gain revenue for local governments while avoiding criminal convictions for drivers.

KEY POINTS

a. DWLS 3 is a crime, and most of the people charged with this offense are poor. A Seattle study in 1999 found that of 184 people with suspended licenses, the average person had $2,095 in unpaid fines and a monthly income of $810.6.[98]

b. Because of economic factors and possibly the deployment of police and their vehicle stop practices, the people charged with DWLS 3 are disproportionately of color.

c. Most people charged with DWLS 3 had their licenses suspended for not paying a fine or for missing a court hearing and if they had means and the knowledge on how to negotiate the court system, they could get their licenses reinstated. Local

95. Driving While License Suspended 3rd Degree Survey of Courts of Limited Jurisdiction, Washington Office of Public Defense (2008).

96. John B. Mitchell & Kelly Kunsch, *Of Driver's Licenses and Debtor's Prison*, 4 SEATTLE J. FOR SOC. JUST. 439, 443 (2005).

97. "A Seattle Times analysis of more than 324,000 citations issued in the past five years also found blacks get more tickets per stop than whites and are more likely to be cited for certain offenses, such as defective headlights. For example, the number of tickets issued to blacks for blocking traffic is four times the proportion of blacks in the driving population." Andrew Garber, "Seattle Blacks Twice as Likely to Get Tickets," THE SEATTLE TIMES, Jun. 14, 2000 (corrected August 3, 2001).

98. Evaluation of Seattle Re-Licensing Program (2002), *available at* http://www.cityofseattle.net/courts/PDF/RelicensingEval.pdf.

prosecutors and courts should work with defenders and community groups to establish pre-charging diversion and re-licensing programs where they do not now exist.

d. DLWS 3 prosecutions consume a dramatic percentage of misdemeanor court, prosecution, and public defense resources in a time of severe budget challenges.

e. The costs of prosecuting DWLS 3 cases are staggering. It is estimated that Washington's statewide average cost of arrest is $334, cost of conviction is $757, and cost per jail day $60.71.[99] Even though most first-time DWLS 3 convictions do not result in jail, many people do go to jail on the second or third offense or for failing to complete probationary requirements. Not counting the cost of any jail time, 100,000 arrests and convictions cost more than $100 million per year. Even if the DWLS 3 cases proceed on the basis of tickets with no arrests, the cost still exceeds $75 million. This cost does not take into account the impact on the individual defendant or his or her family.

EXISTING ALTERNATIVES TO DWLS

Some courts have created relicensing programs to help low-income people get their licenses back while still making payments toward tickets.[100] King County District Court has a relicensing calendar twice a month during which individuals may enroll in the program rather than face a DWLS 3 charge.[101] There is a community service option that allows participants to perform community service at the rate of $10 for each hour worked. The District Court holds are released once the court receives written proof of community service hours performed.

In addition, the program offers participation in work crew and credit towards King County District Court fines at the rate of $150 for every eight-hour day worked. And another option is to make a 10% down payment on fines and monthly payments for the remaining balance. A community-based organization, Legacy of Equality, Leadership and Organizing (LELO), assists individuals with the process and refers individuals to the Relicensing Program.[102] The relicensing program generates revenue as people pay their fines and avoids prosecution, public defense, and jail costs for cases diverted from prosecution.[103] A 2004 study estimated

99. WASH. ST. INST. FOR PUBLIC POLICY, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* at 41, Exhibit B.2 (2006), *available at* http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf. Figures are adjusted for 2007 dollars utilizing the Implicit Price Deflator (GDP) rate and computations performed at http://www.measuringworth.com/uscompare.

100. Cooper Offenbecher, *DWS: A Ticket to Debtor's Prison?*, KING COUNTY BAR BULLETIN, April 2008, *available at* http://www.kcba.org/newsevents/barbulletin/archive/2008/08-04/article1.aspx. *See also*, Mitchell & Kunsch, *supra* note 2.

101. *Re-Licensing*, King Ctny. Dist. Court Servs., *available at* http://www.kingcounty.gov/courts/DistrictCourt/CitationsOrTickets/RelicensingProgram.aspx (last visited Nov. 9, 2010).

102. LELO also conducts its own DWLS education programs. *See* Legacy of Equal., Leadership & Org., http://www.lelo.org.

103. Offenbecher, *supra* note 100.

that for every dollar spent on the King County District Court relicensing program, the court either earned or saved two dollars.[104]

The City of Spokane Prosecutor's office recently established a diversion program for DWLS 3 cases that it believes will reduce the municipal court caseload by 35 per cent.[105] The Legislature should amend the statute so that driver's licenses are not suspended for failure to pay a ticket or attend a court hearing.

104.Costs & Benefits of the King County District Court Relicensing Program, Christopher Murray & Associates, 2004, cited in Offenbecher, *supra* note 100.

105.Robert C. Boruchowitz, *Diverting and Reclassifying Misdemeanors Could Save $1 Billion per Year: Reducing the Need For and Cost of Appointed Counsel*, AMERICAN CONSTITUTION SOCIETY (2010), at 9, *available at* http://www.acslaw.org/files/Boruchowitz%20-%20Misdemeanors.pdf.

IMPLICIT BIAS DISTORT DECISION MAKERS THROUGHOUT THE CRIMINAL JUSTICE SYSTEM

PROBLEM

The criminal justice system involves numerous actors—such as police officers, prosecutors, judges, jurors, and eyewitnesses—whose decisions and judgments have a significant impact on the conviction and punishment of criminal defendants. A great deal of research has shown that race significantly affects the decisions and judgments of most people. Some of this research has been conducted on particular actors (or tasks) within the criminal justice system. For example, the research on bias tends to show that a juror who associates Blacks (as opposed to Whites) with a particular crime will be more likely to convict Blacks (as opposed to Whites) of that crime on the *same* evidence. These biases are subtle phenomena that have some influence in any given case, but which have their most substantial effects over time. The research suggests that biased decision-making artificially inflates the proportion of minorities in the criminal justice system, which likely creates more stereotypes and associations, and thus results in a negative feedback loop.

The research and studies discussed below are either well-recognized meta-analyses (that is, evaluations of large collections of similar studies, used to determine the general state of knowledge regarding a particular issue), or particular studies selected for their relevance, elegance, clarity, and methodological rigor. Unfortunately, the vast majority of research to date has evaluated race as a White-Black dichotomy. Nevertheless, the studies that have expanded the race evaluation to other minority groups have tended to show similar results. Thus, no distinction between minority groups is drawn here, and further treatment of that issue is beyond the scope of this summary.

KEY POINTS

a. Individuals in our society generally associate minorities with criminality; exhibit implicit bias against minorities; and also exhibit divergent behavior in experimental conditions based on the manipulation of race. Researchers have shown that Whites tend to exhibit relatively increased levels of activation in the amygdala—an area of the brain that is associated with emotional stimulation and most notably fear—when presented with Black as opposed to White faces.[106] This effect has been correlated with performance on the Implicit Association Test (IAT), which measures implicit conceptual associations, and which has been used by researchers to measure implicit bias in individuals.[107] Whites generally exhibit implicit bias against Blacks under the IAT. Namely, Whites tend to find it more difficult to associate positive concepts with Black (as opposed to White) faces or names (and the reverse is true with negative concepts). In particular studies, the IAT

106. Elizabeth A. Phelps et al, *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729 (2000).

107. *Id.*

also has been correlated with biased behavior and decision-making (although these studies are less rigorous and methodologically clean).[108]

Other findings have been made regarding mental associations of Blacks with criminality. In one study, individuals primed[109] with crime-related concepts attended relatively more to Black faces as opposed to White faces—and this effect was replicated in a group of police officers.[110] Further, when asked whether faces "looked criminal," a group of police officers judged Black faces to be much more criminal-looking.[111] And these studies involved officers of many races, not only Whites.

b. Criminal investigations and arrests are influenced by the race of potential/actual suspects, and often are based on a faulty application of majoritarian cultural norms. The racial component of a given case may influence judgments of character and guilt, expectations of recidivism, and decisions to arrest and charge. In one study, priming police and probation officers with Black-related concepts significantly influenced responses to race-neutral vignettes of juveniles committing theft and assault.[112] Specifically, the officers were more likely to rate the juveniles negatively, to expect recidivism, and to recommend arresting the juveniles, if primed with Black-related concepts (such as "homeboy" or "minority"). Another study, of general import, observed that White store employees were more likely to monitor and follow Black (as opposed to White) customers who asked to try on sunglasses with a security sensor removed.[113]

Next, a good deal of work has been conducted on deadly force simulations, in which subjects must decide quickly whether to shoot or not-shoot figures appearing on a screen who are carrying either a gun or an innocuous object (such as a wallet). Whites have been shown to commit substantially more errors regarding Black (as opposed to White) target figures.[114] Further, this biased effect was increased in one study when subjects read newspaper articles involving Black (as opposed to White) criminals prior to testing—once again showing the power of underlying

108.Jeremy D. Heider & John J. Skowronski, *Improving the Predictive Validity of the Implicit Association Test*, 9 N. AM. J. PSYCHOL. 53 (2007); Allen R. McConnell & Jill M. Leibold, *Relations among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435 (2001).

109."Priming" occurs when a subject is shown an image or word so quickly that the image or word is not registered in consciousness, but nevertheless has a subconscious impact and affects behavior. This is a common and accepted method of investigating underlying mental processes in the field of social psychology.

110.Jennifer L. Eberhardt et al, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004).

111.*Id.*

112.Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUMAN BEHAV. 483 (2004).

113.George E. Schreer et al, *"Shopping While Black": Examining Racial Discrimination in a Retail Setting*, 39 J. APPLIED SOC. PSYCHOL. 1432 (2009).

114.Joshua Correll et al, *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002).

stereotyping.[115] Another such deadly force study was conducted at the University of Washington with similar results.[116] Further, a similar study recently was conducted with Washington police officers, with reportedly similar results, although that study has not yet been published (or peer-reviewed).[117]

Some work also has been done to determine whether non-verbal cues used by police officers to identify likely suspects are accurate across races.[118] Research has shown that minorities—including specifically minorities who have not been engaging in criminal activity—disproportionately exhibit many of these non-verbal cues (such as pauses in speech or avoidance of eye contact). These same behaviors also have been shown in foreign language speakers.

c. Determinations of guilt and sentencing likely are influenced by the race of defendants, in conjunction with other extra-legal factors. A few substantial meta-analyses have been done regarding mock juror studies involving race (namely, studies in which subjects are provided with trial materials and asked for judgments of guilt and sentencing, and defendant race is manipulated). These studies are limited in various ways (e.g., generally these studies evaluate individual mock jurors as opposed to mock juries engaged in group decision-making), but they appear useful nonetheless. One meta-analysis focused on sentencing decisions made by White mock jurors, and found a small but significant effect of racial bias.[119] Another meta-analysis evaluated verdict and sentencing decisions made by mock jurors (including Black mock jurors) in mock cases involving minority defendants, and that meta-analysis found no significant effect of racial bias (although there were apparent effects within particular types of crime).[120] A subsequent meta-analysis collected more studies and evaluated the effect of out-group bias (including bias by Black mock jurors against White mock defendants).[121] That meta-analysis found a small but significant and reliable effect of race on mock juror verdict and sentencing decisions, which was substantially tempered by jury instructions, or use of binary responses regarding guilt (guilty/not-guilty as opposed to a scale measuring likelihood of guilt). These tempering conditions are more realistic and reflective of

115. Joshua Correll et al, *The influence of stereotypes on decisions to shoot*, 37 EUR. J. SOC. PSYCHOL. 1102 (2007).

116. Anthony G. Greenwald et al, *Targets of discrimination: Effects of race on responses to weapons holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399 (2003).

117. Lois James, *Simulated Deadly Force Scenarios: A New Experimental Tool for Measuring Racial and Gender Bias in Policing*, unpublished manuscript.

118. Robin S. Engel & Richard Johnson, *Toward a better understanding of racial and ethnic disparities in search and seizure rates*, 34 J. CRIM. JUST. 605 (2006); Richard R. Johnson, *Race and police reliance on suspicious non-verbal cues*, 30 Policing: An International Journal of Police Strategies & Management 277 (2007).

119. Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179 (1992).

120. R. Mazzella & A. Feingold, *The effects of physical attractiveness, race, socioeconomic status, and gender of defendant and victims as influenced by race, political orientation, and peer group*, 46 AM. BEHAV. SCIENTIST 108 (2002).

121. Tara L. Mitchell et al, *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 L. & HUMAN BEHAV. 621 (2005).

actual courtroom processes, and thus, based on mock juror research to date, the effect of racial bias on jury decisions in general appears to be fairly insignificant.

However, subsequent research has shown that race may play a significant role in particular types of criminal cases, or in combination with other factors. For example, some studies have found a substantial effect of racial bias for crimes stereotypically associated with a particular race (for example, relatively higher guilty ratings for Whites charged with embezzlement or Blacks charged with grand theft auto).[122] Another study evaluated the interaction of defendant race, socioeconomic status, and attorney race, on mock juror evaluations, and while no factor was individually significant, the three factors combined were very significant (i.e., all else being equal, Mexican poor defendant with Mexican attorney judged guilty by 55% of jurors, while White rich defendant with White attorney judged guilty by 32% of jurors).[123]

d. Cross-racial eyewitness identification is substantially less accurate, and cross-racial lineup construction is less fair. The "cross-race bias" eyewitness phenomenon is the finding that "[e]yewitnesses are more accurate when identifying members of their own race than members of other races."[124] In a survey of 64 eminent experts on eyewitness research, 90% agreed that the cross-race bias phenomenon is reliable enough to be presented in court.[125] Further, a comprehensive and well-regarded meta-analysis of studies regarding cross-racial eyewitness identification found that cross-racial identifications are 1.56 times more likely to be erroneous.[126] Considering the important role that eyewitness testimony plays in criminal trials, this is disturbing. Similarly, another study found that cross-racial lineup constructions (lineups constructed by individuals of a different race than the suspect) are likely to be done with less time and attention to detail in selecting foils, and thus, less fairness.[127] Due to the fact that, as a general matter, minorities are more likely to be identified by White witnesses, and that lineups are more likely to be constructed by Whites, minorities are at a distinct disadvantage regarding the use of eyewitness testimony in the criminal justice system.

122. Christopher S. Jones & Martin F. Kaplan, *The Effects of Racially Stereotypical Crimes on Juror Decision-Making and Information-Processing Strategies*, 25 BASIC & APPLIED SOC. PSYCHOL. 1 (2003); Randall A. Gordon et al, *Perceptions of Blue-Collar and White-Collar Crime: The Effect of Defendant Race on Simulated Juror Decisions*, 128 J. SOC. PSYCHOL. 191 (2001).

123. Russ K. E. Espinoza & Cynthia Willis-Esqueda, *Defendant and Defense Attorney Characteristics and Their Effects on Juror Decision Making and Prejudice Against Mexican Americans*, 14 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 364 (2008).

124. Saul M. Kassin et al, *On the "General Acceptance" of Eyewitness Testimony Research*, 56 AM. PSYCHOL. 405 (2001).

125. *Id.*

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The Seattle Times Winner of a 2010 Pulitzer Prize

Originally published October 21, 2010 at 9:16 PM | Page modified October 22, 2010 at 5:11 PM

Two state Supreme Court justices stun some listeners with race comments

State Supreme Court justices Richard Sanders and James Johnson stunned some participants at a recent court meeting when they said African Americans are overrepresented in the prison population because they commit a disproportionate number of crimes and not because of racial discrimination.

By Steve Miletich
Seattle Times staff reporter

State Supreme Court justices Richard Sanders and James Johnson stunned some participants at a recent court meeting when they said African Americans are overrepresented in the prison population because they commit a disproportionate number of crimes.

Both justices disputed the view held by some that racial discrimination plays a significant role in the disparity.

Johnson also used the term "poverty pimp," an apparent reference to people who purportedly exploit the poor in the legal system, say those who attended the meeting.

Sanders later confirmed his remarks about imprisoned African Americans, saying "certain minority groups" are "disproportionally represented in prison because they have a crime problem."

"That's right," he told The Seattle Times this week. "I think that's obvious."

Johnson did not respond to several messages left Wednesday and Thursday with three staffers in Olympia. He also did not respond to messages left Thursday at his home and with Sanders. Johnson's staff said he was with the court in Spokane to hear cases at the Gonzaga University law school.

African Americans represent about 4 percent of Washington's population but nearly 20 percent of the state prison population. Similar disparities nationwide have been attributed by some researchers to sentencing practices, inadequate legal representation, drug-enforcement policies and criminal-enforcement procedures that unfairly affect African Americans.

Some who attended the meeting say they were offended by the justices' remarks, saying the comments showed a lack of knowledge and sensitivity.

Kitsap County District Court Judge James Riehl, who attended the meeting, said he was "stunned" because, as a trial judge for 28 years, he was "acutely aware" of barriers to equal treatment in the legal system.

Sanders, who is seeking a fourth term in the Nov. 2 general election, and Johnson, who was elected to a second term in the August primary, offered their opinions during an Oct. 7 presentation at the Temple of Justice in Olympia.

Staff from the state Administrative Office of the Courts (AOC), as well as Riehl and a social-justice advocate from the Seattle University School of Law, presented a report on improving the effectiveness of boards and commissions set up by the Supreme Court to ensure fair treatment in the courts for minorities and other groups.

Shirley Bondon, an AOC manager who oversees programs to remove barriers in the legal system, said that during the discussion she told the justices that she believed there was racial "bias in the criminal-justice system, from the bottom up."

Bondon, 50, who is African American, said Sanders told others to turn to a page in the report that listed barriers to the justice system, including age, race, disability and other factors.

Sanders asked for the name of anyone who was in prison because of one of the barriers, according to Bondon and others who attended the meeting.

Sanders also stated that he didn't believe the barriers existed, except for poverty because it might restrict the ability to afford an attorney, Bondon said.

Ada Shen-Jaffe, the Seattle University participant, responded that she didn't have names but could provide research, Bondon and Riehl said.

Shen-Jaffe, said to be traveling, couldn't be reached for comment.

Bondon said she told the group that African Americans comprise a small percentage of Washington's population but comprise a much larger percentage of the prison population.

Sanders replied that African Americans commit more crimes, Bondon and others at the meeting said.

Sanders, in an interview, said he replied with words to the effect that maybe prison statistics reflect crimes that were committed.

After Sanders' remark, Johnson said he agreed, noting that African Americans commit them against their own communities, Bondon said.

Bondon said she told Johnson that was unacceptable and that she didn't believe that to be true.

Johnson then remarked that he believed some people are taken advantage of, and in connection with that, used the term "poverty pimp," Bondon said.

Bondon said she didn't know what Johnson meant by that comment but later concluded he likely was referring to legal-service workers who provide services to the poor, particularly since Shen-Jaffe has a background in that field.

Shen-Jaffe objected to Johnson's remarks and invited Johnson to later talk informally with her about them, Bondon and others at the meeting recalled.

Johnson explained during the meeting that he had heard the term "poverty pimp" from someone else, Bondon said.

The pejorative label has generally been used to describe individuals who represent the poor for their own gain.

Justice Debra Stephens said she heard Sanders and Johnson make the comments, including Johnson using the words "you all" or "you people" when he stated that African Americans commit crimes in their own communities.

Stephens said she was surprised by the "poverty pimp" remark.

"If that were directed at me, I would have felt accused," Stephens said, adding that she doesn't believe that was Johnson's intent, but instead that he chose an unfortunate phrase.

Justice Susan Owens said she heard the comments but didn't understand what Johnson meant by "poverty pimp," though she added that she didn't believe he was directing the term at anyone in particular.

Chief Justice Barbara Madsen said she recalled that Sanders disagreed with the premise that anyone was in prison because of race and asked for a name of someone there because of race.

She also recalled Johnson said something about African Americans committing crimes in their own communities, but that she only heard later that he used the term "poverty pimp."

Madsen said she stopped the conversation because she didn't think it was productive.

Some justices said they didn't hear the comments, in part because of overlapping conversations taking place along a long table.

Riehl, the Kitsap County judge, said he was stunned that the term "poverty pimp" would be used in a meeting where the comment didn't relate to the presentation, and that it was made in front of staff and the Seattle University representative.

Johnson made clear that he didn't think the court's boards and commissions should be funded and said the meeting was costing $25,000 in people's time that could be used for better purposes, Riehl said.

"That obviously took me back a little," Riehl said.

Johnson is widely considered to be the court's most conservative justice.

Bondon, the AOC manager, in a written statement to The Seattle Times, said she was stunned by Sanders' remarks.

"I know that people in all walks of life hold biases, but it was stunning to hear a Justice of the Supreme Court make these outrageous comments in my presence," Bondon wrote.

Bondon said she took the "comments personally, as though he were saying that I and all African Americans had a predisposition for criminality and I was offended."

Bondon said she remembered thinking that she didn't need data or statistics to prove that she and other African Americans don't have a predisposition for criminality.

"Just the idea that it was necessary to disprove the assertion was sickening," Bondon said.

Johnson's pimp comment inferred that "poor people have no right to legal representation. Where's the justice in that?" Bondon wrote.

Sanders, in an interview, said he has a reputation for standing up for those accused of crimes but that he hasn't seen evidence that African Americans are disproportionately imprisoned because of race.

He said his concern was for "individuals," and that if someone is in prison for any reason other than committing the crime, "I want to hear about it."

But statistics aren't proof, he said.

Sanders, a self-described civil libertarian, said he had written court opinions making it clear that prosecutors can't dismiss prospective jurors because of race.

Seattle Times news researcher David Turim contributed to this story.

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Source: http://seattletimes.nwsource.com/html/localnews/2013226310_justices22m.html

The Seattle Times Winner of a 2010 Pulitzer Prize

Editorials / Opinion

Originally published October 24, 2010 at 4:00 PM | Page modified October 25, 2010 at 1:20 PM

Don't re-elect Justice Richard Sanders for state Supreme Court

State Supreme Court justices Richard Sanders and James Johnson disappoint with their remarks that seem to suggest African Americans have a predisposition for crime. Voters should reject Justice Sanders' bid for another term.

STATE Supreme Court justices Richard Sanders and James Johnson inflamed racial tensions with their remarks that African Americans are overrepresented in the state prison system because they commit more crimes.

How disappointing these two legal minds were unable to offer more thoughtful, nuanced views about racial disparities in the criminal-justice system.

African Americans make up 4 percent of the state population and 20 percent of state prisoners. An impressive body of evidence links the disproportionate numbers to drug-enforcement policies, poverty and racial biases throughout society.

Sanders and Johnson have worked in the judicial system long enough to be informed by these disparities and to know better. They missed by a wide mark an opportunity to lead a broader and smarter discussion.

This page takes the unusual step of withdrawing its endorsement of Sanders. The Seattle Times now supports lawyer **Charlie Wiggins**, who was a close call in our primary endorsement. We said then that Wiggins was fully qualified to serve on the bench and be a strong voice pushing back against government. At the time, Sanders' support for state public-disclosure laws cinched his endorsement.

But Sanders' latest remarks fall upon a trash heap of cringe-worthy conduct — the latest for ruling in a public-records case that could have affected a case of his own. In 2008, he called U.S. attorney general Michael Mukasey a "tyrant" to his face. Decades ago, Sanders dressed as a Nazi as a Halloween prank.

Johnson has no challenger and thus is assured another term in next month's election. That does not mean he should escape public censure, it just means there is no one else to vote for.

Sanders's and Johnson's remarks stand out for the starkness of their views after lengthy careers in the justice system. The most damaging assessment that can be made is that the people who know the system best were shocked and dismayed by the two justices' comments.

Kitsap County District Court Judge James Riehl, who was present when the justices made their remarks, says his own 28 years as a judge has provided him with an acute awareness

of the barriers to equal treatment in the legal system. Justice Debra Stephens told The Times that Johnson used the phrases "you all" or "you people" when he talked about African Americans and crimes, noting the unfortunate phrase may have made blacks in the audience feel accused.

Bottom line, Sanders and Johnson were insensitive, uninformed and way too casual about an important societal issue. Voters should reject Sanders and vote for Wiggins.

Source: http://seattletimes.nwsource.com/html/editorials/2013234733_edit25sanders.html

The Seattle Times Winner of a 2010 Pulitzer Prize

Editorials / Opinion

Originally published Friday, October 29, 2010 at 3:32 PM

Guest columnist

Discrimination is the well-documented cause of race disparity in prison

Two Washington Supreme Court justices suggested recently that more African Americans are in prison because they commit more crimes. Guest columnist Nicole A. Gaines lays out the documented evidence that racial discrimination accounts for the disparity.

By Nicole A. Gaines
Special to The Times

THE Seattle Times recently reported that "State Supreme Court justices Richard Sanders and James Johnson ... said African-American people are overrepresented in the prison population because they commit a disproportionate number of crimes."

These justices dismissed any role that racial discrimination plays in the disparity.

The Loren Miller Bar Association, a civil-rights-based organization which in part focuses on disparities that affect the African-American community, condemns these uninformed and misleading statements. Recent studies overwhelmingly prove that racism is pervasive throughout the U.S. justice system.

African Americans make up about 4 percent of Washington's population but approximately 20 percent of the state's prison population. Why? It is not because African Americans are predisposed to commit crimes. In fact, the National Survey on Drug Use and Health found young white Americans, not African Americans, consistently report a higher use of marijuana.

A May 2008 report by the Human Rights Commission found that although whites and blacks engage in drug offenses, including sales, at comparable rates, blacks make up 37 percent of the people arrested for drug offenses even though they only make up 12.4 percent of the American population."

New York Police Department statistics from 2008 show that African Americans were arrested for marijuana possession at seven times the rate of whites. Here in Washington, whites are more involved in drug sales and possession than African Americans, but African Americans are more often arrested and charged in drug cases.

A 2007 study by the Washington State Patrol revealed that during routine traffic stops, "[t]here remains a correlation between the race of the driver and the likelihood of a search."

African Americans are 70 percent and Hispanics are 50 percent more likely to be searched than white drivers.

This difference in how people of different races are treated is directly related to the disproportionate representation of the races in the criminal-justice system.

The inequities continue at the prosecution stage. According to a 1995 report in King County, "whites [were] less likely to have charges filed against them than minorities."

When charged, whites [were] more likely to be released on personal recognizance. The same report indicates in King County, "If the police [recommend] not to release a defendant" then more often than not, "bail rather than release is often recommended by the prosecutor's office for African Americans." In turn, "judges usually always follow" the prosecutor's recommendation.

Racial disparities are also apparent at the sentencing phase, particularly in the federal courts. According to a March 2010 U.S. Sentencing Commission report, blacks in the federal system receive 10 percent longer sentences than similarly situated whites charged with the same crime. When it comes to mandatory sentences, "African-Americans are 21 percent more likely to receive mandatory minimum sentences than white defendants and 20 percent more [likely] to be sentenced to prison than white drug defendants."

Racial disparities are also prevalent in Washington state. According to Crutchfield's report, "... [B]lack defendants, who are in custody, and Hispanics charged with less serious types of violent offenses were less likely to plead guilty to crimes than other defendants."

This is significant. In King County, the prosecuting attorney's sentencing recommendation for defendants who plea prior to trial is often less than those who take the case to trial. In essence, this means people of color are more likely to receive higher sentences because they chose to exercise their constitutional right to trial.

These are just a few examples of the impact of racial disparities within the criminal-justice system. There are other examples, including but not limited to poverty and disproportionate educational opportunities. Thus, until we, as society, acknowledge the impact of race within our legal system, our criminal-justice system will continue disregarding the content of one's character and continue judging people based on the color of their skin.

Nicole A. Gaines is president of the Loren Miller Bar Association.

Source: http://seattletimes.nwsource.com/html/opinion/2013296639_guest30gaines.html

The Seattle Times Winner of a 2010 Pulitzer Prize

Editorials / Opinion

Originally published Friday, October 29, 2010 at 3:32 PM

Guest columnist

Justice Sanders got a bum rap over comments about incarcerated African Americans

Washington Supreme Court Justice Richard Sanders was unfairly targeted for comments he made about the incidence of African Americans incarcerated, argues civil-rights attorney Lem Howell: Sanders has done more to defend the rights of the accused, regardless of race, than anyone on the state high court.

By Lem Howell
Special to The Times

IRONICALLY, Washington Supreme Court Justice Richard Sanders has been unfairly targeted for simply stating the fact that a disproportionate representation of African Americans in our prison population is (obviously) the result of a disproportionate rate of criminal convictions.

I say "ironically" because Justice Sanders has done more than any sitting justice to bring fairness to our criminal-justice system, and he has done more to defend the rights of the accused regardless of race than any of his colleagues.

As a practicing lawyer acutely concerned by such matters, I was personally inspired by Sanders' stirring dissent in a case involving an African-American motorist who was pulled over and arrested by Spokane police for an illegal lane change. By the time the police were done with him, he was sent to the hospital rather than jail because he was so badly beaten. Then he was charged with assaulting an officer.

His defense was that he was entitled to use reasonable force to resist an illegal arrest since an improper lane change is a civil infraction, not an arrestable crime. Nevertheless the trial court refused to instruct the jury as requested. Sanders wrote a wonderful dissent (*State v. Valentine*) pointing out that this instruction was required by hundreds of years of common law as adopted by this jurisdiction.

Nevertheless the majority overruled all these cases, and left Sanders standing nearly alone for the rights of this African American.

In another case he stood alone for the rights of an African American who was sentenced to life without possibility of parole for stealing $300 from an espresso stand armed with a finger in his pocket. (*State v. Rivers*) Sanders pointed out that such a sentence was unconstitutionally cruel because it was so disproportional.

And yes, African Americans are disproportionally represented in the ranks of those serving a similar sentence. Sanders took a lot of heat for this dissent. Later he visited the man three times in prison because he felt this was such a grave injustice. The man is still in prison. Sanders says he thinks of him often and hopes for clemency.

Sanders signed a dissent that would have reversed a conviction obtained by a prosecutor who excused the only African American from the jury in a case where the defendant was also African American. He would have put the burden on the prosecution to justify this decision for nonracial reasons. He did what he could, but he didn't have the votes.

Responding to a rash of malpractice judgments against public defenders for not properly representing their clients, Sanders fought for three years, sometimes alone, to persuade the court to adopt a rule that would require trial court judges to only appoint lawyers for indigent criminal defendants (many of whom are African Americans) who meet minimum qualifications of experience and have adequate financial resources to get the job done. Ultimately he was successful, notwithstanding opposition from many prosecutors.

Justice Sanders is not afraid to tell the truth even when the truth is not popular or may be politically incorrect. He is deeply committed to our justice system and deeply cares about the legal rights of those who come to court.

As far as I'm concerned, he is an asset to the African-American community, and everyone else. Let's be fair to this man who courageously fights for the rights of the unpopular and powerless.

Lem Howell is a civil-rights and personal-injury attorney in Seattle.

Source: http://seattletimes.nwsource.com/html/opinion/2013296640_guest30howell.html

The Seattle Times Winner of a 2010 Pulitzer Prize

Editorials / Opinion

Originally published Friday, November 5, 2010 at 2:51 PM

Guest columnist

Dissecting and healing biases in Washington's courts

Washington state Supreme Court Chief Justice Barbara Madsen talks about what is — and isn't — true about bias in the state courts. She also lays out the work the courts have done to remedy ethnic and gender biases and to break down barriers to justice.

By Barbara Madsen
Special to The Times

IN 1999, Washington Court of Appeals Judge Ronald Cox observed in a newsletter of the Washington State Minority and Justice Commission, that "... A basic problem in dealing with the racial divisions in this country is that there are few ways of engaging in meaningful discussion about those divisions and how to address them. The subject is emotionally charged. Thus, attempts to discuss racial divisions often become opportunities for venting emotions rather than solving the problem."

This is as true today as it was in 1999.

Recent coverage of comments made during the Oct. 7 Supreme Court meeting provides an important opportunity for a constructive discussion about the issue of bias in the justice system.

As chief justice, I want to reaffirm the judiciary's commitment to improving access to justice and eliminating bias.

First, it must be recognized that bias exists. We know this because we have spent 23 years asking, studying, surveying, researching, crafting solutions, monitoring results and working to understand the barriers to justice created by the complex nuances of bias.

For instance, only 36 percent of Washington residents, regardless of their race or ethnicity, believe that African Americans receive the same treatment in courts that others do.

How do we know this? We asked, during an extensive 1999 survey of state residents about public perceptions of the courts.

Is it true? A sentencing study we conducted in 1993 showed that African Americans who commit serious violent crimes were more likely to receive aggravated exceptional sentences than Caucasians who committed serious crimes, and less likely to receive diversion sentencing. However, the same study showed Caucasians were actually more likely to receive extended sentences than African Americans for crimes in general, and that Hispanics were the most likely of all races in Washington to receive aggravated extended sentences.

Our study on public perception showed that 82 percent of Washington residents believe that wealthy residents receive better treatment from the court system.

Is it true? Our groundbreaking 2004 study on Civil Legal Needs found the barriers for low-income residents so pervasive that very few even seek help from the legal system for serious legal matters such as family safety, access to health care, housing and employment.

Only 20 percent of Washington residents believed that women receive worse treatment in courts than men.

Is that true? Our research showed serious systemic problems in the understanding and treatment of domestic violence and rape victims in court. It also found that men were less likely to be awarded primary residential placement than women.

Our 1988 study on gender bias showed how subtle and unwitting bias can be. While 74 percent of the state's judges felt they understood the dynamics and impact of sexual assault on victims, only 12.5 percent of treatment providers felt our judges had that understanding.

Bias often is not overt. Bias is any action or attitude that interferes with impartial judgment. It occurs when decisions are made or actions taken based on preconceived notions about the nature, roles and abilities of persons rather than evaluating each individual situation.

In the 1980s, the Legislature and judiciary became national leaders in examining and responding to bias in the judicial system and continue an aggressive and research-based focus on eliminating bias and barriers to justice.

In 1987, Washington was one of four states to establish a Minority and Justice Task Force (now commission), and the next year became a founding member of the National Consortium on Racial and Ethnic Fairness in the Courts. The 20th annual Consortium conference was held in Seattle in 2008, commemorating Washington's leadership.

Also in 1987, Washington was among the first to establish a Gender and Justice Task Force (now commission) to study gender bias in the courts and develop recommendations for its elimination.

In 1994, the state Supreme Court established the Access to Justice Board to examine impediments to equal treatment, such as income, disability, rural location, language, access to technology and more.

We have continued to renew these commissions and demand more and better information and solutions.

A list of all the steps we have taken over the past 23 years is too long. However, I want to mention a few:

• *Racial and ethnic bias* — Research into disparities in sentencing, in prosecution of felony cases in King County, in bail and pretrial sentence practices, in charging and sentencing for drug offenses and the assessment and impact of court fines; ongoing and varied training of judges and court staff; ongoing recruitment of minority judges and attorneys.

• *Gender bias* — Researching issues of domestic violence and court processes, spousal maintenance decisions, parenting arrangements after divorce, barriers for immigrant women and families, and professional barriers for women attorneys and judges; creating a Domestic Violence Manual for judges; ongoing training for judges, including rural and tribal courts.

• *Barriers* — Developed a comprehensive plan addressing access to the civil justice system for low-income residents; multiple efforts to expand funding for civil legal aid; emphasizing technology to open courts and justice services to people with barriers; increasing legal aid and technology in rural areas; development of programs to help self-represented litigants.

Our courts have spent enormous energy addressing bias and access to meaningful justice, but we recognize the need to reassess our progress. As the new chief justice, I convened the Supreme Court Commissions, Boards and Task Forces Assessment Work Group to take a hard look at existing efforts and make recommendations for modernizing and strengthening the justice system's ability to ensure fair treatment for all.

The work group's report, presented at the Oct. 7 meeting, called for a clearer articulation of diversity goals and accountability to them. It also called for more effective coordination and integration of diversity efforts.

We have learned a great deal during our years of work on bias in the courts. We have learned that it's an extremely complex and nuanced issue, and each new step we take toward understanding those issues brings us closer to our goals. Washington judges and courts remain profoundly committed to discovering and eliminating all barriers to equal justice.

Barbara Madsen is chief justice of the Washington Supreme Court.

Source:
http://seattletimes.nwsource.com/html/opinion/2013358328_guest07madsen.html?prmid=op_ed

The Seattle Times

Editorials / Opinion

Originally published Monday, December 6, 2010 at 3:34 PM
Guest columnist

Ensuring the promise of "Equal Justice Under Law"

Washington state's three law schools are collaborating through a new "Race and the Criminal Justice System Task Force" that incorporates members of the justice system and the community. The deans of the three schools discuss the challenges and importance of ensuring equal justice under the law.

By George Critchlow, Mark Niles and Kellye Y. Testy
Special to The Times

DISPROPORTIONATE prosecution and imprisonment of minorities haunts our criminal-justice system. Too often we see confusion over why minorities are overrepresented among criminal defendants. Studies by University of Washington researchers, which were vigorously debated this year by the 9th Circuit Court of Appeals in a lawsuit alleging racial bias in the state's criminal-justice system, are shedding light on the contentious question.

Research shows that disparate minority imprisonment in Washington is mainly due to problems in how justice-system actors exercise discretion rather than higher minority involvement in crime. The problems of discretion occur at numerous junctures, leading to racial disparities in discretionary decisions, from whose car to search during the investigation stage to what sentences defendants receive.

Racial disparities in discretionary decision-making have gripped national as well as state attention, spotlighting such practices as disproportionate targeting of minorities for investigative stops. A new generation of research has shown how unconscious, "implicit" racial biases shape who are viewed as more suspicious and more dangerous. This leads to a disproportionate targeting of young black and Hispanic men.

Which laws we choose to enforce as priorities — and how stringently — can also lead to racial disparities. An infamous example is the disparity in how we enforce, and sentence for, possession of crack compared to powder cocaine. Both are dangerous drugs. In terms of how these drugs have plagued our communities, however, the crude sense on the streets is that cocaine is the white drug and crack is the scourge in communities of color.

Infamously, federal sentences for crack were dramatically more severe than sentences for powder cocaine, leading to sharp and severe racial disparities. This notorious disparity was not remedied until this autumn when President Obama signed the bipartisan Fair Sentencing Act aimed at lessening some of the disparity.

In Seattle, research has also found racial disparities due to decisions about which laws to enforce. UW researchers found that Seattle police disproportionately arrest blacks and Latinos for drug offenses. The racial disparities stem from organizational practices, including a focus on targeting drug-enforcement discretion on crack cocaine.

Our three law schools are engaged in a newly established "Race and the Criminal Justice System Task Force" in partnership with Washington State Access to Justice Board Chair

and King County Superior Court Judge Steve Gonzalez. We are building a broad-based coalition with partners from the community at large, legal profession, minority bar associations and justice system to examine the issue of race and the criminal-justice system. The task force's objectives will include deepening research and education in this important area and making recommendations for structural reform of our state's and our nation's criminal justice systems.

As a nation, we hold ourselves to the promise of "Equal Justice under Law." We take pride in the fact that our legal system is committed to the fair and impartial treatment of all who seek its protection. The same rules and procedures should apply regardless of an individual's color, ethnicity, social or economic status, gender, disability status or other personal or social characteristics. But both experience and research show that, in many ways, the rules are applied differently based on these characteristics.

We know that controversy can crystallize into constructive, continued research and education so people better understand the realities of the system — and how to fix it.

George Critchlow is interim dean of the Gonzaga University School of Law; Mark Niles is dean of Seattle University School of Law and Dean Kellye Y. Testy is dean of the University of Washington School of Law.

Source: http://seattletimes.nwsource.com/html/opinion/2013611965_guest07critchlow.html

The Seattle Times

Originally published November 17, 2010 at 9:56 PM | Page modified November 17, 2010 at 11:55 PM

Video shows cop kicking teen during arrest, police say

The Seattle Police Department learned Wednesday that a plainclothes police officer kicked a 17-year-old male in the groin during an arrest in October.

By The Seattle Times staff

The Seattle Police Department learned Wednesday that a plainclothes police officer kicked a 17-year-old male in the groin during an arrest in October.

Police reviewed a convenience-store surveillance video showing the arrest Wednesday afternoon and reassigned the officer, a 10-year veteran, to "administrative assignment to home," according to the department's blog.

Police say the Office of Professional Accountability will launch a full investigation.

The incident occurred Oct. 18, when police were downtown conducting a narcotics buy-bust.

An undercover officer attempting to buy drugs was taken to a parking lot, where, according to police, he was surrounded and attacked.

During the operation, two officers were injured and later taken to Harborview Medical Center.

The 17-year-old male fled the parking lot. The plainclothes officer later found him in a convenience store. The arrest and the kicking were captured on the store's surveillance camera, according to the department blog.

In response to a question from The Seattle Times, Seattle City Councilmember Tim Burgess, who chairs the council's public-safety committee, said Wednesday night in an e-mail that he had been briefed on the matter earlier in the evening by Police Chief John Diaz.

"I have full confidence" in the chief and the department's Office of Professional Accountability "to review the facts and reach an appropriate conclusion" about the officer's conduct, Burgess wrote.

News of this incident comes in the wake of several recent incidents of police violence.

On Aug. 30, a Seattle police officer fatally shot a man who failed to follow orders to drop a knife he was carrying.

On June 14, an officer was videotaped punching a 17-year-old in the face following a jaywalking incident during which the officer was shoved.

And in April, an officer stomped on a Latino man prone on the sidewalk and threatened to beat the "Mexican piss" out of him as other officers looked on.

Source: http://seattletimes.nwsource.com/html/localnews/2013461623_video17.html

The Seattle Times

Originally published Wednesday, September 1, 2010 at 12:42 PM

Seattle cop won't face hate-crime charge for kicking Latino man

A Seattle police officer who sparked a public outcry after he stomped a prone Latino man in April and used ethnically inflammatory language will not be charged with the felony of malicious harassment, the King County Prosecuting Attorney's Office announced Wednesday.

By Steve Miletich
Seattle Times staff reporter

A Seattle police detective who sparked a public outcry after he stomped a prone Latino man and used ethnically inflammatory language in April will not be charged with the felony of malicious harassment, the King County Prosecuting Attorney's Office announced Wednesday.

But the Seattle City Attorney's Office plans to review the Police Department's investigative file on the case to determine if any misdemeanor charges are warranted against Detective Shandy Cobane, spokeswoman Kimberly Mills said shortly after the announcement.

The county Prosecutor's Office, in a written statement, said Cobane used "patently offensive language" but will not be charged with malicious harassment under the state's so-called "hate crime" law because prosecutors found he did not intentionally target or threaten the man because of his race or national origin.

Prosecutors reached their decision after reviewing the Seattle police investigation of Cobane.

Seattle Police Chief John Diaz, in a written statement, said he had read the decision and contacted Seattle City Attorney Peter Holmes to ask him to review the case.

Diaz said an internal investigation by the department's Office of Professional Accountability has yet to be completed and remains a "very high priority."

But that investigation will remain on routine hold while Cobane's conduct is reviewed by the city attorney, a department spokesman said.

Cobane, 45, who was working as a gang detective, drew condemnation from civil-rights and minority organizations after he was captured on videotape telling the Latino man he was going to "beat the [expletive] Mexican piss out of you, homey. You feel me?"

In May, the Seattle chapter of the NAACP and other civil-rights groups urged county prosecutors to prosecute Cobane, and a coalition of minority organizations formed after the incident pressed for the firing of both officers.

Estela Ortega, the coalition's chairwoman and the executive director of El Centro de la Raza, a Seattle social-justice organization, labeled the decision of the Prosecutor's Office "disappointing and disturbing."

"As we see it," Ortega said in a written statement, "the prosecutor's office is using nuanced language in the law to help protect a police officer who maliciously used physical force on a young man who posed no threat to the officer or anyone nearby. Further, the vile language used by Officer Cobane spells hatred."

She called on Diaz and Mayor Mike McGinn to hold Cobane accountable, so all officers know "hatred, undue force, and maliciousness" are not acceptable.

The case prompted the Police Department to open internal investigations into the conduct of every officerwho was present but didn't intervene during the April 17 incident, as well as into an allegation that other department members sought to discourage a media outlet from airing the video.

The Police Department didn't identify the media outlet, but Seattle police earlier said they were contacted April 17 by someone at KCPQ-TV hours after the incident was captured by a freelance videographer.

The video eventually was broadcast May 6 by KIRO-TV, prompting McGinn to call the footage disturbing and the Seattle City Council to label it "extremely troubling."

Cobane, who joined the Police Department in 1993, issued a tearful public apology the night of May 7, saying, "I know my words cut deep and were very hurtful. I am truly, truly sorry."

The video showed police detaining three men suspected in what prosecutors have now determined to be two armed robberies.

In the video, Cobane directed his ethnically inflamed remarks to a Latino man, identified as Martin Monetti, 21, of Seattle, who was lying on a sidewalk in the area of Westlake Avenue North.

After the man moved a hand to his face, Cobane is seen apparently trying to stop the movement with his boot but appears to strike the man's head. The man's head flinched upward.

But King County prosecutors, in Wednesday's statement, said Cobane used his foot to stomp down on the man's hand and drag it away from his body.

"Although forceful, the stomp to move Mr. Monetti's hand away from his body was not unreasonable considering the totality of the circumstances that evening," according to the statement.

Moments after Cobane's stomp, patrol Officer Mary Lynne Woollum is seen stomping on the back of the man's leg or knee.

Two of the three men, including Monetti, were later freed. The third man and another suspect identified nearby were arrested and are facing armed robbery charges.

Monetti was present during the alleged robberies but didn't actively participate, according to the prosecutor's statement.

Prosecutors said that although Cobane used offensive language about Monetti's ethnicity, "such language is not in and of itself a crime."

The statement said a threat or assault must be directed toward a person because of the person's race, while Cobane's "command to stay still was directed at Mr. Monetti due to Mr. Monetti's actions and his lack of compliance, not his ethnicity."

Cobane and Woollum were assigned new duties when internal investigations were initially launched.

Woollum's conduct wasn't included in the Prosecutor's Office statement, and it wasn't clear if the City Attorney will examine her actions.

Information from Seattle Times archives is included in this story.

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Source: http://seattletimes.nwsource.com/html/localnews/2012778570_shandy02m.html

The Seattle Times

Originally published February 15, 2011 at 6:27 PM | Page modified February 16, 2011 at 10:08 AM

No charges against Seattle officer who shot woodcarver

King County prosecutors have decided not to file criminal charges against Seattle police Officer Ian Birk in the fatal shooting of woodcarver John T. Williams, according to sources familiar with the decision. Meanwhile, the Police Department has found the shooting unjustified, which could lead to Birk's firing.

By Steve Miletich
Seattle Times staff reporter

King County prosecutors have decided not to file criminal charges against Seattle police Officer Ian Birk in the fatal shooting of woodcarver John T. Williams, sources familiar with the decision say.

The Prosecutor's Office is expected to announce the decision in a news conference, scheduled for 10 a.m. Wednesday, the sources say.

Shortly after, Seattle Police Chief John Diaz is expected to disclose at a news conference that the department's Firearms Review Board has reached a final decision that the Aug. 30 shooting was not justified, say sources briefed on the finding.

The board's conclusion, reached in private deliberations a few days ago, allows the Police Department to begin internal proceedings that could lead to Birk's firing or other discipline, the sources said. In October, the board reached a preliminary decision that the shooting was unjustified, sources said then.

Deputy Police Chief Nick Metz said Tuesday he couldn't comment in detail on the department's plans but said police officials were working on a statement on the course of the case.

Metz said the department was aware that the outcome is a "very sensitive issue" and that the "community is watching closely."

Birk has been on paid leave since the shooting.

The Prosecutor's Office declined Tuesday to discuss its decision.

"Our decision has not been finalized and we will make an official announcement in the near future," said Ian Goodhew, deputy chief of staff for King County Prosecutor Dan Satterberg.

Prosecutors have been confronted with a steep legal hurdle in deciding whether to charge Birk with murder or manslaughter. State law shields police officers from criminal prosecution

when they claim they used deadly force in self-defense, unless it can be shown they acted with malice and a lack of good faith.

A spokesman for Mayor Mike McGinn said Tuesday night that Satterberg and Diaz will make statements on the case on Wednesday.

Spokesman Mark Matassa did not reveal what would be said. He said McGinn will hold his own news conference Wednesday.

The decision not to file criminal charges comes about a month after a King County inquest jury reached mixed findings on the shooting. Four of eight jurors found that Birk wasn't facing an imminent threat when he fatally shot Williams, and that he didn't give Williams sufficient time to put down a knife he was carrying during their confrontation on a Seattle sidewalk.

One juror found that Birk faced a threat and gave Williams sufficient time; three others answered "unknown."

Four jurors determined Birk believed he was in danger when he encountered Williams, while four others answered "unknown."

The findings regarding the actual threat to Birk stand in contrast to previous King County inquest decisions, in which jurors have almost always upheld the actions of police officers involved in deadly shootings.

Inquest jurors weren't asked to weigh whether Birk was guilty or innocent of wrongdoing in the shooting.

The results were reviewed by the Prosecutor's Office to help determine whether to file criminal charges.

Even before the inquest, Birk, 27, who joined the department in July 2008, had been stripped of his gun and badge as a result of the preliminary finding by the Firearms Review Board and Diaz, the police chief, that the shooting was unjustified, sources said. The board waited to make a final decision until after the inquest.

The board, made up of Deputy Chief Clark Kimerer, two captains and a lieutenant, heard testimony in October from civilian witnesses and police investigators. One board member sat in on the inquest. The board determines if officer shootings fall within department policies and procedures. The inquest jury sifted through conflicting testimony and two patrol-car videos and audio that captured some of the confrontation at Boren Avenue and Howell Street but not the shooting itself. Their answers did not have to be unanimous.

Evidence presented during the inquest showed about four seconds elapsed between Birk's first order to Williams to put down the knife and when he fired.

The shooting occurred after Birk saw Williams cross the street holding a flat piece of wood and a knife with a 3-inch blade. Williams, a member of Canada's First Nations people, used the knife for carving, his family says.

Birk got out of his patrol car and followed Williams onto the sidewalk. Birk shouted at Williams to get his attention and ordered him three times to put down the knife. Birk fired when Williams didn't respond, hitting him four times.

Birk testified during the inquest that he was initially concerned because Williams showed signs of impairment while carrying a knife. He said when he sought to question Williams, Williams turned toward him with a "very stern, very serious, very confrontational look on his face."

Birk told jurors Williams "still had the knife out and [was in] a very confrontational posture" when he opened fire.

Williams, a chronic inebriate, had a blood-alcohol level measured during his autopsy at 0.18 percent, above the 0.08 percent at which a driver is deemed legally drunk.

During the inquest, two witnesses contradicted Birk, saying they didn't see Williams do anything threatening before he was shot.

Birk testified that shortly after the shooting he told a witness, a responding officer and a detective that Williams had not complied with his order to put down the knife. He acknowledged that, at that time, he did not tell them that Williams had threatened him.

It wasn't until hours later, Birk testified, that he provided a detailed written statement alleging that Williams had menacingly displayed the knife and "pre-attack indicators."

Williams' knife was found folded in the closed position after the shooting.

Jurors unanimously found that Williams was carrying an open knife when first seen by Birk. But four answered "no" and four "unknown" when asked if the blade was open when Birk fired.

In reviewing the case, prosecutors had various options: charging Birk with second-degree murder, first-degree reckless manslaughter, second-degree negligent manslaughter, or declining to bring a charge.

A second-degree-murder charge would require prosecutors to show beyond a reasonable doubt that Birk intended to unlawfully kill Williams, or that Birk intentionally and unlawfully assaulted Williams, causing his death.

Manslaughter requires less proof. Prosecutors must show only that reckless or negligent conduct caused a death, though they still must do so beyond a reasonable doubt.

Federal prosecutors have been monitoring the case and could consider bringing a criminal civil-rights case against Birk. But they must show willful criminal conduct to obtain a conviction.

The shooting of Williams and other incidents have prompted the American Civil Liberties Union of Washington and 34 community groups to call on the U.S. Justice Department to investigate Police Department practices. Seattle officers have been under scrutiny over use

of force in several incidents in the past year, particularly in dealings with minorities. Justice has opened a preliminary review of the department.

At least two protests are planned for Wednesday over the decision not to file criminal charges against Birk.

The Capitol Hill Blog said there would be a protest at City Hall at 4 p.m., and a Facebook event page announced a protest at 6 p.m. at Westlake Park in Seattle.

Information from staff reporter Jennifer Sullivan and Times archives is included in this story.

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Source: http://seattletimes.nwsource.com/html/localnews/2014235279_policeshooting16m.html

seattlepi

Local
Wednesday, March 24, 2010
Last updated 10:26 a.m. PT

Sheriff wants task force to focus on threats against police

By SCOTT GUTIERREZ
SEATTLEPI.COM STAFF

After six police officers were slain in the Puget Sound region last year, the King County Sheriff's Office wants to create a specialized task force to investigate threats against police and court officials.

The goal would be to identify people who show aggressive behavior toward authorities, including those who have been violent with police or made threats to judges, prosecutors or public defenders. The unit would track those individuals and develop strategies for officers who might frequently deal with them, or even develop a plan for getting those who act out due to mental health issues into treatment.

Sheriff Sue Rahr said Tuesday she'd like to involve detectives from multiple agencies, plus mental health workers and a criminal psychologist to work with police in evaluating the danger posed by certain offenders.

"We're proposing to bring this information together so everyone in the region is aware and there is planning available to decrease the risk," sheriff's Capt. Scott Strathy said during a meeting of the King County Council's Committee on Law, Justice, Health and Human Services.

"We're looking to determine who are the barkers and who are the biters."

It will never be known whether such a task force would have saved four Lakewood police officers ambushed last December while having coffee before their shifts, or whether it would have prevented the slaying of a Seattle police officer in his patrol car on Oct. 31.

Sheriff's officials say they think it would have made a difference.

Maurice Clemmons, who barged into a coffee shop and killed the Lakewood officers, left plenty of hints before his rampage. A felon, he faced life imprisonment on a pending charge and had uttered comments to family members about wanting to shoot police officers. Clemmons would have scored an 8.5 out of a 9-point analytical tool the task force is proposing to use, Strathy said.

A big question is how to pay for the task force. The cash-strapped Sheriff's Office can't afford it. The Sheriff's Office is seeking a federal grant to launch what could be a national pilot program, Strathy said.

The unit's codename would be "RADAR," an acronym for "Risk Assessement, Deterence and Referral," and it would use police work and behavioral analysis. Officers recruited for the program would be specially trained and experts in de-escalating volatile situations -- "part General Patton, part Dr. Phil," Strathy said.

Last year was not just a deadly year for Washington police officers. The number of officers fatally shot nationwide jumped 23 percent in 2009, although on-duty deaths declined overall. The rise in shootings deaths was partly due to five cases involving multiple victims, according to the National Law Enforcement Officers Memorial Fund.

Councilman Reagan Dunn, a former federal prosecutor, praised the task-force idea. "This type of intelligence sharing is the kind of thing we're trying to do at the federal level and international level," he said, noting that he once was threatened while working in the U.S. Attorney's Office.

The Sheriff's Office would develop strict rules to ensure the unit's work doesn't intrude on civil liberties. It would set policy for when to purge information, Strathy said.

The task force's investigative work may be useful to judges deciding whether to withhold bail from serious offenders in custody, Rahr said. As a result of the Clemmons case, voters will decide in November whether to amend the state constitution to give judges the authority to deny bail to offenders who face life imprisonment if convicted and pose a higher risk to society.

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Source: http://www.seattlepi.com/local/417277_sheriff24.html

The Seattle Times

Originally published November 8, 2009 at 12:16 AM | Page modified November 8, 2009 at 1:31 PM

Bombs, guns found at home of suspect in Officer Brenton's slaying

Seattle police detectives are trying to determine why Christopher John Monfort, 41, suspected of arson and deadly shooting, held a grudge against officers that apparently spiraled from destructive to deadly in so little time. Police on Saturday labeled him a "domestic terrorist" who was apparently acting alone and whose motives remain under investigation.

By Mike Carter, Steve Miletich and Jennifer Sullivan
Seattle Times staff reporters

Amid the carnage and confusion of the Halloween night ambush-slaying of Seattle police Officer Timothy Brenton was one seemingly incongruous clue that soon took on an ominous meaning.

A bandanna printed with the American flag, found near the patrol car where Brenton was gunned down, provided a chilling connection to a second crime, just nine days earlier, that also targeted Seattle police.

The link — to the bombing of Seattle police vehicles on Oct. 22, where a small flag was found — allowed investigators to quickly determine Brenton almost certainly had been targeted simply because he was an officer. And it helps explain why police officials quickly labeled the killing an assassination.

Detectives are trying to determine why the man suspected of both crimes, Christopher John Monfort, 41, apparently held a grudge against officers that spiraled from destructive to deadly in so little time. Police on Saturday labeled him a "domestic terrorist" who was apparently acting alone and whose motives remain under investigation.

Monfort was in serious condition at Harborview Medical Center on Sunday, recovering from being shot Friday after, according to police, he pulled a handgun on detectives who approached him in the parking lot of his Tukwila apartment complex.

Assistant Police Chief Jim Pugel said a search Saturday of Monfort's apartment turned up bomb-making materials, improvised explosive devices and two rifles, including a "military-style assault rifle" similar to the type of weapon police believe was used to kill Brenton and wound his rookie partner, Officer Britt Sweeney.

Potential bomb-making materials were found inside a storage shed on the patio of Monfort's apartment late Saturday, police said. At around 8 p.m., residents in Monfort's building were evacuated for about an hour, police said.

This morning, police and crime-scene investigators are still searching Monfort's apartment, said Seattle police Sgt. Sean Whitcomb. Police do not plan to release any new details on the investigation today.

In the apartment, detectives also found news clippings about the firebombing of three police cruisers and a mobile command-post RV at the city's maintenance yard at 714 S. Charles St. That's where the first flag was left — along with a note threatening to kill officers and a flier announcing a rally later that day protesting the videotaped jail-cell beating of a 15-year-old girl by a King County sheriff's deputy last year in SeaTac.

Police also found what one law-enforcement source called a lengthy "manifesto" railing against police brutality and specifically naming the former deputy accused of assaulting the girl in the jail cell, Paul Schene, and Travis Brunner, a rookie deputy who was training with Schene.

Schene was fired; his trial is scheduled to begin this week.

The manifesto said that if police brutality didn't stop, there would be police funerals, according to the source.

"From everything we can tell, this appears to be a case of domestic terrorism," Pugel said of the two crimes.

But Pugel said the motives aren't clear, and the picture of Monfort that is emerging is filled with contradictions.

While he allegedly targeted police, he was clearly interested in law enforcement. He graduated from the University of Washington in March 2008 with a degree in Law, Society and Justice. He had been working as a security guard — but recently had lost his job — and owned a number of firearms.

He also drove a dark-colored Ford Crown Victoria — a model often used by police — equipped with a spotlight.

"That was the only car I ever saw him drive," said neighbor Leon Morgan.

It was Monfort's other car — an early 1980s Datsun 210 — that led police to his apartment Friday morning, Pugel said.

Police had been searching for similar cars since one had been seen on police-cruiser videos several times in the area where Brenton and Sweeney were ambushed, just minutes before and after the attack.

Brenton, 39, a field training officer, and Sweeney, 33, were parked on 29th Avenue north of East Yesler Way in the Leschi neighborhood just after 10 p.m. Halloween night when someone pulled up next to their patrol car and opened fire. Brenton was killed instantly and Sweeney suffered minor wounds.

She was able to get out of the car and fire at the vehicle, which backed up and sped away.

On Friday morning, about the time a solemn police procession made its way to KeyArena for Brenton's memorial, a tipster reported that a Datsun in the parking lot of Monfort's Tukwila apartment complex had been covered with a tarp.

A team of investigators talked to neighbors and Monfort's apartment manager and confirmed he owned a Datsun 210. They contacted prosecutors to obtain a warrant, and then watched the car until a trio of homicide investigators arrived.

Those detectives had just gotten out of their car when Monfort came out of a staircase and walked into the parking lot, Pugel said.

As soon as the detectives identified themselves, Pugel said, Monfort pulled a handgun, pointed it at the officers and pulled the trigger, but the gun didn't go off. He then ran back toward the stairs, with the officers in pursuit.

When Monfort turned again, Pugel said, all three detectives fired at him. He was hit in the cheek and stomach.

Pugel said police questioned and released two others who had been seen with Monfort during the day.

Police profile

What has also emerged from the investigation are similarities between the Police Department's psychological profile of the killer, released last week, and the information coming out about Monfort. Even so, Pugel said Saturday that detectives "had almost nothing" until the Friday tip panned out.

The tipster, whom police have not identified, may be eligible for a $105,000 reward.

The police profile said the shooter might act unusually in the days after the ambush. Police said Monfort's neighbors described his behavior in recent weeks as "bizarre."

The profile also said the shooter "likely has experienced a significant personal crisis in the recent past," including possibly losing his job. Other stressors may have been building in his life as well.

According to police sources, Monfort recently lost his job as a security guard, and Seattle Municipal Court records show he had received a $550 citation for driving without insurance. That ticket was issued Oct. 16, a week before the Charles Street arson.

Pugel said the department is looking into who issued him the ticket.

Virgil Williams, a 52-year-old electrician who lives in the same apartment complex as Monfort, said he spoke with him about a month ago.

"He said his job as a security guard just wasn't going well," Williams said. "He asked me what it took to be an electrician. He seemed like he was just unhappy."

About two weeks later, Williams said, he was in the laundry room of the building and found two security-guard shirts wadded up in the trash can.

Williams didn't know if they belonged to Monfort or not, but he took them upstairs to his own apartment. "They were perfectly good shirts," he said.

After the shooting Friday, Williams said, the shirts were taken by Seattle police detectives as evidence.

Pugel said the three police detectives who shot Monfort have been placed on administrative leave, which is routine after an officer-involved shooting. The detectives fired four to six times, although Pugel did not know how many times Monfort was hit.

Monfort, who has lived in Alaska, California and Washington, has an enigmatic history.

He has no serious criminal history. Besides the recent ticket, he was twice ticketed in Snohomish County.

Those tickets were for a defective turn signal in 2007 and for speeding in 2009. Monfort challenged the 2009 ticket and represented himself in court. The case was dropped after the officer failed to appear at the trial.

It's unclear what happened with the 2007 ticket.

In recent years he has been a student — first at Highline Community College in Des Moines, then at the UW, where he was enrolled in a program aimed at helping minority students go on to graduate work. He obtained his bachelor's degree in March 2008.

He also had worked as a volunteer at the American Civil Liberties Union. ACLU spokesman Doug Honig confirmed that he had been a volunteer.

"He wasn't very involved, and no one remembers him," Honig said Saturday.

According to friends and acquaintances, Monfort was politically active, and it's clear from his studies and his volunteer work that he was concerned about abuse of power and injustice.

He also ran for the student Senate while he was at Highline Community College.

A mentor, Garry Wegner, who was program coordinator for Highline's Administration of Justice program, was close to Monfort and said his former student had recently been a volunteer at the Youth Services Center, teaching incarcerated youth about the criminal-justice system.

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Source: http://seattletimes.nwsource.com/html/localnews/2010226607_suspect08m.htm